

CASE NO.:  
Appeal (civil) 2330 of 2000

PETITIONER:  
M/S HARIDAS EXPORTS

Vs.

RESPONDENT:  
ALL INDIA FLOAT GLASS MFRS. ASSN. & ORS.

DATE OF JUDGMENT: 22/07/2002

BENCH:  
Y.K. Sabharwal, K.G. Balakrishnan.

JUDGMENT:

W I T H

Civil Appeal Nos. 3572 of 2000, 76 of 2002, Civil Appeal No.\_4238/2000 of 2002 @ SLP (C) No. 22549 of 2001 and Civil Appeal No. 3562 of 2000

J U D G M E N T

KIRPAL, C.J.I.

Civil Appeal Nos. 2330 of 2000, 3572 of 2000, 76 of 2002 and S.L.P.(C)No. 22549 of 2001 :

Leave granted.

These appeals are against orders passed by the Monopolies and Restrictive Trade Practices Commission (hereinafter referred to as the "MRTP Commission") whereby Indonesian manufacturers of float glass had been restrained from exporting the same to India at allegedly predatory prices.

Respondent No.1 is an association of float glass manufacturers in India. During March-April, 1998, complaints were made by the said respondent to the Customs Department, alleging that the Indonesian manufacturers of float glass, in association with Indian importers were allegedly indulging in heavy under-invoicing. The respondents were, however, informed by the Customs Department in Calcutta that if they had any genuine grievance, the same could be made before the Designated Authority, Ministry of Commerce dealing with anti-dumping complaints. On 26th May, 1998, the respondent No.1 presented a complaint before the Designated Authority. This complaint appears to have been filed before the Anti-Dumping Authority and the same was possibly not pursued by the complainant.

On 10th September, 1998, the respondent No.1 filed a complaint before the MRTP Commission under Section 33(1)(j), (ja) and Section 36A read with Section 2(o) of the Monopolies and Restrictive Trade Practices Act, 1969 (hereinafter referred to as the 'MRTP Act') against three Indonesian companies alleging that they were manufacturing float glass and were selling the same at predatory prices in India, and were hence resorting to restrictive and unfair trade practices. In the complaint, it was stated that the float glass of Indonesian origin was being exported into India at the CIF price of US\$ 155 to 180 PMT. At this price, some float glass had been

shipped into India during the period December, 1997, to June, 1998. It was alleged that these sale prices were predatory prices as they were less than not only the cost of production for the product in Indonesia but also the variable cost of production of the product. The complainant gave figures indicating the estimated cost of float glass internationally as well as the cost of production of float glass in India with a view to demonstrate that the Indian manufacturers of float glass would not be able to compete with the price at which the Indonesian manufacturers were presently selling or intending to sell to Indian consumers. On this basis, it was contended that the sale of float glass by the Indonesian manufacturers at the said price of US\$ 155 to 180 PMT will restrict, distort and prevent competition by pricing out Indian producers from the market. This would result in lowering the production of the Indian industry and the consequent idle capacity and losses would force the industry to become sick which would lead to its closure which would have a direct impact on the employment in the industry.

In response to the notice issued to the Indonesian companies, M/s P.T. Mulia Industries (respondent No. 2 in this appeal) wrote a letter to the MRTP Commission stating that it had never in the past exported float glass to India. The other two respondents did not send any reply to the Commission. The appellant, however, which is the Indian importer of the float glass from Indonesia had filed a caveat before the Commission. It also filed a reply refuting the allegations of the respondent and it was the contention of the appellant that respondent No.1 was a cartel of Indian manufacturers of float glass which was, in fact, exporting out of India at prices far lower than their own cost of production in India. It was also contended by the appellant herein that the cost of production of float glass was lower in Indonesia than in India and float glass was not being exported to India at predatory prices.

The application under Section 12-A for interim injunction was heard by the Chairman of the Commission and a second Member. There was a difference of opinion amongst them. While the Chairman vide order dated 18th January, 1999, allowed the application and restrained the Indonesian companies from exporting to India their float glass production at predatory prices, Dr. S. Chakravarthy, the second Member dismissed the application, inter alia, holding that there was no evidence to substantiate the plea of predatory pricing at this stage. By order dated 9th February, 2000, the third Member who heard the case concurred with the view taken by the Chairman and passed an order of injunction against the Indonesian companies.

While Civil Appeal No. 2330 of 2000 is filed by the Indian importer who was the caveator before the Commission, Civil Appeal No. 3572 of 2000 has been filed by P.T. Muliaglass which is the subsidiary of P.T. Mulia Industrindo. It is the case of P.T. Muliaglass that the holding company does not carry out any manufacturing operations and that is why it had informed the MRTP Commission that it was not engaged in the export of float glass to India and, therefore, it did not appear before the MRTP Commission. P.T. Mulia Glass which, in fact, manufactures the float glass being aggrieved by the order of the MRTP Commission has filed the appeal, inter alia, contending that it is not exporting float glass to India at predatory prices.

On behalf of the appellant, it was submitted that the MRTP Commission had no jurisdiction to entertain and adjudicate upon the complaint which was made by the respondents. It was submitted that the essence of the complaint of the respondents before the MRTP Commission was of injury to the domestic industry on account of low prices by the Indonesian manufacturers which is a dispute under Anti-Dumping law and does not fall within the jurisdiction of the MRTP

Commission. It was submitted that the complaint which was made against the Indonesian exporters was one essentially of dumping as it had been contended that the Indonesian exporters were exporting float glass at very low prices which were predatory in nature and the intention was to cause injury to the domestic industry.

It was submitted that Article 18.1 of the WTO Agreement on Implementation of Article VI of the GATT, 1994, provides that "no specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT, 1994 as interpreted by this Agreement". The remedy against the practice of "dumping"/export of goods at "predatory prices" has been expressly agreed upon internationally under the General Agreement on Tariffs and Trade (GATT) to which India is a signatory. The Agreement deals with anti-dumping duties and provides mechanism to implement it.

In pursuance of the GATT, 1994, the Parliament for the first time inserted provisions 9A to 9C in the Customs Tariff Act vide the Customs Tariff (Amendment) Act, 1995, No. 6 of 1995 which replaced the provisions of sections 9, 9A and 9B earlier inserted in the Customs Tariff Act under Act No. 52 of 1982. The Statement of Objects and Reasons to the Bill clearly states that the Bill seeks to amend the Custom Tariff Act to bring the provisions of the Custom Tariff Act in conformity with the provisions of Article VI of the GATT 1994, and the agreements on subsidies and countervailing measures. Even the preamble of the Customs Tariff (Amendment) Act, 1995, No. 6 of 1995 also provides that the provisions of sections 9, 9A and 9B of the Customs Tariff Act, 1975, have been replaced by the new sections 9, 9A and 9B to reflect the changes in the domestic law, consequent upon coming into effect the Agreement on Anti-dumping (i.e. an Agreement on implementation of Article VI of the GATT 1994). under the Uruguay Round on 1st January, 1995.

Section 9A, inter alia, provides that where any article is exported from any country or territory to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article. The said section indicates how the normal value and the margin of dumping is to be ascertained. Section 9B contains provisions which provide for exemption from levy under Section 9 or Section 9A in certain cases while Section 9C gives the right of appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article. The Act contemplates the Designated Authority, which is appointed under its provisions, to conduct a detailed investigation into the allegation of dumping of articles before it determines the normal value, export price and the margin of dumping. It is important to note that in undertaking this exercise, the Government or the foreign country exporting the article is required to be informed. By notification dated 1st January, 1995, Anti-Dumping Duty Rules were framed. Rule 14 sets out circumstances under which the designated authority may terminate an investigation. In Rule 14(d), there is a de-minimus requirement that is to say the volume of the dumped imports, actual or potential, should account for not less than 3% of the imports of the like product. If the imports are below this level, the authority shall terminate the investigation immediately. It is the case of the appellant that the float glass which was imported from Indonesia was much less than 3%.

The learned counsel for the appellants contended that the respondents have in the complaint filed by them with the MRTP Commission under the MRTP Act sought redressal of their alleged grievance that certain Indonesian companies are selling float glass at prices much lower than their cost of production and are thereby

allegedly indulging in predatory pricing with an alleged intent to eliminate competition and causing material injury to the interest of domestic float glass industry. For redressal of the alleged grievance of the respondents, a specific remedy has been provided under sections 9A to 9C of the Customs Tariff Act and the Anti-dumping Duty Rules. The provisions of sections 9A to 9C introduced under the Customs Tariff Act and the Anti-dumping Duty Rules provide for a complete and exhaustive machinery to prevent dumping of goods into India including export of goods into India at predatory price causing "injury" to domestic industry, causing threat of injury to domestic industry and material retardation to establishment of domestic industry by way of imposition of anti-dumping duty on import of such goods. The expression "injury" has been defined under Article 3 of the Agreement on Anti-Dumping as under:

"Injury shall unless otherwise specified, be taken to mean material injury to a domestic industry; threat of material injury to a domestic industry or material retardation of the establishment of such an industry, and shall be interpreted in accordance with the provisions of this Article."

Thus, it was submitted, the remedy for imposition of anti-dumping duty has been provided so as to prevent distortion, impairment and restriction of competition in domestic industry. A specific authority, i.e., the Designated Authority on Anti-dumping has been constituted under the Anti-dumping Duty Rules framed under the Customs Tariff Act which has the powers to conduct investigation upon receipt of a complaint from the domestic industry or suo motu relating to dumping of goods by a foreign company to identify the existence, degree and effect of any alleged dumping in relation to import of any article and injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry, etc. and to recommend to the Central Government the amount of anti-dumping duty to remove the injury to the domestic industry, based on which the Central Government imposes provisional or final anti-dumping duty upon importation of the concerned goods into India as a result of which the cost for the Indian importer for the imported goods and the articles becomes the same as that of fair value of such goods and articles in the domestic market. The object of the provisions of the Customs Tariff Act and the Anti-dumping Duty Rules is thus to prevent distortion, impairment and restriction of competition caused by export of goods to India at dumped/predatory price. In view of the aforesaid, the finding of the MRTP Commission that as the provisions of the Customs Tariff Act only provide for imposition of custom duties, they have had no relevance for overriding the provisions of the MRTP Act, is erroneous, was the submission. It is also submitted that the object of the MRTP Act on the other hand generally is to check concentration of economic power to the common detriment, to control monopolies and to prohibit monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto. In view of the above, the MRTP Act and the provisions of the Customs Tariff Act cover the same subject-matter as the scope and object of both the Acts is same although the MRTP Act is a general Act and the Customs Tariff Act is a special Act for the redressal of grievance of the respondents.

It was urged that where a particular subject has received special treatment under specific provisions/statute, it will exclude the applicability of the general provision(s) which might otherwise cover the said topic. Therefore, applying this well-settled law, the general provisions of the MRTP Act will be excluded in relation to any grievance and complaint pertaining to dumping/exporting of goods at predatory price from foreign country into India, with an intent to cause injury to the domestic industry which is specifically covered under the provisions of Sections 9A, 9B and 9C of the Customs Tariff

Act and the Anti-dumping Duty Rules framed there under. Therefore, Sections 9A to 9C of the Customs Tariff Act exclude the jurisdiction of the MRTTP Commission in such matters. The appellants rely on the following decisions of the Hon'ble Supreme Court which unequivocally lays down and reiterates the above mentioned principle:

- (i) Belsund Sugar Co. Ltd. vs. State of Bihar and Others  
(1999) 9 SCC 620; at 638 and 639, 641, 648, 649 and 650.
- (ii) Jogendra Lal Saha vs. State of Bihar and Others  
1991 Supp (2) SCC 654; at 657
- (iii) Life Insurance Corporation of India vs. D.J.Bahadur and Others  
(1981) 1 SCC 315; at 349, 350-354.
- (iv) Damji Valji Shah and Another Vs. Life Insurance Corporation of India and Others  
[1965] 3 SCR 665; at 673.
- (v) Gobind Sugar Mills Ltd. vs. State of Bihar and Others  
(1999) 7 SCC 76; at 80-82.
- (vi) Shriram Mandir Sansthan vs. Vatsalabai and Others  
(1999) 1 SCC 657; at 661 and 662.

On behalf of the respondents, it was submitted that the provisions of the Customs Tariff Act, 1975, relating to imposition of anti-dumping duties do not in any way oust the jurisdiction of the MRTTP Commission over the restrictive trade practice of predatory pricing. It was contended that the two statutes occupied different fields and were distinct in their scope and applicability. There was no overlap or conflict between the statutes and hence the question of repeal, whether implied or express, did not arise. The Customs Tariff Act is concerned with the imposition of duties of customs. Imposition of customs duty is the policy decision of the Government in the realm of taxation. Section 9A read with the Rules provide for the determination of certain objective criteria on the basis of which the decision of the Central Government to levy anti dumping duty can be based. The Customs Tariff Act does not confer any right on any individual or Association and does not provide for any remedy to them. Only the domestic industry can approach the Designated Authority.

It was further contended that whereas predatory pricing enquiries are concerned with sales below the cost of production of the predator with the intention to eliminate competition, anti-dumping investigations are triggered when an exporter sells his products in the export market at a price below that of the price at which he sells his product in the country of origin. In anti-dumping investigations, therefore, the focus is on sale price in the country of origin as opposed to the cost of production.

According to the respondents, the MRTTP Act provides for a judicial remedy for specified practices done individually or collectively. An individual consumer or a trade association or a competitor can approach the MRTTP Commission. There is a right of appeal to the Supreme Court against the orders passed by the MRTTP Commission. Only domestic industry has the right to initiate anti-dumping proceedings. Thus the scope and operation of the Acts mentioned above was different. In particular, the ingredients of transactions which attract operation of the MRTTP Act and the Customs Tariff Act are different and the question of one superseding the other as a special law does not arise. They operate in different fields and are subject to different considerations. Hence, in the absence of any conflict or overlap between the two statutes, the question of the Customs Tariff Act provisions impliedly repealing the provisions of Section 33(1)(j) of the MRTTP Act do not arise, was the submission.

While adopting the arguments of the other counsel, Shri Anil

B. Divan, Senior Advocate on behalf of the respondent No. 1 referred to Sections 2(e), 2(u), 13 and 14 of the Act. He submitted that Section 2(u)(i) which defines "trade practice" covers a chain of events/series of transactions that affect the price charged or methods of trading. Thus a part of "trade practice" may be outside India but the affectation of prices may have effect in India. Thus, he submitted, the import of goods and the sale in India which is the last link of the trade practice of predatory pricing read with Section 14 clearly gives jurisdiction in an appropriate case to the MRTP Commission. He contended that like the EEC as well as the USA, the law in India was the same, namely, that if the effect of a restrictive trade practice came to be felt in India because of a part of the trade practice being implemented in India, the MRTP Commission would have jurisdiction. This "effects doctrine" was, therefore, sought to be invoked with a view to clothe the MRTP with jurisdiction to pass orders even though a transaction which resulted in exporting goods to India at predatory price, which was in effect a restrictive trade practice, had been carried outside the territory of India. He submitted that where the effect of restrictive trade practice carried out outside the territory of EEC or USA is felt within the EEC or USA, the authorities enforcing competition law in the EEC or the USA exercise jurisdiction in regard to such conduct. He relied upon the decision of the European Court of Justice in the Wood Pulp case rendered on 27th September, 1988. There, while interpreting Article 85 of the EEC Treaty which prohibited any agreement, decision and concerted practice which have the effect of prevention, restriction or distortion of competition within the common market, it was held that where producers established outside the EEC implement a pricing agreement within the common market the community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle and is not in breach of the principle of international comity.

It was submitted by Mr. Divan that even while a regime for imposition of anti-dumping duties has been present in the EEC right from 1968, it was never suggested before the European Commission or the European Court of Justice that it's jurisdiction stood ousted or that the provisions of Article 85 stood impliedly repealed by the anti-dumping code in respect of imports. Mr. Divan also submitted that in the USA, the Antitrust Enforcement Guidelines for International Operations issued by the U.S. Department of Justice enunciated that the State Department will exercise jurisdiction under the Sherman Act over foreign conduct which had direct, substantial and reasonably foreseeable effects on U.S. domestic or import commerce.

While adopting the arguments of the other counsel, Shri Anil Divan on behalf of the respondents, drew the Court's attention to Section 4 of the MRTP Act which reads as follows:-

"Application of other laws not barred.- (1) Save as otherwise provided in sub-section (2) or elsewhere in this Act, the provisions of this Act, shall be in addition to, and not in derogation of, any other law for the time being in force.

(2) Notwithstanding anything contained in Section 3 or elsewhere in this Act, so much of the provisions of this Act, as relate to matters in respect of which specific provisions exist in the-

- (i) Reserve Bank of India Act, 1934 (2 of 1934), or the Banking Regulation Act, 1949 (10 of 1949), or
- (ii) State Bank of India Act, 1955 (23 of 1955), or the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959), or
- (iii) Insurance Act, 1938 (4 of 1938),

shall not apply to a banking company, the State Bank of India or a subsidiary bank, as defined in the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959), or an insurer, as the case may be."

He submitted that the provisions of the MRTTP Act clearly postulated the continued applicability of other laws. There was no specific provision in the MRTTP Act which made any other law inapplicable and there was no reason why by a process of interpretation the Indian MRTTP Act should be emasculated and a beneficiant anti-monopoly jurisdiction exercised world-wide should be denied to the Indian MRTTP Commission.

What is the scheme of the Act, insofar as it is relevant to the present case, relating to allegation of restrictive trade practice and the jurisdiction and power of the Commission in regard thereto.

As the preamble indicates the MRTTP Act, inter alia, prohibits restrictive trade practices. Section 2(o) defines restrictive trade practice while Section 2(u) defines trade practice.

Section 10 gives the jurisdiction to the Commission to inquire into any restrictive trade practice. This jurisdiction can be exercised either upon receiving of a complaint or upon reference made by the Government or upon an application by the Director General or upon its own knowledge or information. Before a process is issued requiring the attendance upon any person the Commission may require, under Section 11, the Director General to make an investigation and to submit a report. Section 12-A contains the power of the Commission to grant temporary injunctions and the same reads as follows:-

"12-A. Power of the Commission to grant temporary injunctions.- (1) Where, during an inquiry before the Commission, it is proved, whether by the complainant, Director General, any trader or class of traders or any other person, by affidavit or otherwise, that any undertaking or any person is carrying on, or is about to carry on, any monopolistic or any restrictive or unfair, trade practice and such monopolistic or restrictive, or unfair, trade practice is likely to affect prejudicially the public interest or the interest of any trader, class of traders or traders generally or of any consumer or consumers generally, the Commission may, for the purposes of staying or preventing the undertaking or, as the case may be, such person from causing such prejudicial effect, by order, grant a temporary injunction restraining such undertaking or person from carrying on any monopolistic or restrictive, or unfair, trade practice until the conclusion of such inquiry or until further orders.

(2) The provisions of Rules 2-A to 5 (both inclusive) of Order XXXIX of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), shall, as far as may be, apply to a temporary injunction issued by the Commission under this section, as they apply to a temporary injunction issued by a civil court, and any reference in any such rule to a suit shall be construed as a reference to any inquiry before the Commission."

Section 14 relates to orders where a party concerned does not carry on business in India. Section 15 contains the restriction of application of orders in certain cases and reads as follows:-

"Restriction of application of orders in certain cases.- No order made under this Act with respect to any monopolistic or restrictive trade practice shall operate so as to restrict-

(a) the right of any person to restrain any infringement of a patent granted in India, or

(b) any person as to the condition which he attaches to a licence to do anything, the doing of which but for the licence would be an infringement of a patent granted in India, or

(c) the right of any person to export goods from India, to the extent to which the monopolistic or restrictive trade practice relates exclusively to the production, supply, distribution, or control of goods for such export."

Chapter V contains provisions relating to restrictive trade practices and unfair trade practices. In the present case, it was the contention of the respondents that there were agreements between the Indian importers and the foreign parties which were registerable under Section 33 of the Act. So far as the import of float glass is concerned, it was contended that the provisions of Section 33 (1) (j) were attracted. The relevant portions of Section 33 are as follows:-

"Registerable agreements relating to restrictive trade practices.-

(1) Every agreement falling within one or more of the following categories shall be deemed, for the purposes of this Act, to be an agreement relating to restrictive trade practices and shall be subject to registration in accordance with the provisions of this Chapter, namely-

(a) xxx xxxx

(b) xxx xxxx

(c) xxx xxxx

(d) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers;

(e) xxx xxxx

(f) xxx xxxx

(g) xxx xxxx

(h) xxx xxxx

(i) xxx xxxx

(j) any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor;

(ja) any agreement restricting in any manner, the class or number of wholesalers, producers or suppliers from whom any goods may be bought;

(jb) any agreement as to the bids which any of the parties thereto may offer at an auction for the sale of goods or any agreement whereby any party thereto agrees to abstain from bidding at any auction for the sale of goods;

(k) xxx xxxx

(l) xxx xxxx

(2) The provisions of this section shall apply, so far as may be, in relation to agreements making provision for services as they apply in relation to agreements connected with the production, storage, supply, distribution or control of goods.

(3) No agreement falling within this section shall be subject to registration in accordance with the provisions of this Chapter if it is expressly authorised by or under any law for the time being in force or has the approval of the Central Government or if the Government is a party to such agreement."

The registration of agreement is provided for by Section 35.

The relevant provisions of which are as follows:-

"Registration of agreement.- (1) The Central Government shall, by notification in the Official Gazette, specify a day (hereinafter referred to as the appointed day) on and from which every

agreement falling within Section 33 shall become registrable under this Act:

Provided that different days may be appointed for different categories of agreements.

(2) Within sixty days from the appointed day, in the case of an agreement existing on that day, and in the case of an agreement made after the appointed day within sixty days from the making thereof, there shall be furnished to the Director General in respect of every agreement falling within Section 33, the following particulars, namely-

- (a) the names of the persons who are parties to the agreement; and
- (b) the whole of the terms of the agreement.

(3) If at any time after the agreement has been registered under this section, the agreement is varied (whether in respect of the parties or in respect of the terms thereof) or determined otherwise than by efflux of time, particulars of the variation or determination shall be furnished to the Director General within one month after the date of the variation or determination.

(4) The particulars to be furnished under this section in respect of an agreement shall be furnished-

- (a) in so far as the agreement or any variation or determination of the agreement is made by an instrument in writing, by the production of the original or a true copy of that agreement; and
- (b) in so far as the agreement or any variation or determination of the agreement is not so made, by the production of a memorandum in writing signed by the person by whom the particulars are furnished.

(5) The particulars to be furnished under this section shall be furnished by or on behalf of any person who is a party to the agreement or, as the case may be, was a party thereto immediately before its determination, and where the particulars are duly furnished by or on behalf of any such person, the provisions of this section shall be deemed to be complied with on the part of all such persons.

Explanation I.- Where any agreement subject to registration under this section relates to the production, storage, supply, distribution or control of goods or the performance of any services in India and any party to the agreement carries on business in India, the agreement shall be deemed to be an agreement within the meaning of this section, notwithstanding that any other party to the agreement does not carry on business in India.

Xxx xxx"

The investigation by the Commission and the orders which may be passed by it relating to restrictive trade practices is dealt with by Section 37.

We will first consider whether the MRTP Act has extra territorial application. In other words, can the MRTP Commission pass orders against parties who are not in India and who do not carry on business here and where agreements are entered into outside India with no Indian being a party to it.

The preamble of the MRTP Act reads as follows:

"An Act to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto."

Presumably the economic system to which reference has been made in the preamble of the Act can only be with regard to the Indian economic system and not any other system in the world. The object of the Act was that there should be no exploitation of the people of India, as a result of concentration of economic power or by reason of monopolistic and restrictive trade practices being carried out in India.

Section 1(2) states that the Act "extends to the whole of India except the State of Jammu and Kashmir". Section 2(a) defines "agreement" while Section 2(e) defines "goods" which reads as follows:-

"goods" means goods as defined in the Sale of Goods Act, 1930

(3 of 1930), and includes,-

(i) products manufactured, processed or mined in India;

(ii) shares and stocks including issue of shares before allotment;

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

Section 14 which has relevance on the point in issue reads as follows:-

"Orders where party concerned does not carry on business in India.- Where any practice substantially falls within monopolistic, restrictive, or unfair, trade practice, relating to the production, storage, supply, distribution or control of goods of any description or the provision of any services and any party to such practice does not carry on business in India, an order may be made under this Act with respect to that part of the practice which is carried on in India."

Reading Sections 1(2), 2(e) and 14 together can leave no manner of doubt that the Act has no extra territorial operation. Section 1(2) specifically provides that the Act extends to the whole of India except the State of Jammu and Kashmir, thereby defining the geographical boundary of the operation of the Act. Section 2(e)(iii) defines goods as including those goods which are supplied, distributed or controlled in India or the goods imported into India. The emphasis is on the words "in India" or "into India". Paraphrasing the said sub-section "goods" would mean "those goods supplied in India or goods distributed in India or goods controlled in India or goods imported into India". In the present case, we are concerned with float glass which was sought to be imported into India. For the purpose of the Act, it is only the goods imported into India which will fall within the definition of the word "goods" in Section 2(e). As such for the Commission to exercise any jurisdiction goods must be those which are imported into India. As long as the import has not taken place and the goods are merely intended for export to India the same will not fall within the definition of the word "goods" in Section 2(e).

Even if there was any manner of doubt the same would stand dispelled by the plain reading of Section 14. The said section visualizes where, inter alia, restrictive or unfair trade practice is carried on and any party to such practice does not carry on business in India then an order can be passed under the Act only with respect to that part of the practice which is carried on in India. To put it differently, it is only that part of monopolistic, restrictive, or unfair, trade practice, relating to production, supply etc. of goods in India in respect of which orders can be passed. To put matters beyond any doubt Explanation I to Section 35, which refers to agreements which are subject to registration under the said section, provides that when any party to the agreement for the production, supply, distribution etc. of goods or performance of any services in India carries on business in India then that agreement shall be deemed to be an agreement within the meaning of the section, notwithstanding that any other party to the

agreement does not carry on business in India. The meaning of this clearly is that it is only that agreement which would require registration in India if at least one party to the agreement carries on business in India. It may happen that there may be two or more parties which enter into an agreement outside India, relating to supply or distribution of goods to India, the formation of such an agreement would not ipso facto require any registration even if it relates to restrictive trade practice but if one of the parties to an agreement carries on business in India then that agreement shall be deemed to be an agreement within the meaning of the section which would require registration.

The next question which would arise for consideration is whether the principle of "effect doctrine" has any application in India. Where, in other words, actions take place and agreements are entered into outside India but the resultant adverse effect is experienced in India then can the MRTP Commission have any jurisdiction. The preamble of the Act indicates that the MRTP Act was enacted, inter alia, for prohibiting any restrictive trade practice. Restrictive trade practice has been defined in Section 2(o) which reads as follows:

" '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 effect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions;"

The expression "trade practice" has been defined under Section 2(u) which reads as under:

" '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;"

Section 33 of the Act deals with certain types of agreements stipulated therein to be an agreement relating to restrictive trade practice and such agreement requires to be registered. Section 37(1) gives the Commission power to inquire whether an agreement is governed by Section 33 and has been registered under Section 35 or not.

Section 37 reads as under :

"37. Investigation into restrictive trade practices by Commission.- (1) The Commission may inquire into any restrictive trade practice, whether the agreement, if any, relating thereto has been registered under Section 35 or not, which may come before it for inquiry and, if, after such inquiry it is of opinion that the practice is prejudicial to the public interest, the Commission may, by order, direct that-

(a) the practice shall be discontinued or shall not be repeated;

(b) the agreement relating thereto shall be void in respect of such restrictive trade practice or shall stand modified in respect thereof in such manner as may be specified in the order.

(2) The Commission may, instead of making any order under this section, permit the party to any restrictive trade practice, if he so applies to take such steps within the time specified in this behalf by Commission as may be necessary to ensure that the trade practice is no longer prejudicial to the public interest, and in any such case, if the Commission is satisfied that the necessary steps have been taken within the time specified, it may decide not to make any order under this section in respect of that trade practice.

(3) No order shall be made under sub-section (1) in respect of-

- (a) any agreement between buyers relating to goods which are bought by the buyers for consumption and not for ultimate resale whether in the same or different form, type or specie or as constituent of some other goods;
- (b) a trade practice which is expressly authorised by any law for the time being in force.

(4) Notwithstanding anything contained in this Act, if the Commission during the course of an inquiry under sub-section (1), finds that the owner of any undertaking is indulging in monopolistic trade practices, it may, after passing such orders under sub-section (1) or sub-section (2) with respect to the restrictive trade practices as it may consider necessary, submit the case along with its findings thereon to the Central Government for such action as that Government may take under Section 31."

Section 37 thus gives power to the Commission to inquire into any restrictive trade practice and if it is of the opinion that the practice is prejudicial to the public interest, the Commission may, by order, direct that the practice shall be discontinued or shall not be repeated. It appears to us that what is, inter alia, prohibited by the Act will be carrying on restrictive trade practice as defined in Sections 2(o) and 2(u) of the Act. The restrictive trade practice may or may not be directly connected with or be the result of any agreement between the parties in India. Any act which falls under the category of restrictive trade practice can be investigated into and orders passed under Section 37(1). Sections 2(o) and 2(u) do not specifically indicate that the practice should be carried on only by a person or persons in India. If the trade practice is such that it becomes a restricted trade practice in India as contemplated by Section 2(o), then action can be taken under Section 37(1) in respect of such a trade practice.

Section 38 provides that every restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied of any one or more of the circumstances mentioned in Clauses (a) to (k) of Section 38 exists and it is further satisfied that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement.

Section 2(u) does state that 'trade practice' means any practice relating to the carrying on of any trade but then it adds that such a trade practice would include 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. The Act and the aforesaid section, in particular, is, therefore, concerned specifically with the incidence of the restrictive trade practice within India which in Section 2(o)(i) refers to the obstruction to the flow of capital or resources into the stream of production, while Section 2(o)(ii) talks of manipulation of prices or conditions of delivery or to effect the flow of supplies in the market but which must be such as to impose on the consumers unjustified costs or restrictions. To put it differently, mere manipulation of prices or conditions of delivery would not be a

restrictive trade practice under Section 2 (o)(ii) unless it is done in such a manner so as to impose on the consumers unjustified costs or restrictions. Lowering of prices cannot be regarded as imposing on the consumers unjustified costs or restrictions.

Under Section 33(1)(j) of the Act, any agreement to sell goods at such prices as would have the effect of eliminating competition or a competitor is regarded as an agreement relating to restrictive trade practice and shall be subject to registration. The Act nowhere states that this agreement should be only in India or between Indian parties. In effect, this Section recognizes the 'effects doctrine', namely, where an agreement results in sale of goods at such prices which would have the effect of eliminating competition or a competitor. In the very nature of things, the sale of goods keeping in mind the definition of the word "goods" in Section 2(e) must be of goods imported into India, in the case like the present. But if we replace the word "goods" in Section 33(1)(j) with the definition of "goods" in Section 2(e)(iii), then the Section 33(1)(j) would read as follows:  
"Any agreement to sell goods imported into India at such prices as would have the effect of eliminating competition or a competitor."

Thus, the agreement requiring registration must be in respect of goods after their import into India.

In other words, where the goods are already in India, then any agreement which has the effect of eliminating competition or a competitor of the sale of those goods existing in India would be a restrictive trade practice and it would be immaterial as to where the agreement takes place in relation to the sale of those goods. The "effects doctrine" would be applicable only in relation to those goods which are within the territory of India before its sale referred to in Section 33(1)(j) of the Act. An agreement, which results in sale outside India and the export of the goods to India, even if that sale is at predatory prices, would not fall within the ambit of Section 33(1)(j) of the Act. It is a subsequent agreement of sale of the imported goods, if it has the effect of eliminating competition or a competitor, which would be registerable under Section 33(1)(j) of the Act.

Even if an agreement is executed outside India or the parties to the agreement are not in India and agreement may not be registerable under Section 33, being an outside India agreement, nevertheless, if any, restrictive trade practice, as a consequence of any such an outside agreement, is carried out in India then the Commission shall have jurisdiction under Section 37(1) in respect of that restrictive trade practice if it comes to the conclusion that the same is prejudicial to the public interest.

It is possible that persons outside India indulge in such trade practices, not necessarily restricted to the effectuation of prices within India, which have the effect of preventing, distorting or restricting competition in India or gives rise to a restrictive trade practice within India then in respect of that restrictive trade practice, MRTTP Commission will have jurisdiction. The counsel for the respondents is right in submitting that if the effect of restrictive trade practices came to be felt in India because of a part of the trade practice being implemented here the MRTTP Commission would have jurisdiction. This "effects doctrine" will clothe the MRTTP Commission with jurisdiction to pass an appropriate order even though a transaction, for example, which results in exporting goods to India at predatory price, which was in effect a restrictive trade practice, had been carried out outside the territory of India if the effect of that had resulted in a restrictive trade practice in India. If power is not given to the MRTTP Commission to have jurisdiction with regard to that part of trade practice in India which is restrictive in nature then it will mean that persons outside India can continue to indulge in such practices whose

adverse effect is felt in India with impugntiy. A competition law like the MRTP Act is a mechanism to counter cross border economic terrorism. Therefore, even though such an agreement may enter into outside the territorial jurisdiction of the Commission but if it results in a restrictive trade practice in India then the Commission will have jurisdiction under Section 37 to pass appropriate orders in respect of such restrictive trade practice.

We will now consider whether the Anti-dumping provisions will oust the jurisdiction of the MRTP Commission, as has been contended by the appellants.

The jurisdiction of the MRTP Commission, in our opinion, is not ousted by the Anti-dumping provisions in the Customs Act. The two Acts operate in different fields and have different purposes. The Import Control Act and the Customs Tariff Act are concerned with import of goods into India and the duty which could be imposed on the imported items. Import may be allowed on the basis of an import license or, depending upon the policy, import may be allowed under OGL - Open General License where no specific license for import is required. Whether to allow import or not and the terms on which an item may be imported is a matter of policy and regulated by law.

There is in this case no challenge to the import policy allowing import of float glass and even if such a challenge was to be there it would hardly succeed. The grievance of the respondents is that import is being made at predatory prices. The challenge is to the actual import. But allowing such a challenge will amount to giving the MRTP Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to import, which jurisdiction the Commission does not have. It is not a court with power of judicial review over legislative action. Therefore, it would have no jurisdiction to decide whether the action of the Government in permitting import of float glass even at predatory prices is valid or not. The Commission cannot prohibit import, its jurisdiction commences after import is completed and any restrictive trade practice takes place.

Customs duty on import of any goods is levied under the provisions of the Customs Tariff Act. The rate at which the import duty is to be levied is a matter of policy. The rate of duty is determined by the schedule to the Customs Tariff Act and is subject to such exemption as may be granted under that Act. Thus the rate of import duty which is imposed is a legislative act and is thus not amenable to the jurisdiction of the MRTP Commission. A party cannot contend before the MRTP Commission that the rate of duty is too high or too low. In fact, such a challenge is hardly likely to succeed in a Court of law and the question of the MRTP Commission having such a jurisdiction does not arise.

Apart from the rate of duty the value of the goods imported has to be determined for the purpose of levy of duty. The customs authorities are required to determine whether the value of the goods imported has been correctly declared. In case of wrong valuation, the customs authorities can determine the correct value and levy duty thereon. Normally the goods are valued at the price at which they are actually purchased. Then that will be the value at which the duty will be imposed. It is not the case of the respondents that the appellants are guilty of under-valuing the goods imported. It is the low price which has been charged by the Indonesian exporter which is really the object of attack.

The levy or non-levy of anti-dumping or other duty being a legislative act pursuant to the exercise of powers under the Customs Tariff Act can also not be a subject-matter of judicial review by the

MRTTP Commission. The two Acts substantially operate in different fields and the following table brings out some of the distinctions between the MRTTP Act and the Anti-dumping provisions:

COMPETITION LAW  
ACTIONS

ANTI-DUMPING ACTIONS

1.

2.

3.

4.

5.

Competition law is concerned

with the regulation of competition in a particular market within the territory of a country. Thus, it would take within its sweep a whole host of anti-competitive practices including (i) monopolistic trade practices, as defined in Section 2(i) of the MRTP Act, (ii) restrictive trade practices, as defined in Section 2(o), and (iii) unfair trade practices as defined in Section 36A.

A Complaint under the MRTP Act can be filed by a Trade Association or any Consumer or a Registered Consumers Association, or a reference can be made by the Central Government or the State Government or even by the Director General upon its own knowledge or information. [Section 10(1)(A) of the MRTP Act.]

Competition law procedures allow and require consideration of interest groups such as manufacturers, importers, exporters, consumers and the general public. Commercial actors can have their interests assessed through the determination of the market, causation or injury. Interests of consumers are taken into account when assessing the impact of a business practice on competition.

In predatory pricing enquiries, the complainant has to establish that the predator acted with intent to eliminate competition and competitors. Actual injury is not required.

In most countries, competition cases are dealt with by a court of law, where parties are entitled to full discovery rights and due process.

An anti-dumping law is concerned with addressing just one type of unfair, international trade practice that causes injury to domestic industry, i.e., "dumping" of goods by an exporting country.

An Anti Dumping Petition can be filed by the Domestic Industry as defined under the Anti Dumping Rules or suo motu by the Designated Authority. [See Rules 2 (b), 5(1) and 5(4) of the Anti Dumping Rules.]

No interest group other than domestic industry has full legal standing in anti-dumping cases. The predominant interest group is of domestic producers. Industrial users and consumers do not have legal standing to maintain a complaint.

In anti-dumping complaints, intent is irrelevant but actual injury has to be shown. Further, a causal link has to be established between the dumping and the injury suffered.

Anti-dumping enquiries are always conducted by government agencies through administrative procedures and law.

A perusal of the above chart indicates that the two statutes and regimes operate in different and distinct spheres and there is no conflict between the two regimes/statutes. Hence, the question of implied repeal of the provisions of Section 33(1)(j) of the MRTP Act, 1969 on account of the provisions of Section 9A of the Customs Tariff Act, 1975 does not arise.

It is thus seen that the provisions relating to anti-dumping contained in the Customs Tariff Act do not in any way affect the power or jurisdiction of the MRTP Commission. The Import Control Act and the Customs Tariff Act on the one hand and the MRTP Act on the other operate in different independent fields and the authority under one has no jurisdiction over the other. In other words, their paths do not cross each other. While the provisions of Anti-dumping Act are concerned with the levy of anti-dumping duty, the MRTP Act in the present case would be concerned with the agreements between the parties which relate to the restrictive trade practices. Therefore, it would be incorrect to say that the incorporation of the anti-dumping provisions ousts the jurisdiction of the MRTP Commission to inquire and pass orders, inter alia, with regard restrictive trade practice in India.

It was submitted that import by the Indian party from Indonesia

at predatory prices required the agreement for import to be registered as per Section 33 (1)(j) of the Act. On the facts of this case, we are not inclined to agree that such a case is made out. As far as Section 33(1)(j) is concerned, there must be an agreement between the foreign seller and the Indian importer to sell goods at such prices as would have the effect of eliminating competition of a competitor, i.e., here the Indian industry. What seems to have happened here is that the monopolistic Indian undertakings are now having to face competition. The quantum of import in the present case is a small fraction of the total float glass which is manufactured and sold in India. The reduction in prices of the Indian importer is to the benefit of the Indian customer. It is only if there is an agreement between the Indian importer and the foreign seller which has such an effect that the production in India of float glass by efficient Indian industry would have to stop and such stoppage is considered prejudicial to the public interest, can an order under Section 12-A or Section 37 be passed. It is the case of the petitioners that the Indian manufacturers have formed a cartel of their own and are charging high prices because of lack of competition. It is alleged that the Indian manufacturers are making much profits and despite import of float glass having taken place for the last 5-10 years the Indian industry has not suffered. On the other hand, the volume of sales has increased and the profit of the Indian producers not decreased. Under these circumstances, it was contended, the passing of the injunction was wholly uncalled for.

Import of material at prices lower than prevailing in India cannot per se be regarded as being prejudicial to the public interest. If the normal or export price of any goods outside India is lower than the selling price of an indigenously produced item then to say that the import is prejudicial to the public interest would not be correct. The availability of goods outside India at prices lower than those which are indigenously produced would encourage competition amongst the Indian industry and would not per se result in eliminating the competitor, as was sought to be submitted by the respondents.

It is while dealing with a complaint relating to restrictive trade practice that the MRTP Commission has the jurisdiction to grant temporary injunction under Section 12-A(1). It is only on the basis of proof, and not mere allegation, and on the basis of an inquiry before the Commission that any trader or class of traders is carrying on a restrictive trade practice which is likely to affect prejudicially the public interest or the interest of any trader, class of traders or traders generally or of consumers that the Commission would have jurisdiction to grant a temporary injunction restraining any undertaking or person from carrying on any restrictive trade practice. While the Commission has power to grant ex-parte temporary injunction, but in view of Explanation II to Section 12-A, whereby the provisions of Rule 2-A of Order XXXIX of the Code of Civil Procedure, 1908 are made applicable, for the grant of temporary injunction the Commission normally ought to give notice and hear the respondents before passing an order of injunction. What is, however, important is that the conditions stipulated in Section 12-A(1) have to be satisfied before an order for injunction can be passed. In other words, it has to be proved that the respondents before the Commission is carrying on or about to carry on a restrictive trade practice which will be prejudicial to the public interest or to the interest of traders etc. before an order for injunction can be issued. Merely because an industry will find itself unable to be able to compete with imports from outside can be of no ground for exercising jurisdiction under Section 12-A(1). It is only if the trade practice which is being impugned is such that would fall within the four corners of Section 2(o), which defines restrictive trade practice, can the Commission grant an injunction. The facts on record do not indicate any justification for any interim order being passed in the present case. Furthermore, the impugned order passed against the foreign

manufacturers of float glass, who do not carry on business in India is clearly contrary to the provisions of Section 14 of the Act and, as such, cannot be sustained.

In our opinion, the MRTTP Commission has no extra territorial jurisdiction. The action of an exporter to India when performed outside India would not be amenable to jurisdiction of the MRTTP Commission. The MRTTP Commission cannot pass an order determining the export price of an exporter to India or prohibiting him to export to India at a low or predatory price.

The matter may be examined from another angle. In this case, there is a sale of float glass by the exporter in Indonesia. If the float glass was ready and available, then being ascertained goods the sale would be regarded as having taken place where the goods existed at the time of sale, i.e., in Indonesia. If the glass had to be manufactured and not readily identifiable, then the sale would take place outside India when the goods are appropriated to the contract by the foreign exporter. Here the appropriation would take place in Indonesia when the glass is earmarked and exported to India. In either case the MRTTP Commission would have no jurisdiction to stop that sale. If the said sale cannot be stopped and the import policy permits the Indian importer to import on payment of duty then we fail to see what jurisdiction the MRTTP Commission can possibly have till a restrictive trade practice takes place after float glass is imported into India.

It is not as if the Indian industry has no remedy against goods being exported to India at predatory prices. It is because of the need for such a provision that the Customs Act was amended and anti-dumping provisions were incorporated. Recourse to this was taken by the respondents but then that remedy was not pursued. At this stage, it is relevant to refer to the provisions of Section 11 of the Customs Act. The said Section gives the Central Government a power to prohibit importation or exportation of goods, if it is satisfied that it is necessary to do so for any of the purposes specified in sub-section (2). Under sub-section (2), such prohibition can be for the purpose of establishment of any industry (sub-clause (i)); preventing serious injury to domestic production of goods of any description (sub-clause (j)); the compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India (sub-clause (s)); the prevention of the contravention of any law for the time being in force (sub-clause (u)) and any other purpose conducive to the interest of general public (sub-clause (v)). Inasmuch as, the import into the country is, inter alia, governed by the Customs Act and the power to prohibit or not to prohibit the importation of any goods is with the Government, then unless and until, a law prohibiting import is infringed, it is difficult to perceive as to how the MRTTP Commission can prevent the importation of the goods. In this connection, it is also useful to refer to Section 33(3) of the Act which reads as under:

"No agreement falling within this section shall be subject to registration in accordance with the provisions of this Chapter if it is expressly authorized by or under any law for the time being in force or has the approval of the Central Government or if the Government is a party to such agreement."

Inasmuch as the importation of float glass is permitted by law, under the provisions of the Customs Act and the Import Control Act, then an agreement in relation to such an import may not be liable to be registered under the provisions of the Act. It is only in respect of float glass, which is imported and thereafter if in respect to that a restrictive trade practice is indulged can the MRTTP Commission have jurisdiction qua post import Indian end of the transaction.

Conclusions :

From the aforesaid discussion and reasons, we arrive at the following conclusions:-

1. Anti-dumping provisions do not per se oust the jurisdiction of the MRTP Commission.
2. The MRTP Commission can, inter alia, take action whenever a Restrictive Trade Practice is carried out in India in respect of imported goods or otherwise.
3. It is only in respect of the Indian leg of the restrictive trade practice, can an order under Section 12 A and/or Section 37 be passed.
4. Under Section 33 of the Act what can be registered is only an agreement in regard to which any party to an agreement carries on business in India [Section 35 Explanation I]. But this does not mean that if an agreement is entered into outside India and which results in a Restrictive Trade Practice in India, the MRTP Commission has no jurisdiction. The "effects doctrine" will apply and Section 2(o) read with Section 2(u) and Section 37 gives jurisdiction to the MRTP Commission to pass appropriate orders qua the Restrictive Trade Practice in India. The MRTP Commission, in such a case, may not be able to stop import but there can be order imposing post import restrictions such as, for example, not to sell imported goods in India in such a manner which will be regarded as a restrictive trade practice under Section 37.
5. In Explanation I to Section 35 the use of the words "shall be deemed to be an agreement within the meaning of this section." and the time-frame for registration clearly indicates that Section 33 and Section 35 apply only to Indian agreements or agreements in India and, therefore, it became necessary to incorporate Explanation I so as to enlarge the ambit and give extra territorial jurisdiction in relation to those agreements which relate to performance of services in India and any party to that agreement carries on business in India.
6. On the facts of this case, the impugned order passed by the MRTP Commission against the Indonesian exporters cannot be sustained and is set aside

Appeals are disposed of in the aforesaid terms. Parties to bear their own costs.

Civil Appeal No. 3562 of 2000 :

Interim order of the MRTP Commission restraining the appellant from dispatching, directly or indirectly, soda ash to India is the subject matter of challenge in this appeal.

The complainant M/s Alkali Manufacturers Association of India (AMAI for short) had filed a complaint before the MRTP Commission under Section 33(1)(d), Section 36-A and Section 40 read with Section 2(i) & (o) of the MRTP Act. The Complainant Association had 34 members carrying on the business of Soda Ash in India. In the complaint, it was stated that the Soda Ash was being manufactured by six companies in India and was being sold to the Indian consumers at a net price of Rs. 8190 to Rs. 8320 PMT net of excise. It was alleged that the appellant M/s American Natural Soda Ash Corporation (hereinafter referred to as ANSAC) consisted of six producers of natural Soda Ash who have joined together to form an Export Cartel by virtue of a Membership Agreement amongst them entered into in America on 8th December, 1983. By this agreement, the

six producers had agreed that all export sales by them or by any of their subsidiaries will be made through ANSAC which was set up as a Corporation in accordance with the provisions of the United States Export Trade Act, 1918. It was further alleged in the complaint that ANSAC in an attempt to invade the Indian market and undercut the Indian producers, it sold American Soda Ash to Indian consumers at an unrealistically low price of US \$ 132 PMT-CIF. With a view to circumvent the prohibition in Indian law against monopolistic, restrictive and unfair trade practices, a strategy had been adopted by ANSAC by selling American Soda Ash to Indian consumers through the front of one M/s G. Premjee of Singapore in whose favour the Indian producers had opened letters of credit. According to this complaint, there was a bulk sale of soda ash by ANSAC to the Indian Consumers through the conduit of M/s G. Premjee of Singapore. On the basis of these averments, namely, that ANSAC was a Cartel of American Soda Ash Producers and was likely to affect maintenance of prices at reasonable and realistic levels in India and with a view to adversely affect the local production and availability of Soda Ash, the MRTP Commission should enquire against this restrictive and unfair trade practice and grant an ex-parte injunction restraining ANSAC from despatching the goods. On the basis of these allegations, the MRTP Commission on 9th September, 1996 passed an ad-interim injunction, which was subsequently confirmed by it, directing ANSAC not to indulge in the practice of cartelisation by exporting soda ash to India in the form of cartel directly or indirectly. The order further stated that it was without prejudice to the final outcome of the said enquiry as well as to the rights of the importers or exporters in the individual capacity to export soda ash to India. This order has been affirmed by the Commission by its order of 9th March, 2000.

While denying that ANSAC was a cartel or that export of Soda Ash to India was violative of any of the provisions of the MRTP Act, ANSAC has submitted in this appeal that the MRTP had no extra-territorial jurisdiction and furthermore in view of the provisions of the anti-dumping law, the MRTP Commission had no jurisdiction to decide the case.

This appeal was heard along with Civil Appeal No. 2330 of 2000 - M/s Haridas Exports v. All India Float Glass Manufacturers Association. In Haridas Exports case common contentions raised in this appeal regarding jurisdiction of the MRTP Commission and the scope and ambit of the MRTP Act vis-a-vis Anti Dumping Duty have been dealt with. We now propose to deal with the allegation of export by the appellant, which is alleged to be a cartel, and whether there was justification for granting the injunction.

Some more undisputed facts, which are relevant may first be mentioned. ANSAC was set up under the Webb Powerence Act of U.S.A. as an export agency, the six producers of soda ash in U.S.A. being its members. Like a canalising agency exports of natural soda ash by these producers cannot be made by the members individually. Exports of soda ash from U.S.A. are made by the canalising agency, namely, the appellant.

While the Indian companies manufacture synthetic soda ash, the American companies export natural soda ash which is cheaper to produce than the Indian soda ash. Since its inception in 1983, the appellant had sold for export to India only one consignment equal to 1.44 per cent of the annual production of India, and it is in respect of this consignment that the MRTP Commission issued injunction restraining its import. Till today, therefore, no soda ash has been exported by the appellant to India.

It was submitted by the respondent that the agreement of 1983 formed a cartel and was registrable under Section 33(1)(d) of the MRTP

Act.

In so far as Section 33 (1) (d) is concerned, the scheme appears to be that every agreement falling under Section 33 (1)(a) to (1) is presumed to be one relating to restrictive trade practice and is subject to registration. An agreement falling under Section 33 need not necessarily be one in writing inasmuch as Section 2(a) defines an agreement as including any arrangement or understanding as well. Therefore, if apart from written agreement there is an arrangement or understanding amongst the sellers or the purchasers with regard to the purchase or sale of goods to be only at the prices or on terms or conditions agreed upon amongst them then such an agreement would require registration. Section 33(1)(d) regards an agreement to be one relating to restrictive trade practice if such agreement relates to purchase or sale of goods or to tender for sale or purchase of goods only at prices or on terms or conditions agreed upon amongst the sellers or amongst the purchasers. Such an agreement amongst the sellers or amongst the purchasers relating to purchase or sale or to the prices in respect thereof may be regarded as the formation of a cartel.

Section 35 specifies the period within which every agreement falling under Section 33 becomes registrable. As we have already noticed, Explanation I would make such an agreement registrable only when at least one party to the agreement carries on business in India. On an agreement being filed under Section 35 particulars are furnished to the Director General who is required to maintain a register under Section 36. Section 37 then gives the jurisdiction to the Commission to make an inquiry, whether an agreement is registered or not, in order to find out if a restrictive trade practice is prejudicial to the public interest. The effect of this is that by not registering an agreement falling under Sections 33 and 35 the Commission is not divested of its jurisdiction of exercising its powers under Section 37. The opening words of Section 37 make it quite clear that an inquiry into any restrictive trade practice can be made by the Commission even in relation to an agreement which is not registered. Therefore, once an agreement comes to the notice of the Commission which is to be regarded as containing a restrictive trade practice then the Commission is under an obligation to find out and determine whether in its opinion the practice is prejudicial to the public interest. It is only if the Commission is satisfied that there is prejudice to the public interest then the Commission has the jurisdiction to direct either that the practice shall be discontinued or shall not be repeated or to hold that any such agreement which is prejudicial to the public interest shall be void in respect of such restrictive trade practice or that the said agreement shall be modified in such a manner as may be specified. If remedial steps have been taken then, as contemplated by Section 37 (2), no order need be passed by the Commission. One further restriction on the power of the Commission to pass order is also contained in Section 37 (3) (b) which provides that if a trade practice is expressly authorised to be carried on by any law for the time being in force then no order shall be passed under Section 37. This Explanation is in addition to the provisions of Section 38 which deals with cases relating to presumption as to the agreement of the types mentioned there in being in the public interest.

The impact of reading of the provisions together is that what is sought to be targeted in relation to restrictive trade practice is not the nature or the factum of the restriction but such restriction should not be prejudicial to the public interest. For example, an agreement may be entered into amongst the purchasers in order to ensure constant supply of goods at a reasonable rate. Such an agreement even though it may fall under Section 33 (1) (d) would not be regarded as being prejudicial to the public interest.

It is in this context that when we examine the provisions of Section 12-A, we find that the power of the Commission to grant

temporary injunction arises only after it is satisfied that a restrictive trade practice or unfair trade practice is being carried on which is likely to affect prejudicially the public interest or the interest of trader or class of traders etc. It is only with a view to prevent the causing of a prejudicial effect that an interim order can be passed by the Commission under Section 12-A.

As we have already seen the Act does not have any extra territorial operation. An agreement which is referred to under Section 33 (1) (d) must, therefore, be of a kind in which a person in India is a party. This is clear from the bare reading of Explanation I to Section 35. This means that for an agreement to fall within the ambit of Section 33(1)(d) and in respect of which the Commission can exercise its powers under Section 37 a person in India must be regarded as one of the sellers who is a person to such an agreement. This is clear from the use of the words "any party to the agreement carries on business in India" occurring in Explanation I to Section 35. A Careful reading of Section 33(1)(d) indicates that it refers to two classes of agreements. One class is an agreement to purchase goods or to tender for the purchase of goods only at prices or on terms or conditions agreed upon between the purchasers. The other class is an agreement to sell goods or to tender for the sale of goods only at prices or on terms or conditions agreed upon between the sellers. In other words, Section 33(1)(d) refers to the agreements which have the effect of forming either a buyers cartel or a sellers cartel. This sub-section does not refer to or deal with agreements of sale and purchase between sellers and purchasers.

In the case of import of soda ash, the contention is that the appellant is a cartel in America which was proposing to sell soda ash to India at very low prices with a view to eliminate competition and to adversely affect the Indian industry. Any agreement of sale by the appellant to an Indian purchaser would not attract the provisions of Section 33(1)(d), which refers only to cartelising agreements and not to agreements of sale and purchase. But the MRTP Commission will have jurisdiction under Section 37 to pass orders if such a sale was to amount to being a restrictive trade practice. For the Commission to have jurisdiction to pass such an order, whether interim or final, it must come to the conclusion that it is in public interest to do so. It is to be borne in mind that public interest does not necessarily mean interest only of the industry. Unless and until it can be demonstrated that an efficient Indian industry would be forced to shut down or suffer serious loss resulting in closure or unemployment, the Commission ought not to pass an injunction restraining an Indian party from importing goods from a cartel at predatory prices. Importing goods at a price lower than what is available in India is not per se illegal. We have provisions under the Customs Act which enables the Government to impose anti-dumping duties with a view to protect the Indian industry. Nevertheless, the era of protectionism is now coming to an end. The Indian industry has to gear up so as to meet the challenges from abroad. If the cartel is selling goods to India and still making profit then it will not be in the interest of the general body of the consumers in India to prevent the import of such goods. The remedy of the Indian industry, in such an event, is to take recourse to the provisions under the Customs Act in relation to the levy of anti-dumping duties.

A cartel is formed, inter alia, with a view that members of the cartel do not wage a price war and they sell at an agreed or uniform price. There may perhaps also be a cartel where members divide the territories to which each of them can export. There is little doubt that the object of an export cartel is to capture a market even if at first, it may result in a loss to the exporter.

The competition law in the form of MRTP as it stands today does

not contain any provision, which can give it jurisdiction to interfere merely with cartel formation. Formation of cartel which takes place outside India is outside the territorial jurisdiction of the MRTP. The Indian importer obtaining goods at a low price does not contravene any law. He has obtained a good bargain.

We need not go into the question whether anti-dumping provisions in the Customs Act can be an effective remedy against such cartelisation. But if the cartel carries out Restrictive Trade Practice in India or its actions have the effect of a Restrictive Trade Practice being carried out in India, then the MRTP Commission will get jurisdiction to act under Section 37(1) of the MRTP Act.

We make it clear that we are expressing no opinion as to whether the appellant is a cartel or on the question of predatory prices for the reason that we are satisfied that here no case had been made out by the respondents for the grant of injunction against the appellant. The injunction issued against the appellant was not only against the provisions of Section 14 of the Act but even on facts as alleged no case had really been made out for any order under Section 12-A or Section 37 of the Act more so when no import of soda ash into India from the appellant had, in fact, taken place. On the other hand, prima facie the allegation of the appellant that it is the respondents which have formed a cartel and do not welcome any competition does merit consideration, perhaps in another case.

For the aforesaid reasons, this appeal is allowed with costs.