Union of India and Another

Vs

Cynamide India Ltd. and Another

Civil Appeal No. 1603 of 1985

(K. N. Singh, O. Chinnappa Reddy JJ)

10.04.1987

JUDGMENT

CHINNAPPA REDDY, J. -

1. It was just the other day that our brothers Ranganath Misra and M. M. Dutt, JJ. had to give direction in a case (vincent Panikulangara v. Union of India ((1987) 2 SCC 165)) where a public spirited litigant had complained about the unscrupulous exploitation of the Indian Drug and Pharmaceutical Market by multinational corporations by putting in circulation low - quality and even deleterious drugs. In this group of cases we are faced with a different problem of alleged exploitation by big manufacturers of bulk drug. The problem is that of high prices, bearing, it is said, little relation to the cost of production to the manufacturers. By way of illustration, we may straightway mention a glaring instance of such high-pricing which was brought to our notice at the very commencement of the hearing. 'Barlagan Ketone', a bulk drug, was not treated as an essential bulk drug under the Drugs (Prices Control) Order, 1970 and was not included in the schedule to that Order. A manufacturer was, under the provisions of that Order, free to continue to sell the drug at the price reported by him to the Central Government at the time of the commencement of the order, but was under an obligation not to increase the price without the prior approval of the Central Government. The price which the manufacturer of Barlagan Ketone, reported to the Central Government in 1971 was Rs. 24,735.68 per kg. After the 1979 Drugs (Prices Control) Order came into force, the distinction between essential and non essential bulk drugs was abolished and a maximum price had to be fixed for Barlagan Ketone also like other bulk drugs. The manufacturer applied for fixation of price at Rs. 3500 per kg. The government, however, fixed the price at Rs. 1810 per kg. For the moment, ignoring the price fixed by the government, we see that the price of Rs. 24,735 per kg. at which the manufacturer was previously selling the drug and at which he continues to market the drug to this day because of the quashing of the order fixing the price by the High Court, is so unconscionably high even compared with the price claimed by himself that it appears to justify the charge that some manufacturers do indulge in 'profiteering'.

2. Profiteering, by itself, is evil. Profiteering in the scarce resources of the community, much needed life-sustaining foodstuffs and life-saving drugs is diabolic. It is a menace which has to be fettered and curbed. One of the principal objectives of the Essential Commodities Act, 1955 is precisely that. It must be remembered that Article 39(b) enjoins a duty on the State towards securing 'that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; The Essential Commodities Act is a legislation towards that end. Section 3(1) of the Essential Commodities Act enables the Central Government, if it is of opinion 'that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair price', to 'provide for

regulating or prohibiting by order, the production, supply and distribution there of and trade and commerce there in; In particular, section 3(2)(c) enables the Central Government, to make an order providing for controlling the price at which any essential commodity may be bought or sold. It is pursuance of the powers granted to the Central Government by the Essential Commodities Act that first the Drugs (prices Control) Order, 1970 and later the Drugs (Price Control) Order, 1979 were made. Armed with authority under the Drugs (prices Control) Order, 1979 the Central Government issued notification fixing the maximum prices at which various indigenously manufactured bulk drugs may be sold by the manufacturers. These notification were questioned on several grounds by the manufacturers and they have been quashed by the Delhi High Court on the ground of failure to observe the principles of natural justice. Since prices of 'formulations' are primarily dependent on prices of 'bulk drugs', the notification fixing the retail prices of formulations were also quashed. The manufacturers had also filed review petitions before the government under paragraph 27 of the 1979 Order. The review petitions could not survive after the notifications sought to be reviewed had themselves been quashed. Nevertheless the High Court gave detailed directions regarding the manner of disposal of the review petitions by the High Court. The Union of India has preferred these appeals by special leave of this Court against the judgment of the High Court. The case for the Union of India was presented to us ably by Shri G. Ramaswamy, the learned Additional Solicitor General and the manufacturers were represented equally ably by Shri Anil Divan.

3. Before we turn to the terms of the Drugs (Prices Control) Order, 1979, we would like to make certain general observation and explain the legal position in regard to them.

4. We start with the observation, 'Price fixation is neither the function nor the forte of the court'. We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire into the question, in appropriate proceeding, whether relevant consideration have gone in and irrelevant considerations kept out of the determination of the price. For example, if the legislature has decreed the pricing policy and prescribed the factor which should guide the determination of the price, we will, if necessary, enquire into the question whether the policy and the factors are present to the mind of the authorities specifying the price. But our examination will stop there. We will go no further. We will not deluge ourselves with more facts and figures. The assembling of the raw materials and the mechanics of price fixation are the concern of the executive and we leave it to them. And, we will not re-evaluate the considerations even if the prices are demonstrably injurious to some manufacturers of producers. The court will, of course, examine ifs there is any hostile discrimination. That is a different 'cup of tea' altogether.

5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In the case of Parliamentary legislation, the proposition is self evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing-there are several instances of the legislature the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate - in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi judicial. But, where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity.

6. Occasionally, the legislature directs the subordinate legislating body to make 'such enquiry as it thinks fit' before making In such a situation, while such enquiry by the subordinate legislative body

as it deems fit is a condition precedent to the subordinate legislation, the nature and the extent of the enquiry is in the discretion of the subordinate legislating body and the subordinate legislation is not open to question on the ground that the enquiry was not as full as it might have been. The provision for 'such enquiry as it thinks fit' is generally an enabling provision, intended to facilitate the subordinate legislating body to obtain relevant information form all and whatever source and not intended to vests any right in anyone other than the subordinate legislating body. It is the sort of enquiry which the legislature itself may cause to be made before legislating, an enquiry which will not confer any right on anyone.

7. The third observation we wish to make is, price fixation is more in the nature of a legislative activity than any other. It is true that, with the proliferation of delegated legislation, there is a tendency for the line between legislation and administration to vanish into an illusion. Administrative quasi-judicial decisions tend to merge in legislative activity and conversely, legislative activity tends to fade into and present an appearance of an administrative or quasi-judicial activity. Any attempt to draw a distinct line between legislative and administrative functions, it has been said, is, difficult in theory and impossible in practice; Though difficult, it is necessary that the line must sometimes be drawn as different legal rights and consequences may ensue. The distinction between the two has usually been expressed as 'one between the general and the particular'. 'A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. 'Legislation is the process of formulating a general rule of conduct without reference to particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases; It has also been said : "Rule making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations". But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and nonlegislative acts. A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character, not directed against a particular situation. It is intended to operate in the future. It is conceived in the interest of the general consumer public. The right of the citizen to obtain essential articles at fair prices and the duty of the State to so provide them are transformed into the power of the state to fix prices and the obligation of the producer to charge no more than the price fixed. Viewed from whatever angle, the angle of general application, the prospectiveness of its effect, the public interest served, and the rights and obligations flowing therefrom, there can be no question that price fixation is ordinarily a legislative activity. Price fixation may occasionally assume an administrative or quasi judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the government or its nominee and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. In such situations the determination of price

may acquire a quasi judicial character. Otherwise, price fixation is generally legislative activity. We also wish to clear a misapprehension which appears to prevail in certain circles that price fixation affects the manufacturer or producer primarily and therefore fairness requires that he be given an opportunity and that fair opportunity to the manufacturer or producer must be read into the procedure for price fixation. We do not agree with the basic premise that price fixation primarily affects manufacturers and producers. Those who are most vitally affected are the consumer public. It is for their protection that price fixation is resorted to any increase in price affects them as seriously as any decrease does a manufacturer, if not more.

8. The three observation made by us are well settled and well founded on authority. The cases to which we shall now refer, will perhaps elucidate what we have tried, unfelicitously, to express.

9. In Shree Meenakshi Mills Ltd. v. Union of India ((1974) 1 SCC 468), a notification fixing the ex-factory price of certain counts of cotton yarn was questioned on the ground that the price had been arbitrarily fixed. After referring to Harishankar Bagla v. State of M. P. ((1955) 1 SCR 380 : AIR 1954 SC 465 : 1954 Cri LJ 1322), Union of India v. Bhana Mal Gulzai Mal ((1960) 2 SCR 627 : AIR 1960 SC 475 : 1960 Cri LJ 664), Sri Krishna Rice Mills v. Joint Director (food) ((1974) 1 SCR 418), State of Rajasthan v. Nath Mal and Mitha Mal (1954 SCR 982 : AIR 1954 SC 307), Narendra Kumar v. Union of India ((1960) 2 SCR 375 : AIR 1960 SC 430), Panipat Co-operative Sugar Mills v. Union of India ((1973) 1 SCC 129), Anakapalle Co-operative Agriculture & Industrial Society Ltd. v. Union of India ((1973) 3 SCC 435) and Premier Automobiles Ltd. v. Union of India ((1972) 2 SCR 526 : (1972) 4 SCC (N) 1 : AIR 1972 SC 1690), a Constitution Bench of the court observed that the dominant object and the purpose of the legislation was the equitable distribution and availability of commodities at fair price and if profit and the producer's return were to be kept in the forefront, it would result in losing sight of the object and the purpose of the legislation. If the prices of yarn or cloth were fixed in such a way to enable the manufacturer or producer recover his cost of production and secure a reasonable margin of profit, no aspect of infringement of any fundamental right could be said to arise. It was to be remembered that the mere fact that some of those were engaged in the industry, trade or commerce alleged that they were incurring loss would not render the law stipulating the price unreasonable. It was observed : (SCC p. 493, paras 76 and 77)

The control of prices may have effect either on maintaining or increasing supply of commodity or securing equitable distribution and availability at fair prices. The controlled price has to retain this equilibrium in the supply and demand of the commodity. The cost of production, a reasonable return to the producer of the commodity. The cost of production, a reasonable return to the producer of the commodity are to be taken into account. The producer must have an incentive to produce. The fair price must be fair not only form the point of view of the consumer but also from the point of view of the producer. In fixing the prices, a price line has to be held in order to give preference or predominant consideration to the interest of the consumer or the general public over that of the producers in respect of essential commodities. The aspect of ensuring availability of the essential commodities to the consumer equitably and at fair price is the most important consideration.

The producer should not be driven out of his producing business. He may have to bear loss in the same way as he does when he suffers losses on account of economic forces operating in the business. If an essential commodity is in short supply or there is hoarding, cornering or there is unusual demand, there is abnormal increase in price. If price increases, it becomes injurious to the consumer. There is no justification that the producer should be given the benefit of price increase attributable to hoarding or cornering or artificial short supply. In such a case, if an "escalation" in price is contemplated at intervals, the object of controlled price may be stultified. The controlled

price will enable the consumer and the producer to tide over difficulties. Therefore, any restriction in excess of what would be necessary in the interest of general public or to remedy the evil has to be very carefully considered so that the producer does not perish and the consumer is not crippled.

The cases of panipat Sugar Mills ((1973) 1 SCC 129) and Anakapalle Society ((1973) 3 SCC 435) were distinguished on the ground that they were governed by sub-section (3-C) of section 3 of the Essential Commodities Act and therefore, Essential Commodities Act and therefore, had no relevance to the case before the Constitution Bench. The case of premier Automobiles ((1972) 2 SCR 526 : (1972) 4 SCC (N) 1 : AIR 1972 SC 1690) was distinguished on the ground that the decision was rendered by invitation and on the agreement of the parties irrespective of technical and legal question. The court quoted with approval a passage from Secretary of Agriculture v. Central Reig Refining Co. (338 US 604 : 94 Law Ed 381) stating : (quoted in SCC p. 492, para 69)

Suffice it to say that since Congress fixed the quotas on a historical basis it is not for this Court to reweigh the relevant factors and, perchance, substitute its notion of expediency and fairness for that of Congress. This is so even though the quota thus fixed may demonstrably be disadvantageous to certain areas or persons. This Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation.

In Saraswati Industrial Syndicate Ltd. v. Union of India ((1974) 2 SCC 630), the court observed : (SCC p. 636, para 13)

Price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It could not, therefore, give rise to a complaint that a rule or natural justice has not been followed in fixing the price. Nevertheless, the criterion adopted must be reasonable. Reasonableness, for purposes of judging whether there was an "excess of power" or an "arbitrary"exercise of it, is really the demonstration of a reasonable nexus between the matters which are taken into account in exercising a power and the purposes of exercise of that power.

It was also reiterated that the decision in Shree Meenakshi Mills' case ((1974) 1 SCC 468) was based on a special agreement between the parties and therefore, had no relevance to the question before them.

10. In Prag Ice & Oil Mills v. Union of India ((1978) 3 SCC 459), a Constitution Bench of seven judges of this Court had to consider the validity of the Mustard Oil (Price Control) Order, 1977, an Order made in exercise of the powers conferred upon Central Government by the Essential Commodities Act. Chandrachud, C.J. speaking for the court approved the observation of Beg, C.J. in Saraswati Industrial Syndicate ((1974) 2 SCC 630) that it was enough compliance with the constitutional mandate if the basis adopted for price fixation was not shown to be so patently unreasonable as to be in excess of the power to fix the price. He observed : (SCC p. 490, para 52)

In the ultimate analysis, the mechanics of price fixation has necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of processual basis of price fixation has to be accepted in the generality of cases as valid.

Referring to Shri Meenakshi Mills ((1974) 1 SCC 468), the learned Chief Justice reaffirmed the approval accorded to the statement in secretary of Agriculture v. Central Reig Refining Company (338 US 604 : 94 Law Ed 381) that courts of law could not be converted into tribunals for relief

from the crudities and inequities of complicated experimental economic legislation. Panipat Sugar ((1973) 1 SCC 129) and Anakapalle Society ((1973) 3 SCC 435) were again referred to and it was pointed out that these cases turned on the language of Section 3(3-C) of the Essential Commodities Act. Premier Automobiles ((1972) 2 SCR 526 : (1972) 4 SCC (N) 1 : AIR 1972 SC 1690) was considered and it was affirmed that the judgment in that case could not be treated as precedent and could no afford any appreciable assistance in the decision of price fixation cases as it proceeded partly on agreement between the parties and partly on concessions made at the bar. Beg, C.J. who delivered a separate opinion, for himself and for Desai, J. agreed that the judgment in Premier Automobiles ((1972) 2 SCR 526 : (1972) 4 SCC (N) 1 : AIR 1972 SC 1690) was not to provide a precedent in price fixation cases. He also reaffirmed the proposition that price fixation was in the nature of a legislative measure and could not give rise to a complaint that natural justice was not observed. He indicated the indicia which led him to the conclusion that price fixation was a legislative measure. He observed : (SCC p. 482, para 37)

We think that unless, by the terms of particular statute, or order, price fixation is made a quasi-judicial function for specified purposes or cases, it is really legislative in character in the type of control order which is now before us because it satisfies the tests of legislation. A legislative measure does not concern itself with the facts of an individual case. It is meant to lay down a general rule applicable to all person or objects or transaction of a particular kind or class. In the case before u s, the Control Order applies to sales of mustard oil anywhere in India by any dealer. Its validity does not depend on the observance of any procedure to be complied without particular types of evidence to be taken on any specified matters as condition precedent to its validity. The test of validity is constituted by the nexus shown between the order passed and the purposes for which it can be passed, or, in other words by reasonableness judged by possible or probable consequences.

In New India Sugar Works v. State of U. P. ((1981) 2 SCC 293), there was an indication though it was not expressly so stated that the question of observing natural justice did not arise in cases of price fixation. In M/s. Laxmi Khandsari v. State of U. P. ((1981) 2 SCC 600), it was held that the sugarcane Control Order, 1966 was legislative measure and therefore, rules of natural justice were not attracted In Rameshchandra Kachardas Porwal v. State of Maharashtra ((1981) 2 SCC 722), it was observed that legislative activity did not invite natural justice and that making of a declaration that a certain place shall be a principal market area under the relevent Agricultural Produce Markets Acts was an act legislative in character. The observation of Megarry, J. in Bates v. Lord Hailsham of St. Marylebone ((1972) 1 WLR 1373 : (1972) 3 All ER 1019) that the rules of natural justice do not run in the sphere of legislation, primary or delegated, was cited with approval and two well known textbooks writers Paul Jackson and Wade, H.W.R. were also quoted. The former has said : "There is no doubt that a minister, or any other body, in making legislation, for example, by statutory instrument or by law, is not subject to the rules of natural justice - Bates v. Lord Hailsham of St. Marylebone ((1972) 1 WLR 1373 : (1972) 3 All ER 1019) - any more than is Parliament itself; Edinburgh and Dalkeith Rv. v. Wauchope per Lord Brougham ((1842) 8 CI & F 700, 720); British Railways Board v. Pickin ((1974) 1 All ER 609). The latter has said (Wade, H.W.R. : Administrative Law, 5th Edn., p. 506) : "There is no right to be heard before the making of legislation, whether primary or delegated, unless it is provided by statute." In Sarkari Sasta Anaj Vikreta Sangh v. State of M. P. ((1981) 4 SCC 471), it was pointed out that the amendment of the Madhya Pradesh Foodstuffs Distribution Control Order was a legislative function and there was, therefore, no question of affording an opportunity to those who were to be affected by it.

11. In welcome Hotel v. State of A. P. ((1983) 4 SCC 575) the observation of Chandrachud, C.J. in Prag Ice and Oil Mills ((1978) 3 SCC 459) were quoted with approval in connection with the

fixation of prices of foodstuffs served in restaurants.

12. In Tharoo Mal v. Puran Chand ((1978) 1 SCC 102), one of the question was regarding the nature of the hearing to be given before imposing municipal taxes under the Uttar Pradesh Municipalities Act, 1916. It was held : (SCC p. 105, para 3)

... the procedure for the imposition of the tax is legislative and not quasi-judicial ... The right to object, however, seems to be given at the stage of proposals of the tax only as a concession to requirements of fairness even though the procedure it legislative and not quasi judicial.

13. We mentioned that the Panipat ((1973) 1 SCC 129) and the Anakapalle ((1973) 3 SCC 435) were both cases where the question was regarding the price payable to a person who was required to sell to the government a certain percentage of the quantity of sugar produced in his mill. The Order requiring him to sell the sugar to the government was made under Section 3(2)(f) of the Essential Commodities Act under which the Central Government was enabled to make an order requiring any person engaged in the production of any essential commodity to sell the whole or a specified part of the quantity produced by him to the government or its nominee. It will straightway be seen that an order under Section 3(2)(f) is a specific order directed to a particular individual for the purpose of enabling the Central Government to purchase a certain quantity of the commodity from the person holding it. It is an order for a compulsory sale. When such a compulsory sale is required to be made under Section 3(2)(f), the question naturally arises what is the price to be paid for the commodity purchased ? Section 3 (3-C) provides for the ascertainment of the price. It provides that in calculating the amount to be paid for the commodity required to be sold regard is to be had to - (a) the minimum price, if any, fixed for sugarcane by the Central Government under this section; (b) the manufacturing cost of sugar; (c) the duty or tax, if any, paid or payable thereon; and (d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar. It is further prescribed that different prices may be determined, from time to time, for different areas or for different kinds of sugar. It is to be noticed here that the payment to be made under Section 3(3-C) is not necessarily the same as the controlled price which may be fixed under Section 3(2) (c) of the Act, Section 3(2)(c) of the Act, we have already seen, enables the Central Government to make an order controlling the price at which any essential commodity may be bought or sold, if the Central Government is of the opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or in securing their equitable distribution and availability at fair prices. Section 3(3-C) provides for the determination of the price to be paid to a person who has been directed by the Central Government by an Order made under Section 3(2) (f) to sell a certain quantity of an essential commodity to the government or its nominee. While Section 3(2)(c) contemplates an Order of a general nature, Section 3(3-C) contemplates a specific transaction. If the provisions of Section 3(2)(c) under which the price of an essential commodity may be controlled are contrasted with Section 3(3-C) under which payment is to be made for a commodity required to be sold by an individual to the government, the distinction between a legislative act and a non-legislative act will at once become clear. The Order made under Section 3(2)(c), which is not in respect of a single transaction, nor directed to a particular individual is clearly a legislative act, while an Order made under Section 3(3-C) which is in respect of a particular transaction of compulsory sale from a specific individual is a non-legislative act. The Order made under Section 3(2)(c) controlling the price of an essential commodity may itself prescribe the manner in which price is to be fixed but that will not make the fixation of price a non-legislative activity, when the activity is not directed towards a single individual or transaction but is of a general nature, covering all individuals and all transactions. The legislative character of the activity is not shed and an administrative or quasi-judicial character acquired merely because guidelines prescribed by the

statutory order have to be taken into account.

14. We may refer at this juncture to some illuminating passages from Schwartz's book on 'Administrative Law' 1976, pp 143-44. He said :

> If a particular function is termed "legislative" or "rule making" rather than "judicial" or "adjudication", it may have substantial effects upon the parties concerned. If the function is treated as legislative in nature, there is no right to notice and hearing, unless a statute expressly requires them. If a hearing is held in accordance with a statutory requirement, it normally need not be a formal one, governed by the requirements discussed in Chapter 6 and 7. The characterization of an administrative act as legislative instead of judicial is thus of great significance.

As a federal court has recently pointed out, there is no "bright line" between rule-making and adjudication. The most famous pre-APA attempt to explain the difference between legislative and judicial functions was made by justice Holmes in Prentis v. Atlantic Coast Line Co. ((1908) 211 US 210, 226) "A Judicial inquiry", said he, "investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." The key factor in the Holmes analysis is time : a rule prescribes future patterns of conduct; a decision determines liabilities upon the basis of present or pact facts.

The element of applicability has been emphasized by others as the key in differentiating legislative from judicial functions. According to Chief Justice Burger, "Rule-making is normally directed toward the formulation or requirement having a general application to all members of a broadly identifiable class". (Dissenting in American Air Lines, Inc. v. CAB, 359 F 2d 624, 636 : 385 US 843 (1966) An adjudication, on the other hand, applies to specific individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely affected; adjudication operates concretely upon individuals in their individual capacity.

15. We may now turn our attention to the two Drugs (prices Control) Order of 1970 and 1979, both of which were made by the Central Government in exercise of its powers under section 3 of the Essential Commodities Act.

16. The Drugs (prices Control) Order, 1970 defined 'Bulk Drugs' as follows :

> "Bulk drugs' means "any unprocessed pharmaceutical, chemical, biological and plant product or medicinal gas conforming to pharmacopoeial or other standards accepted which is used as such or after being processed into formulation and includes an essential bulk drug.

Bulk drugs were divided into essential bulk drugs which were included in the schedule and bulk drugs which were not so included. In the case of essential bulk drugs, paragraphs 4 of the Order enabled the Central Government to fix the maximum price at which such essential bulk drugs should be sold. In the case of bulk drugs, which were not included in the schedule, a manufacturer was entitled to continue to market the product at the same price at which he was marketing the product at the time of the commencement of the Order. He was required to report this price to the Central Government within two weeks of the commencement of the Order and was further prohibited from

increasing the price without obtaining the approval of the Central Government.

17. A Committee on Drugs and Pharmaceutical Industry, popularly known as the Hathi Committee was appointed by the Government of India to enquire into the various facets of the Drug Industry in India. One of the terms of reference was 'to examine the measures taken so far to reduce prices of drugs for the consumer, and to recommend such further measures as may be necessary to rationalise the prices of basic drugs and formulations; The Hathi Committee noticed that 'in a country like India where general poverty and the wide disparities in levels of income between different sections existed' it was particularly important to emphasise 'the social utility of the industry and the urgent need for extending as rapidly as possible certain minimum facilities in terms of preventive and curative medicines to the large mass of people both urban and rural; It was said :

> The concern about drug prices, therefore, really arises form the fact that many of them are essential to the health and welfare of the community; and that there is no justification for the drug industry charging prices and having a production pattern which is based not upon the needs of the community but on aggressive marketing tactics and created demand.

The Government of India accepted the report of the Hathi Committee and announced in parliament the 'Statement of Drug Policy' pursuant to which the Drugs (prices Control) Order, 1970 was repealed and the Drugs (price control) Order, 1979 was made. Paragraph 44 of the Statement of Drug Policy of 1978 dealt with 'Pricing policy' and it may be usefully extracted here. It was as follows :

> The Hathi Committee had recommended that a return post tax between 12 to 14 percent on equity that is paid up capital plus reserves, may be adopted as the basis for price fixation, depending on the importance and complexity of the bulk drug. In the case of formulations, the Hathi Committee felt that the principle of selectivity could be introduced in terms of (a) the size of the units, (b) selection of items, and (c) controlling the prices only of market leaders, in particular, of products for which price control is contemplated. The Hathi Committee considered that units (other than MRTP units) having only turnover of less than Rs. 1 Crore may be exempted from price control. Alternatively, all formulations (other than those marketed under generic names) which have an annual sale in the country in excess of Rs. 15 lakhs (inclusive of excise duty) may be subjected to price control, irrespective of whether or not the total annual turnover of the unit is in excess or Rs. 1 crore. The ceiling price will be determined taking into account the production costs and a reasonable return for the units which are the market leaders. Yet another variant of selectivity, according to the Hathi Committee, would be to identify product groups which individually are important and which collectively constitute the bulk of the output of the industry. In respect of each item of this list, it would be possible to identify the leading producers who account for about 60% of the sales between them. On the basis of cost analysis in respect of those units, maximum prices may be prescribed and all other units may be free to fix their prices within this ceiling. On balance, the Hathi Committee was of the view that this particular variant selectivity may be administratively simpler.

18. The Drugs (prices Control) Order, 1979 was made pursuant to this Statement of Policy. Paragraph 2(a) of the drugs (prices Control) Order, 1979 defines 'bulk drug' to mean "any substance

including pharmaceutical, chemical, biological or plant product or medicinal gas conforming to pharmacopoeial or other standards accepted under the Drugs and Cosmetics Act, 1940, which is used as such or as an ingredient in any formulations". "Formulation" is defined as follow :

> Formulation means a medicine processed out of, or containing one or more bulk drug or drugs, with or without the use of any pharmaceutical aids for internal or external use for, or in the diagnosis, treatment, mitigation or prevention of disease in human beings or animals, but shall not include -
>
> (i) any bona fide Ayurvedic (including Sidha) or Unani (Tibb) systems of medicine;
>
> (ii) any medicine included in the Homeopathic system of medicine;
>
> (iii) any substance to which the provisions of the Drugs and Cosmetics Act, 1940 (23 of 1940), do not apply.

The expressions "free reserve", "leader price", "net worth", "new bulk drug", "pooled price", "pre-tax return", "retention price"are defined in the following manner :

> "Free reserve' means a reserve created by appropriation of profits, but does not include reserves provided for contingent liability, disputed claims, goodwill, revaluation and other similar reserves.
>
> 'leader price' means a price fixed by the government for formulations specified in category I, category II or category III of the Third Schedule, in accordance with the provisions of paras 10 and 11, keeping in view the cost of or efficiency, or both, or major manufacturers of such formulations.

'net worth' means the share capital of a company plus free reserve, if any.

'new bulk drug' means a bulk drug manufactured within the country, for the first time after the commencement of this Order.

'pooled price' in relation to a bulk drug, means the price fixed under para 17.

'pre-tax return' means profits before payment of income tax and surtax and includes such other expenses as do not form part of the cost of formulations.

'retention price' in relation to a bulk drug means price fixed under pass 4 and 7 for individual manufacturers, or importers, or distributors, of such bulk drugs.

The distinction between an essential bulk drug included in the schedule and a bulk drug not so included in the schedule, which was made in 1970 Drugs (Prices Control) Order was abandoned in the 1979 Order. Bulk drugs, were, however, broadly divided into indigenously manufactured bulk drugs, imported bulk drugs and bulk drugs which were both manufactured indigenously as also imported.

19. Paragraph 3 of the 1979 Order enables the government, with a view to regulating the equitable distribution of any indigenously manufactured bulk drug specified in the First or the Second Schedule and making it available at a fair price and after making such enquiry as it deems fit, to fix

from time to time by notification in the official gazette, the maximum price at which the bulk drug shall be sold. Clause (2) of paragraph 3 provides that while so fixing the price of a bulk drug, the government may take into account the average cost of production of such bulk drug manufactured by an efficient manufacturer and allow a reasonable return or net worth. By way of an explanation efficient manufacturer is defined to mean

a manufacturer -

> (i) whose production of such bulk drug in relation to the total production of such bulk drug in the country is large, or
>
> (ii) who employs efficient technology in the production of such bulk drug.

We have already noticed that 'net worth' is defined to mean 'the share capital of a company plus free reserve, if, any; 'Free reserve' itself is separately defined. It is then prescribed by clause (3)

No person shall sell a bulk drug at a price exceeding the price notified under sub-paragraph (1), plus local taxes, if any payable : provided that until the price of bulk drug is so notified the price of such bulk drug shall be the price which prevailed immediately before the commencement of this Order and the manufacture of such bulk drug at a price exceeding the price which prevailed as aforesaid.

This means that until the maximum sale price of a indigenously manufactured bulk drug is fixed under paragraph 3 of the 1979 Order, the price fixed under paragraph 4 of the 1970 Order or the price permitted under paragraph 5 of the 1970 Order was to be maximum sale price. Paragraph 3(4)(a) requires a manufacturer commencing production of the bulk drug specified in the First or Second Schedule, the price of which has already been notified by the government, not to sell the bulk drug at a price exceeding the notified price. Paragraph 3(4)(b) provides that where the price of a bulk drug has not been notified by the government, the manufacturer shall, within 14 days of the commencement of the production of such bulk drug, make an application to the government in Form I and intimate the government the price at which he intends to sell the bulk drug and the government may, after making such an enquiry as it thinks fit, by order, fix a provisional price at which such bulk drug shall be sold.

20. Paragraph 4 of the 1979 order provides that notwithstanding any thing contained in paragraph 3, the government may, if it considers necessary or expedient so to do for increasing the production of an indigenously manufactured bulk drug specified in the First or Second Schedule, by order, fix -

> (a) a retention price of such bulk drug,
>
> (b) a common sale price for such bulk drug taking into account the weighted average of the retention price fixed under clause (a).

Paragraph 4 it thus in the nature of an exception to paragraph 3. It is meant to provide a fillip to individual manufacturers of bulk drug whose production it is necessary to increase. Retention price, by its very definition pertains to industrial manufacturers. Common sale price, we take it, is the price at which manufacturers whose retentions are fixed may sell the bulk drug despite the maximum sale price fixed under paragraph 3.

21. Paragraph 5 deals with the power of the government to fix maximum sale price of new bulk drugs. Paragraph 6 enables the government to fix the maximum sale price of imported bulk drugs

specified in First and Second Schedules. Paragraph 7 deals with the power of the government to fix retention price and pooled price for the sale of bulk drugs specified in the First and Second Schedules which are both indigenously manufactured and imported. Paragraph 9 empowers the government to direct manufacturers of bulk drugs to sell bulk drugs to manufacturers of formulations. Paragraph 10 prescribes a formula for calculating the retail price of formulation. The formula is :

#R.P. = (M.C. + C.C. + P.M. + P.C.) x (1 + M.U./100) + E.D.##

"R.P." means retail price.

"M.C." means material cost and includes the cost of drugs and other pharmaceutical aids used including overages, if any, and process loss there on in accordance with such norms as may be specified by the government from time to time by notification in the official gazette in this behalf.

"C.C" means conversion cost worked out in accordance with such norms as may be specified by the government from time to time by notification in the official gazette in this behalf.

"P.M." means the cost of packing material including process loss thereon worked out in accordance with such norms as may be specified by the government from time to time by notification in the official gazette in this behalf.

"P.C." means packing charges worked out in accordance with such norms as may be specified by the government from time to time by notification in the official gazette in this behalf.

"M.U." means mark-up referred to in para 11.

"E.D." means excise duty.

Paragraph 11 explains what 'Mark - up' means. Paragraph 12 empowers the government to fix leader prices of formulation of categories I and II specified in the Third Schedule, paragraph 13 empowers the Government to fix retail price of formulations specified in category III of Third Schedule. Paragraph 14 contains some general provisions regarding prices of formulations. Paragraph 15 empowers the government to revise prices of formulations.

22. Paragraph 16 provides that where any manufacturer, importer or distributor of any bulk drug or formulation fails to furnish information as required under the Order within the time specified therein, the government may, on the basis of such information as may be available with it, by order, fix a price in respect of such bulk drug or formulation as the case may be. Paragraph 17 requires the government to maintain the Drugs Prices Equalization Account to which shall be credited, by the manufacturer, among other items,

the excess of the common selling price or, as the case may be, pooled price over his retention price.

It is provided that the amount credited to the Drugs Prices Equalization Account shall be spent for paying to the manufacturer, "the shortfall between his retention price and the common selling price or as the case may be, the pooled price."

23. Paragraph 27 enables any person aggrieved by any notification or order under paragraphs 3, 4, 5, 6, 7, 9, 12, 13, 14, 15, or 16 to apply to the government for a review of the notification or order within fifteen days of the date of the publication of the notification in the official gazette, or as the case may be, the receipt of the order by him.

24. Bulk drugs constituting categories I and II are enumerated in the First Schedule. Bulk drugs constitution category III are enumerated in the Second Scheduler. Formations constituting categories I, II and III, are enumerated in the Third Schedule. The Fourth Schedule prescribes the various forms referred to in the different paragraphs of the Drugs (Prices Control) Order. Form No.1 which is referred to in paragraphs 3(4), 5 and 8(1) is titled "Form of application for fixation or revision of prices of bulk drug". The several columns of the form provide for various particulars to be furnished and item 18 requires the applicant to furnish "the cost of production of the bulk drugs as per proforma (attached) duly certified by a practising Cost/Chartered Accountant ". The 'proforma' requires particular of cost data, such as, raw materials, utilities, conversion cost, total cost of production, interest on borrowings, minimum bonus, packing, selling expenses, transport charges, transit insurance charges, total cost of sales, selling price, existing price or notional or declared prices, etc. to be furnished. A note at the end of the proforma requires the exclusion from cost certain items of expenses, such as, bonus in excess of statutory minimum, bad debts and provisions, donations and charities, loss/gain on sale of assets, brokerage and commission, expenses not recognised by income tax authorities and adjustment relating to previous years.

25. Shri G. Ramaswamy, learned Additional Solicitor General of behalf of the Union of India, submitted that the fixation of maximum price under paragraph 3 of the Drugs (prices Control) Order was a legislative activity and, therefore, not subject to any principle of natural justice. He urged that relevant information was required to be furnished and was indeed furnished all the manufacturers in the prescribed form as required by paragraph 3(4) of the Drugs (prices Control) Order. This information obtained from the various manufacturers was taken into account and a report was then obtained from the Bureau of Industrial Cost and Prices, a high powered expert body specially constituted to undertake the study of industrial cost structures and pricing problems and to advise the government. It was only thereafter that notifications fixing the prices were issued. He further submitted that paragraph 27 of the Control Order gave a remedy to the manufacturers to seek at review of the order fixing the maximum price under paragraph 3. The review contemplated by paragraph 27 insofar as it related to the notification under paragraph 3, it was submitted by the learned Additional Solicitor General did not partake the character of a judicial or quasi judicial proceeding. He urged that the manufacturers had invoked the remedy by way of review, but before the application for review could be dealt with, they rushed to the court with the writ petitions out of which the appeal and the special leave petitions arise. He urged that the government has always been ready and willing to give a proper hearing to the parties and in fact gave them a hearing in connection with their review applications. The grievance of the manufacturers in the writ petitions that they were not furnished the details of the basis of the price fixation was not correct since full information was furnished at the time or the hearing of the review applications when the matter underwent thorough and detailed discussion between the parties and the government as well as the Bureau of Industrial Cost and Prices.

26. The submission of Shri Anil Divan, learned counsel for the respondents was the unlike other price control legislations, the drugs (prices Control) Order was designed to induce better production by providing for a fair return to the manufacturer. Reference was made to the Hathi Committee report which and recommended a return of 12 to 14 percent post tax return on equity, that is, paid up capital plus reserves and the 'Statement on Drug Policy' which mentioned that ceiling prices may be

determined by taking into account production costs and a reasonable return. Great emphasis was laid on the second clause of paragraph 3 of the 1979 Order which provides that in fixing the price of a bulk drug, the government may take into account the average cost of production of such bulk drug manufactured by an efficient manufacturer and allow a reasonable return on net worth. It was submitted that the provision for an enquiry preceding the determination of the price of a bulk drug, the prescription in paragraph 3 clause (2) that the average cost of production of the drug manufactured by an efficient manufacturer should be taken into account and that a reasonable return on net worth should be allowed and the provision for a review of the order determining the price, established that price fixation under the Drugs (prices Control) Order, 1979 was a quasi-judicial activity obliging the observance of the rules of natural justice. The suggestion of the learned counsel was that the nature of the review under paragraph 27 was so apparently quasi judicial and that the need to know the reasons for the order sought to be reviewed was so real if the manufacturer was effectively to exercise his right to seek the quasi judicial remedy of review, that by necessary implication it became obvious that the order fixing the maximum price must be considered to be quasi-judicial and not legislative in character. The provision for enquiry for enquiry in the first clause of paragraph 3 and the prescription of the matters to be taken into account in the second clause of paragraph 3 further strengthened the implication, according to the learned counsel was contended that in any case, whatever be the nature of the enquiry and the order contemplated by paragraph 3, the review for which provision was made by 27 was certainly of a quasi-judicial character and, therefore, it was necessary that the manufacturer should be informed of the basis for the fixation of the price and furnished with details of the same in order that they may truly and effectively avail themselves of the remedy of review. If that was not done, the remedy would become illusory. It was argued with reference to various fact and figures that the price had been fixed in an arbitrary manner and the government was not willing to disclose the basis on which the price were fixed on the pretext that it may involve disclosure of matters of confidential nature. It was stated that the application of the manufacturers for review of the notifications fixing the prices had not been disposed of for years though time was really of the very essence of the matter. The prices of formulations were dependent on the prices of drugs and it was not right that prices of formulation should have been fixed even before the applications for review against the notification fixing the price of bulk drugs were disposed of. It was suggested that the delay in disposing of the review applications had the effect of rendering the original notifications fixing the prices unreal and out of date and liable to be struck down on that ground alone.

27. We are unable to agree with the submission of the learned counsel for the respondents either with regard to the applicability of the principles of natural justice or with regard to the nature and the scope of the enquiry and review contemplated by paragraphs 3 and 27. While making our preliminary observations, we pointed out that price fixation is essentially a legislative activity though in rare circumstances, as in the case of a compulsory sale to the city though in rare circumstances, as in the case of a compulsory sale to the government or its nominee, it may assume the character of an administrative or quasi-judicial activity. Nothing in the scheme of the Drugs (prices Control) Order induces us to hold that price fixation under the Drugs (prices Control) Order is not a legislative activity, but a quasi-judicial activity which would attract the observance of the principles of natural justice. Nor is there anything in the scheme or the provision of the Drug (prices Control) Order which otherwise contemplates the observance of any principle of natural justice or kindred rule, the non-observance of which would give rise to a cause of action to a suitor. What the Order does contemplate however is 'such enquiry' by the government 'as it thinks fit'. A provision for 'such enquiry as it such as it thinks fit' by a subordinate legislating body, we have explained earlier, is generally an enabling provision to facilitate the subordinate legislating body to obtain

relevant information from any source and it is not intended to vests any right in anybody other than the subordinate legislating body. In the present case, the enquiry contemplated by paragraph 3 of Drugs (prices Control) Order is to be made for the purposes of fixing the maximum price at which a bulk drug may be sold, with a view to regulating is equitable distribution and making it available at a fair price. The primary object of the enquiry is to secure the bulk drug at a fair price for the benefit of the ultimate consumer, an object designed to fulfill the mandate of Article 39(b) of the Constitution. It is primarily from the consumer public's point of view that the government is expected to make its enquiry. The need of the consumer public is to be ascertained and making the drug available to them at a fair price is what it is all about. The enquiry is to be made from that angle and directed towards that end. So, information may be gathered from whatever source considered desirable by the government. The enquiry, obviously is not to be confined to obtaining information from the manufacturer only and indeed must go beyond. How ever, the interest of the manufacturer are not to be ignored. In fixing the price of a bulk drug, the government is expressly required by the Order to take into account the average cost of production of such bulk drug manufactured by 'an efficient manufacturer and allow a reasonable return on 'net worth' For this purpose too, the government may gather information from any source including the manufacturers. Here again the enquiry by the government need not be restricted to 'an efficient manufacturers' or some manufacturers; nor need it be extended to all manufacturers. What is necessary is that the average cost of production by 'an efficient manufacturers' must be ascertained and a reasonable return allowed on 'net worth'. Such enquiry as it thinks fit is an enquiry in which information is sought from whatever source considered necessary by the enquiring body and is different from an enquiry in which an opportunity is required to be given to persons likely to be affected. The former is an enquiry leading to a legislative activity while the latter is an enquiry which ends in an administrative or quasi-judicial decision. The enquiry contemplated by paragraph 3 of the Drug (Prices Control) Order is an enquiry of the former character. The legislative activity being a subordinate or delegated legislative activity, it must necessarily comply with the statutory conditions if any, no more and no, less and no implications of natural justice can be read into it unless it is a statutory condition. Notwithstanding that the price fixation is a legislative activity, the subordinate legislation has taken care here to provide for a review. The review provided by paragraph 27 of the Order is akin to a post-decisional hearing which is sometimes afforded after the making of some administrative orders, but not truly so.

28. It is a curious amalgam of a hearing which occasionally precedes a subordinate legislative activity such as the fixing of municipal rates etc. that we mentioned earlier and post-decision hearing after the making of an administrative or quasi-judicial order. It is a hearing which follows a subordinate legislative activity intended to provide an opportunity to affected persons such as the manufacturers, the industry and the consumer public to bring to the notice of the subordinate legislating body the difficulties or problems experienced or likely to be experienced by them consequent on the price fixation, whereupon the government cannot be confined to the individual manufacturer seeking review but must necessarily affect all manufacturers of the bulk drug as well as the consumer public. Since the maximum price of a bulk drug is required by paragraph 3 to be notified any fresh decision taken in the, Proceeding for review by way of modification of the maximum price has to be made by a fresh notification fixing the new maximum price of the bulk drug. In order words, the review it is fruitful must result in fresh subordinate legislative activity. The true nature of the review provided by paragraph 27 insofar as it relates to the fixation of maximum price of bulk drugs under paragraph 3 and leader price and prices of formulations under paragraphs 12 and 13 is hard to define. It is difficult to give it a label and to fit it into a pigeon hole, legislative, administrative or quasi-judicial. From the scheme of the Control Order and the context

and content of paragraph 27, the review insofar as it concerns the orders under paragraphs 3, 12 and 13 appears to be in the nature of a legislative review of legislation, or more precisely a review of subordinate legislation by a subordinate legislating body at the instance of an aggrieved person. Once we have ascertained the nature and character of the review, the further question regarding the scope and extent of the review is not very difficult to answer. The reviewing authority has the fullest freedom and discretion to prescribe its own procedure and consider the matter brought before it so long as it does not travel beyond the parameters prescribed by paragraph 3 in the case of a review against an order under paragraph 3 and the respective other paragraphs in the case of other orders. But whatever procedure is adopted, it must be a procedure tuned to the situation. Manufactures of any bulk drug are either one or a few in number and generally they may be presumed to be well informed persons, well able to take care of them selves, who have the assistance of accountants, advocates and experts to advise and espouse their cause. In the context of the drug industry with which we are concerned and in regard to which to Control Order is made we must proceed on the basis that the manufacturers of bulk drugs are generally person who know all that is to be known about the price fixed by the government. From the legislative nature of the activity of the government, it is clear that the government is under no obligation to make any disclosure of any information received and considered any it in making the Order but in order to render effective the right to seek a review given to an aggrieved person we think that the government, if so requested by the aggrieved person we think that the government, if so requested by the aggrieved manufacture is under an obligation to disclose any relevant information which may reasonably be disclosed pertaining to 'the average cost of production of the bulk drug manufactured by an efficient manufacturer' and 'the reasonable return one net worth; For example, the manufacturer may require the government to give information regarding the particulars detailed in Form No. 1 of the Fourth Schedule which have been taken into account and those which have been excluded. The manufacturer may also require to be informed the elements which were taken into account and those which were excluded in assessing the 'free reserves' entering into the calculation of 'net worth; These particulars which he may seek from the government are mentioned by us only by way of illustration. He may seek any other relevant information which the government shall not unreasonably deny. That we think is the nature and scope of the review contemplated by paragraph 27 in relation to orders made under paragraphs 3, 12 and 13.

29. On the question of the scope of a review, the learned counsel for the respondents invited our attention to Vrajlal Manilal & Co. v. Union of India ((1964) 7 SCR 97 : AIR 1964 SC 1643), Shivji Nathubhai v. Union Of India ((1960) 2 SCR 775 : AIR 1960 SC 606), Maneka Gandhi (Maneka Gandhi v. Union of India, (1981) 2 SCR 533 : (1981) 1 SCC 664 : AIR 1981 SC 818), Swadeshi Cotton Mills (Swadeshi cotton Mills v. Union of India (1981) 2 SCR 533 : (1981) 1 SCC 664 : AIR 1981 SC 818), and Liberty Oil Mills Liberty Oil Mills v. Union of India, (1984) 3 SCR 676 : (1984) 3 SCC 465 : AIR 1984 SC 1271). We are afraid none of these cases is of any assistance to the correspondence since the court was not concerned in any of those cases with a review of subordinate legislation by the subordinate legislating body.

30. In Vrajlal Manilal & Co. v. Union of India ((1964) 7 SCR 97 : AIR 1964 SC 1643), the court held that the Union of India when disposing of an application for review under Rule 59 of the Mines Concession Rules functioned as a quasi-judicial authority and was bound to observe the principles of natural justice. The decision rendered without affording a reasonable opportunity to the appellants to present their case was contrary to natural justice was therefore, void. In Shivji Nathubhai v. Union of India ((1960) 2 SCR 775 : AIR 1960 SC 606), it was decided by the court that the power of review granted to the Central government under Rule 54 of the Mineral Concession Rules required the authority to act judicial and its decision would be a quasi-judicial act

and the fact that Rule 54 gave power to the Central Government to pass such order as it may deem 'just and proper' did not negative the duty to act judicially. In Maneka Gandhi case (Maneka Gandhi v. Union of India, (1981) 2 SCR 533 : (1981) 1 SCC 664 : AIR 1981 SC 818) Bhagwati, J. (as he then was) while expounding on natural justice pointed out that in appropriate cases where a predecisional hearing was impossible, there must at least be a post-decisional hearing so as to meet the requirement of the rule audi alteram partem. In Swadeshi Cotton Mills (Swadeshi Cotton Mills v. Union of India, (1981) 2 SCR 533 : (1981) 1 SCC 664 : AIR 1981 SC 818), it was observed that in cases where owing to the compulsion of the fact-situation or the necessity of taking speedy action, no predecisional hearing is given but the action is followed soon by a full post-decisional hearing to the person affected, there is in reality no exclusion of the audia alteram partem rule. It is an adaptation of the rule to meet the situational urgency. In Liberty Oil Mills v. Union of India (Liberty Oil Mills v. Union of India, (1984) 3 SCR 676 : (1984) 3 SCC 465 : AIR 1984 SC 1271), the question arose whether clause 8-B of the Import Control Order which empowered the Central Government or the Chief Controller to keep in abeyance applications for licences or allotment of imported goods where any investigation is pending into an allegation mentioned in clause 8 excluded the application of the principles of natural justice. The court pointed out that it would be impermissible to interpret a statutory instrument to exclude natural justice unless the language of the instrument left no option to the court. As we said these cases have no application to a review of subordinate legislation by the subordinate legislating body at the instance of a party.

31. We mentioned that the price fixed by the government may be questioned on the ground that the consideration stipulated by the order as relevant were not taken into account. It may also be questioned on any ground on which a subordinate legislation may be questioned, such as, being contrary to constitutional or other statutory provisions. It may be questioned on the ground of a denial of the right guaranteed by Article 14, if it is arbitrary, that is if either the guidelines prescribed for the determination are arbitrary or if, even though the guidelines are not arbitrary, the guidelines are worked in an arbitrary fashion. There is no question before us that paragraph 3 prescribes any arbitrary guidelines. It was, however, submitted that the guidelines were not adhered to and that facts and figures were arbitrarily assumed. We do not propose to delve into the question whether there has been any such arbitrary assumption of facts and figures. We think that if there is any grievance on that score, the proper thing for the manufacturers to do is to bring it to the notice of the government in their application for review. The learned counsel argued that they were unable to bring these facts to the notice of the government as they were not furnished the basis on which the prices were fixed. On the other hand, it has been pointed out in the counter-affidavits filed on behalf of the government that all necessary and required information was furnished in the course of the hearing of the review applications and there was no justification for the grievance that particulars were not furnished. We are satisfied that the procedure followed by the government in furnishing the requisite particulars at the time of the hearing of the review applications is sufficient compliance with the demands of fair play in the case of the class of persons claiming to be affected by the fixation of maximum price under the Drugs (Price Control) Order. As already stated by us, manufacturers of bulk drugs who claim to be affected by the Drugs (Price Control) Order, belong to a class of persons who are well and fully informed of every intricate detail and particular which is required to be taken into account in determining the price. In most cases, they are the sole manufacturers of the bulk drug and even if they are not the sole manufacturers, they belong to the very select few who manufacture the bulk drug. It is impossible to conceive that they cannot sit across the table and discuss item by item with the reviewing authority unless they are furnished in advance full details and particulars. The affidavits filed on behalf of the Union of India show that the procedure which is adopted in hearing the review applications is to discuss across the table the

various items that have been taken into account. We do not consider that there is anything unfair in the procedure adapted by the government. If necessary it is always open to the manufacturers to seek a short adjournment of the hearing of the review application to enable them to muster more facts and figures on their side. Indeed we find that the hearing given to the manufacturers is often protected. As we said we do propose to examine this question as we do not want to constitute ourselves into a court of appeal over the government in the matter of price fixation.

32. The learned counsel argued that there were several patent errors which came to light during the course of the hearing in the High Court. He said that obsolete quantitative usages had been taken into consideration, proximate cost data had been ignored and the data relating to the year ending November 1976 had been adopted as the basis. It was submitted that there were errors in totaling, errors in calculation of prices of utilities, errors in the calculation of net worth and many other similar errors. As we pointed out earlier, these are all matters which should legitimately be raised in the review application, if there is any substance in them. These are not matters for investigation in a petition under Article 226 of the Constitution or under Article 32 of the Constitution. Despite the pressing invitation of Shri Divan to go into facts and figure, we have carefully and studiously refrained from making any reference to such facts and figures as we consider it outside our province to do so and we do not want to set any precedent as was supposed to have been done in Premier Automobiles ((1972) 2 SCR 526 : (1972) 4 SCC (N) 1 : AIR 1972 SC 1690) though it was not so done and, therefore, needed explanation in later cases.

33. One of the submissions of Shri Divan was that in calculating "net worth" the cost of new works in progress and the amount invested outside the business were excluded from 'free reserves' and that such exclusion could not be justified on any known principle of accountancy. We think that the question has to be decided with reference to the definition of 'free reserve' in paragraph 2(g) of the Control Order and not on any assumed principle of accountancy. This is also a question which may be raised before the government in the review application. Referring to the 'proforma' attached to Form No. 1 of the Fourth Schedule in which are set out several items which have to be taken into account in assessing the cost of production, the learned counsel attacks the notes at the end of item No. 14 which mentions the various items of expenses to be excluded in ascertaining the cost. The notes is as follows :

> Notes : (1) Items of expenses to be excluded from costs -
>
> (a) Bonus in excess of statutory minimum.
>
> (b) Bad debts and provisions.
>
> (c) Donations and charities.
>
> (d) Loss/Gain on sale of assets.
>
> (e) Brokerage and commission.
>
> (f) Expenses not recognized by income tax authorities (salary/perquisites, advertisements, etc.)
>
> (g) Adjustments relating to previous years.

In particular, he argued that item (a) 'bonus in excess of statutory minimum' should not have been

excluded so also items of expenditure coming under the other heads (b) to (g) which had been allowed by income tax authorities as legitimate expenses. His submission was that where bonus in excess of statutory minimum was payable under the provisions of the Bonus Act there was no option left to the manufacturer not to pay the excess bonus. Similarly where expenses have been legitimately incurred and allowed by income tax authorities, there was no jurisdiction for excluding those items of expenditure from the cost. We do not agree with the submission. It was open to the subordinate legislating body to prescribe and adopt its own mode of ascertaining the cost of production and the items to be included and excluded in so doing. The subordinate legislating body was under no obligation to adopt the method adopted by the income tax authorities in allowing expenses for the purpose of ascertaining income and assessing it. There may be many items of business expenditure which may be allowed by income tax authorities as legitimate expenses but which can never enter the cost of production. So long as the method prescribed and adopted by the subordinate legislated body is not arbitrary and oppose to the principal statutory provisions, it can not be legitimately questioned. Another submission of the learned counsel related to the norms for the conversion costs, packing charges and process loss of materials and packing materials required to be modified for the purpose of calculating retail prices of the formulation. The argument, for example, was that there should be a more scientific formula in regard to conversion cost and not, as was done, so many rupees and paise per thousand capsules or one litre of liquid. We do not agree with the submission. It is open to the subordinate legislating authority to adopt a rough and ready but otherwise not unreasonable formula rather than a needlessly intricate so-called scientific formula. We are unable to say that the subordinate legislating authority acted unreasonably in prescribing the norms in the manner it has done.

34. While on the question of formulation, we would like to refer to the "oration" of Dr. N. H. Antia at the 24th Annual convocation of the National Academy of Medical Sciences where he posed the question :

> Why do we produce 60,000 formulations of drugs worth Rs. 2500 crores which reach only 20 per cent of the population when WHO recommends only 258 drugs and Rs. 750 crores worth would suffice for all our people if used in an ethical manner ?

35. A general submission of the learned counsel was that the price of formulations should not have been prescribed until the review application filed by the manufacturer in regard to the patent bulk drugs was dependent on the price of the bulk drug and it was, therefore, not right to fix the price of formulation when the price of bulk drug was in question in the review application and there was a prospect of the price of the bulk drug being increased. We do not see any force in the submission. We think that it is the necessary duty of the government to proceed to fix the retail price of the formulation as soon as the price of the parent bulk drug is fixed. Price fixation of a formulation is no doubt dependent on the price of the bulk drugs, but it is not to await the result of a review application which in end may turn out to be entirely without substance. If a review application is allowed and the price of the bulk drug is raised and if in the meanwhile, the formulation had been ordered to be sold at a low price, it may result in considerable loss to the manufacturer. But on the other hand, if the review application turns out to be entirely without substance and has to be rejected and if in the meanwhile the formulation is allowed to be sold at a higher price, the consumer public suffers. Thus, the ups and downs of commerce are inevitable and it is not possible to devise a foolproof system to take care of every possible defect and objection. It is certainly not a matter at which the court could take a hand. All that the court may do is to direct the government to dispose of the review application expeditiously according to a time-bound programme. All that the government may do is to dispose of the review application with the utmost expedition. But as we

perceive the public interest, it is necessary that the price of formulation should be fixed close on the heels of the fixation of bulk drug price.

36. Another submission of Shri Divan was that there was considerable delay in the disposal of the review applications by the government and that even now no orders had been passed in several cases. According to the learned counsel, the very delay in the disposal of review applications was sufficient to vitiate the entire proceeding and scheme of the price fixation. According to the learned counsel, the price of a bulk drug is dependent on many variable factors which keep changing very fast. If time is allowed to lapse whatever price is fixed, it soon becomes out of date. If review applications are not disposed of expeditiously the notifications fixing the prices must be struck down as having become obsolete. It is difficult to agree with these propositions. It is true that the price of a bulk drug is dependent on innumerable variables. But, it does not follow that the maximum price must must necessarily be struck down as obsolete by the mere passage of time. We agree that applications for review must be dealt with expeditiously and whenever they are not so dealt with, the aggrieved person may seek a mandamus from the court to direct the government to deal with the review application within a time framework.

37. We notice that in all these matters, the High Court granted stay of implementation of the notifications fixing the maximum prices of bulk drugs and the retail prices of formulations. We think that in matters of this nature, where prices of essential commodities are fixed in order to maintain or increase supply of the commodities or for securing the equitable distribution and availability at fair prices of commodity, it is not right that the court should make any interim order staying the implementation of the notification fixing the prices. We consider that such orders are against the public interest and ought not to be made by a court unless the court is satisfied that no public interest is going to be served. In the present case, an ex-parte interim order was made on April 20, 1981 in the following terms :

In the meantime on the petitioners' giving an undertaking to maintain prices both for bulk and formulation, as were prevailing prior to the impugned notification we stay implementation of the impugned bulk drug prices as well as formulation prices.

Thereafter on November 25, 1981, a further order was made to the following effect :

> After hearing learned counsel and with there consent, an arrangement has been worked out as an interim measure. We, therefore, confirm till further orders the interim order made by us on April 20, 1981. The terms of the said order, that is on the undertaking given on behalf of the petitioners to maintain status quo on the prices prevailing prior to the issue of the impugned notification, the petitioners, through their counsel further given an undertaking to this court that, in the petition is dismissed and the rule is discharged, the petitioners shall within eight weeks of the dismissal of the petition by this court, deposit in this court the difference in the prices of the formulations in question for being .... equalization account. The petitioners, through their counsel further given an undertaking that in this court the petitioners would not contend or challenge the said amount if deposited, is not liable to be deposited under any law whatsoever. It is made clear that undertaking is without prejudice to the petitioners' right to take appropriate directions from the supreme court if so advised in this regard.

No doubt the order as made on November 25, 1981 has the manufacturers on terms, but the

consumer public has been left high and dry. Their interests have no way been taken care of. In matters of fixation of price, it is the interest of the consumer public that must come first and any interim order must take care of that interest. It was argued by the learned counsel that the undertaking given by the parties lapsed with the disposal of the writ petition by the high court and that it could no longer be enforced. We do not agree with this submission. Apart from the fact that an appeal is ordinarily considered to be a continuation of the original proceeding, in the present case, we notice that further orders of the supreme court were also in contemplation and such further orders could only be if appeals were preferred to the supreme court. We do not think that there was any doubt in anyone's mind that the matter would be taken up in appeal to the supreme court whichever way the writ petitions were decided. We are of the view that the undertakings given by the parties in the present cases were intended to and do continue to subsist.

38. On the conclusions arrived at by us we have no doubt that the appeal must be allowed and the writ petition in the high court dismissed. However, we think that it is necessary to give a direction to the government to dispose of the review applications after giving a notice of hearing to the manufacturer. The hearing may be given within two months from today and review application disposed of within two weeks after the conclusion of the hearing. Any information sought by the manufacturer may given to him at the hearing in terms of what we have said in the judgment. The Union of India is entitled to the costs of the appeal and the writ petition in the high court.

39. It appears that although several writ petitions filed by different manufacturers were disposed of the high court by a common judgment, the Union of India filed an appeal within the prescribed period of limitation against one of the manufacturers, Cynamide India Limited, only. This was apparently done under some misapprehension that it would be enough if a single appeal was filed. Later when it was realized that separate appeals were necessary, the Union of India filed petitions for special leave to appeal against the other manufacturers also. As these petitions were filed beyond the prescribed period of limitation, petitions for condoning the delay in filing the petitions for special leave to appeal had to be and were filed. These applications are strenuously opposed by the manufacturers who contend the ordinary rule which is enforced in cases of delay namely that everyday's delay must be properly explained should also be rigorously enforced against the government. It is contended that the government is a well versed litigant as compared with private litigants and if there is justification of adopting a liberal approach in condoning delay in the case of private litigants there was no need to adopt such approach in the case of the government. In cases like the present where parties have acted on the assumption that no appeals had been filed against them and have proceeded to arrange their affairs accordingly it would be unjust to condone the delay in filing the appeals at the instance of the government. Though we see considerable force in the submission of Shri Divan, we think that the circumstances of the instant cases do justify the exercise of our discretion to condone the delay. Two important features have weighed with us in condoning the delay. One is that all the writ petitions were disposed of by a common judgment and an appeal had been filed in the principal case. The other is that it is a matter of serious concern to the public interest. We, therefore, condone the delay, grant special leave in all the petitions for special leave and direct the appeals to be listed for hearing on May 1, 1987.

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