

SUPREME COURT OF INDIA

R.D. Goyal

Vs.

Reliance Industries Ltd.

(H Sema CJI. and S Sinha JJ.)

20.11.2002

JUDGMENT

S.B. Sinha, J

1. The core question in this batch of appeals is as to whether shares or convertible debentures even before they are allotted can be considered to be "goods" within the meaning of Section 2(e) of the *Monopolies and Restrictive Trade Practices Act, 1969* (the 'M.R.T.P. Act').

2. The appellants herein pursuant to or in furtherance of an invitation to offer debentures linked with equity shares for public issue applied therefor. The respondents are public limited companies. They had offered capital for subscription but had linked the equity shares with the accrued redeemable non-convertible debentures.

3. A complaint was made to the effect (which is the subject-matter of Civil Appeal Nos. 2071-2100 of 1987) that the issue of equity shares tied up with debentures is a restrictive trade practice within the meaning of Sections 2(o)(ii), 33(1)(b) and 33(1)(g) of the M.R.T.P. Act. In Civil Appeal No.2490 of 1995, the subject-matter of complaint was that the public issue of debentures offered by the respondent therein upon certain terms and conditions amounted to unfair trade practice as the respondent- company in their prospectus for raising capital through the issue of debentures made false and misleading claims.

4. The said complaints were inquired into by the Director General, who upon finding a prima facie case, recommended for issuance of notice; whereafter a proceeding was initiated by the Commission. The respondents herein raised preliminary objection questioning the jurisdiction of the Commission to deal with the subject-matter of such complaints. The Commission on the said preliminary objection, raised the following issues:

“1.(a) Whether having regard to true legal nature and characteristics of debentures, the same could be considered as "goods" within the meaning of Section 2(e) of the M.R.T.P. Act, 1969 even before they are allotted to the debenture-holder?

(b) Whether it makes any difference to the answer to the foregoing question, if the debentures offered by the company are compulsorily or optionally convertible into an equity share?

2. Assuming that debentures are even prior to their allotment "goods", whether any trade practice is involved where the company simply invites applications for allotment of debenture for the purpose of raising capital for its trade or business?

3. Whether the company provides or makes available any service to the prospective investors where it simply issues debentures and invites application therefor within the meaning of Section 2(r) of the M.R.T.P. Act? The said preliminary issues were determined by the Commission in favour of the respondents herein and against the appellants."

5. Ms. Indira Jaising and Mr. Anup G. Choudhary, learned senior counsel appearing on behalf of the appellants, inter alia, would submit that the Commission committed a manifest error of law in passing the impugned judgment insofar as it failed to properly construe the definition of 'goods' contained in the Sale of Goods Act, 1930 vis--vis its definition contained in Section 2(e) of the *M.R.T.P. Amendment Act, 1991*, as also the definition of service as contained in Section 2(r) thereof. According to the learned counsel the action on the part of the respondents herein involved unfair trade practice. The learned counsel would urge that as the 'stocks' and 'shares' come within the purview of definition of 'goods', it cannot be said that only because they had not been allotted to the respective applicants, they would not become so. In any event, it was submitted, notice inviting offer for purchase of shares in lieu of convertible debentures would amount to 'rendition of service' by the Respondent. It was submitted that the expression 'goods and service' must be interpreted in a broad manner.

6. Ms. Indira Jaising further urged that it may be that the definition of expression 'goods' had been amended in the year 1991 so as to bring within its purview the shares and stocks including issue of shares before allotment but such amendment being merely clarificatory in nature, the Commission must be held to have misdirected itself in holding that shares and debentures before they are issued do not come within the purview of expression 'goods'. It was argued that a public limited company offers shares from time to time and thus an act of raising capital by allotment of shares would be an act of 'trade' and consequently the same would amount of 'rendition of service' within the meaning of Section 2 (r) of the Act. Reliance in this connection has been placed in the case of *Lucknow Development Authority v. M.K.Gupta*¹. It was further submitted that the decision of this Court in *Morgan Stanley Mutual Fund etc. v. Kartick Das etc.*² whereupon the Commission has placed reliance is not applicable to the fact of the present case as the same was rendered while considering a matter interpreting the provisions of the Consumers Protection Act, 1986. In any event, as therein various questions raised in these appeals had not been considered, the matter may be referred to a larger Bench for an authoritative pronouncement by this Court. Mr. Choudhary further submitted that linking shares with debentures being 'unfair trade practice', the question as to whether the shares or stocks would amount to 'goods' or not lose significance particularly when having regard to the various provisions of the Companies Act, allotment of shares is

not a matter of much importance. Before advertng to the issues involved in these appeals, relevant statutory provisions may be looked into. 'Goods' have been defined in the *Sale of Goods Act, 1930* to mean:

"every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;"

The expression 'goods' was defined in Section 2(e) of the M.R.T.P. Act to mean :

"goods" includes goods produced in India, and, in relation to any goods, supplied, distributed or controlled in India, also includes goods imported into India."

The aforesaid definition underwent an amendment in 1984 and again in 1991. Now it reads thus :

"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;"

7. Section 2 (r) defines "Service" to mean :

"service which is made available to potential users and includes the provisions of facilities in connection with banking, financing, insurance, chit fund, real estate, transport processing supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"

8. Section 2(s) defines the term 'trade' to mean "any trade, business, industry, profession or occupation relating to the production supply distribution, or control of goods and includes the provision of any services;"

9. Section 2(u) defines the expression "trade practice" as under :

"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;"

10. The expression 'debenture' however, is not defined in the Act. The question therefore, which arises for consideration is as to whether convertible debentures would be 'goods' within the meaning of provisions of the MRTP Act.

11. Debentures, as ordinarily understood, in our considered view, would not come within the purview of definition of goods as it is simply an instrument of acknowledgement of debt by the company whereby it undertakes to pay the amount covered by it and till then it undertakes further to pay interest thereon to the debenture-holders.

12. It has been observed by the Company Law Committee in its report quoted by Ramaiya at page 26 of his commentary :

"A debenture means a document which either creates or acknowledges a debt. Ordinarily a debenture constitutes a charge on the undertaking of the company or some part of its property, but there may be debentures without any such charge and under the law, it is not necessary that the debentures should create a charge. We have, therefore, brought the definition of debentures, in line with that contained in English Companies Act, 1948, which defines 'debentures' as including 'debenture stock' bonds and other securities of a company, whether constituting a charge on the assets of the company or not."

13. Palmer on Company Law has made similar observations in paragraph 44.02, 24th Edn. He said that in modern commercial usage, a debenture denotes an instrument issued by the company normally but not necessarily called on the face of it a debenture, and providing for the payment of a specified sum at a fixed rate with interest thereon.

14. Debentures having regard to the definition of 'actionable claim' as defined in Section 3 of the Transfer of Property Act would constitute actionable claims except where they are secured by mortgage of immovable property or hypothecation or pledge of immovable property.

15. It is true that when there exists a statutory definition in respect of an expression, the dictionary meaning thereof cannot be applied. It is also true that when a statutory definition uses the word 'includes', it provides an extended meaning thereto but it is equally well-settled that the words are required to be construed in terms of the legislative intent.

16. It is furthermore a well-settled principle of law that if the words are general and not precise, their interpretations are to be restricted to the fitness of matter.

17. The Commission in the instant case was dealing with the question as to whether the respondents herein had resorted to unfair trade practice or not? In the event they were found to be doing so, it inter alia, could direct that such practice be discontinued. In a given case,

the Commission may grant temporary injunction or award compensation as provided under Section 12A and 12B thereof. As by reason of the provision of the said Act, the right of the traders can be controlled or restricted, the provisions thereof must receive a strict construction. Furthermore, the expressions 'debentures' and 'shares' convey distinct and separate meaning although they belong to the same genesis. In "All About Debentures" by Mr. T.M. Sen and Mr. C. Chandrasekhar, the distinction between the 'shares' and 'debentures' has been stated thus:

"Debentures distinguished from:

(a) Shares Although shares and debentures belong to the same genesis yet they have distinct and different characteristics. The Companies Act, 1956 deals with the issue of debentures in the same manner as it deals with the issue of shares, but the similarity ends with the mode and manner of issue, their allotment, their transferability and in the applicability of forfeiture provisions. The corpus of the two issues forms two different segments of capital - shares representing the share capital and the debentures representing the loan capital. Shareholders are the owners of the company till the company is folded up fully while debentureholders are only creditors of the company sometimes secured and sometimes unsecured and that too for a defined period. The rights of the shareholders and debenture-holders are different as also their remedies. To the extent the comparison could bear between the two, the procedures are by and large the same for both in the matter of issue, allotment and transfers and forfeiture. Shares, therefore, are distinct from debentures, although in the usual parlance they both are grouped together in many legislations and referred to some times by the generic term of 'scrip'. It is on account of their free transferability and marketability, they are referred together. The stamp duty on the share certificates and debenture certificates and on their transfers is totally different and bears no comparison. The incidents of debenture certificates as seen from our discussion about above are different from the incidents of shares certificates and hence bear no comparison.

Therefore, there is no equation between shares and debentures except as referred to above."

18. 'Share' has been defined in Section 2(46) of the Companies Act to mean a share in the share capital of a company which in turn would mean that it would represent contribution of the share-holder towards the share capital of the company. On the other hand, a debenture is an instrument of debt executed by the company acknowledging its receipt to repay the same at a specified rate and also carrying an interest. It is in sum and substance a certificate of loan or a bond evidencing the fact that the company is liable to pay a specified amount with interest and although the money raised by the debentures becomes a part of the company's capital structure yet it does not become a share capital. In any event, a debenture would not come within the purview of definition of goods, in as much as, although the shares and stocks are included in the definition of goods but debentures are not.

19. We may also note that having regard to the provisions contained in Section 36A of the M.R.T.P. Act, there cannot be any doubt whatsoever that an inquiry proceeding can be initiated when an element of unfair trade practice arises in the matter of promoting sale, or use of any goods. Shares before their allotment, in our opinion, are not goods. In *Sri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd.*³ it has been held that in Company law "allotment" means the appropriation out of the previously unappropriated capital of a company, of a certain number of shares to a person. Till allotment is made, shares do not exist as such. It is only on allotment in this sense that the shares come into existence. Therefore, till the shares are actually issued, the question of the company having issued debentures as transferable property would not arise and thus there cannot be any doubt whatsoever that the shares before their allotment would not come into existence and they cannot be regarded as goods. Debentures would also not come within the purview of definition of stock. In *Sellar v. Charles Bright & Co. Ltd. reported in*⁴, the law is stated in the following terms :

"The Judgments Act, 1838 (1 & 2 Vict. C. 110) s.14, speaks of "any stock or shares of or in any public company in England." Debentures are neither "stock" nor "shares". A distinction is drawn between "debenture stock" and "shares or stock" of a company by the Companies Clauses Act, 1863 (26 & 27 Vict. C.118) s. 23.

The meaning of "stock" in the section is indicated by its collocation with "shares" as being something ejusdem generis therewith. If debenture stock would not be within the section, a fortiori debentures are not: see Palmer's Company Precedents, 8th ed. Part III. P. 5. Debentures are clearly not shares. They are simply specially debts due from the company, which may nor may not be secured by a charge on the company's assets. A debenture-holder as such is not a member, but a creditor of the company. He has no share in the capital of the company, and his right to payment is not dependent on its profits. He has not, as a shareholder has, a voice in the management of the company's affairs. In the case of *In re Bodman (1)* it was held by Chitty J. that a bequest of all the testator's shares in a gas company would not pass debenture stock of that company. He said in giving judgment "Debenture stock therefore stands in a materially different position from that occupied by proprietary or capital stock of the company: in other words, debenture stock is borrowed money capitalized for purposes of convenience. The words used by this testator aptly and correctly describe his shares in this gas company, and I should be improperly extending the meaning of the word 'shares', if I were to hold that it included debenture stock, which, as I have already explained, is property of a different kind altogether from the ordinary or proprietary stock of a company."

20. The matter may be considered from another angle. Under Sections 44(2) and 56 of the Companies Act, 1956, in the prospectus to be filed with the Registrar, a statement has to be made as regards amount payable on application of allotment of each share. One of the particulars required to be mentioned in the prospectus is the price to be paid for shares or debentures subscribed for under the options or right. "Subscription" is an amount of money subscribed for acquiring any periodical or even to acquire right of membership in a company

or in a club. When a subscriber of any periodical receives the periodical it is nothing short of purchasing it for a price.

'Price' has been defined in Section 2(1) of the M.R.T.P. Act in the following terms :

"Price", in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing;" The act of inviting offer shares of any company does not get translated into a kind of service qua the allottee subscriber. Subscription, therefore, is not in the nature of valuable consideration for any service.

Reliance on Lucknow Development Authority's case (supra) by Ms. Jaising is misplaced. In that case, the National Consumers' Disputes Redressal Commission was concerned with the question of interpretation of the term "consumer" within the meaning of the Consumer Protection Act, 1986. It was held that :

"The right thus to approach the Commission or the Forum vests in consumer for unfair trade practice or defect in supply of goods or deficiency in service. The word 'consumer' is a comprehensive expression. It extends from a person who buys any commodity to consume either as eatable or otherwise from a shop, business house, corporation, store, fair price shop to use of private or public services. In Oxford Dictionary a consumer is defined as, "a purchaser of goods or services". In Black's Law Dictionary it is explained to mean, "one who consumes. Individuals who purchase, use, maintain, and dispose of products and services. A member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services, credit reporting, debt collection, and other trade practices for which state and federal consumer protection laws are enacted.."

21. In the instant case, the action on the part of the company, in our opinion, does not involve any sale of goods or rendition of any service. The pointed issue is squarely covered by a decision of this Court in Morgan Stanley Mutual Fund (supra). Therein this Court was considering a question as to whether share for allotment of which only an application has been made was goods as defined under Section 2(1)(i) of the *Consumer Protection Act, 1986*. The said section reads as under :

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

The definition of 'goods' as contained in the aforementioned provision is in pari-materia with the provisions of the said Act. It was held that :

"As to the scope of this clause, reference may be made to *Maneckji Pestonji Bharucha v. Wadilal Sarabhai & Co.* It was observed thus:

"The Company is entitled to deal with the shareholder who is on the register, and only a person who is on the register is in the full sense of the word owner of the share. But the title to get on the register consists in the possession of a certificate together with a transfer signed by the registered holder. This is what Bharucha had. He had the certificates and blank transfers, signed by the registered holders. It would be an upset of all Stock Exchange transactions if it were suggested that a broker who sold shares by general description did not implement his bargain by supplying the buyer with the certificates and blank transfers, signed by the registered holders of the shares described. Bharucha sold what he had got. He could sell no more. He sold what in England would have been choses in action, and he delivered choses in action. But in India, by the terms of the Contract Act, these choses in action are goods. By the definition of goods as every kind of moveable property it is clear that not only registered shares, but also this class of choses in action, are goods. Hence equitable considerations not applicable to goods do not apply to share in India."

29. Again in *Madholal Sindhu of Bombay v. Official Assignee of Bombay* it was held thus :

"A sale according to the Sale of Goods Act (and in India goods include shares of joint stock companies) takes place when the property passes from the seller to the buyer."

Therefore, at the stage of application it will not be goods. After allotment different considerations may prevail.

30. A fortiori, an application for allotment of shares cannot constitute goods. In other words, before allotment of shares whether the applicant for such shares could be called a consumer? In *CIT v. Standard Vacuum Oil Co.* while defining shares, this Court observed :

"A share is not a sum of money; it represents an interest measured by a sum of money and made up of diverse rights contained in the contract evidenced by the articles of association of the Company."

31. Therefore, it is after allotment, rights may arise as per the contract (Article of Association of Company). But certainly not before allotment. At that stage, he is only a prospective investor (sic in) future goods."

22. Furthermore, as noticed hereinbefore, the expression 'goods', underwent an amendment in the year 1991. The relevant notes on clauses as contained in the Statement of Objects and Reasons of the Monopolies and Restrictive Trade Practices (Amendment) Bill, 1991 (Bill No.198 of 1991) speaks thus :-

"Clause 2 seeks to enlarge the definition of 'goods' by including issue of shares before allotment. The scope of the definition of 'service' is also being enlarged by including

chit-fund. An explanation has also been added that any deals in real estate shall be deemed to be included in 'service'"

23. It is, therefore, evident that the said amendment is not explanatory or clarificatory in nature. By reason thereof, the definition of goods was sought to be enlarged which will have prospective operation. The very fact that the Parliament in its wisdom sought to enlarge the definition of goods by including the issue of shares by allotment as also the service is a clear pointer to the fact that thereby the mischief which was existing in the said provision was sought to be remedied.

24. It is, therefore, axiomatic that before the said definition of 'goods' was amended, the matter relating to issue of shares before allotment was not included therein.

25. In *Shree Gopal Paper Mills Ltd. v. Commissioner of Income-tax, Central, Calcutta*⁵ the question which fell for consideration before a Bench of the Calcutta High Court was the meaning and scope of the words "share", "issue of share" vis--vis "bonus share" issued to them. The Calcutta High Court noticed the decision of this Court in *Sri Gopal Jalan & Co. v. Calcutta Stock Exchange Association Ltd.*⁶ wherein it was held that allotment of share means appropriation of unissued shares to a specified number of persons. It was further held that issue of shares is something distinct from allotment and is subsequent act whereby the title of the allottee becomes complete.

26. The matter thence came up before this Court in *Shree Gopal Paper Mills Ltd. v. Commissioner of Income-tax, Central, Calcutta*⁷. It was held by the High Court that a share cannot be held to have been issued unless a share certificate is given to the concerned person. This Court, however, disagreed with the view of the High Court only to the aforementioned extent. It was noticed:

"The words "allot" and "distribute" found in clause (b) of the resolution do not carry the matter further. Their meaning should be gathered from the context in which they were used. Clauses (b) and (c) of the resolution must be read harmoniously with clause (a). The word "allotment" has not been defined in the Companies Act. The meaning of the word "allot" or "allotment" will have to be gathered from the context in which those words are used. This court considered the meaning of the word "allotment" in *Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association Ltd.* Therein, it referred to a large number of English decisions which have considered the meaning of that word. In that decision this Court referred to the observations of Chitty J. in *In re Florence Land and Public Works Co.*:

"To my mind there is no magic whatever in the term 'allotment' as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares."

27. In Sri Gopal Jalan's case Sarkar J (as he then was) quoted with approval the following passage from Farwell L.J. in *Mosley v. Koffyfontain Mines Ltd.*:

"As regards the construction of these particular articles, it is plain that the words 'creation', 'issue' and 'allotment' are used with three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital; first, it is created; till it is created the capital does not exist at all. When it is created it may remain unissued for years, as indeed it was here; the market did not allow of a favourable opportunity of placing it. When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Sterling J. in *Spitzel v. Chinese Corporation*, he says:

'What is an allotment of shares. Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person'"

28. After examining the various decisions, Sarkar J. observed : "It is beyond doubt from the authorities to which we have earlier referred, and there are many more which could be cited to show the same position, that in company law 'allotment' means the appropriation out of the previously unappropriated capital of a company, of a certain number of shares to a person. Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence"

29. In view of the aforementioned authoritative pronouncement of this Court it must be held that shares pending allotment in view of the provisions of law as thence existed could not be said to be goods. For the aforementioned reasons, it is not necessary to go into the other questions raised at the Bar. For the views, we have taken, the judgment of the Commission cannot be found fault with. These appeals are dismissed accordingly. No costs.

¹(1994) 1 SCC 243

²(1994) 4 SCC 225

³AIR 1964 SC 250

⁴(1904), *King's Bench Division at page 447*

⁵(1967) 37 *Comp.Cas* 240

⁶(1963) 33 *Comp.Cas.*862

⁷(1970) 77 *I.T.R.*543