

Tata Engineering & Locomotive Co. Ltd., ... vs The Registrar Of The Restrictive ... on 21 January, 1977

Equivalent citations: 1977 AIR 973, 1977 SCR (2) 685, AIR 1977 SUPREME COURT 973, 1977 2 SCC 55, 1977 TAX. L. R. 1789, 1977 2 SCR 685, 1977 47 COM CAS 520

Author: A.N. Ray

Bench: A.N. Ray, M. Hameedullah Beg, Jaswant Singh

PETITIONER:

TATA ENGINEERING & LOCOMOTIVE CO. LTD., BOMBAY

Vs.

RESPONDENT:

THE REGISTRAR OF THE RESTRICTIVE TRADEAGREEMENT, NEW DELHI

DATE OF JUDGMENT21/01/1977

BENCH:

RAY, A.N. (CJ)

BENCH:

RAY, A.N. (CJ)

BEG, M. HAMEEDULLAH

SINGH, JASWANT

CITATION:

1977 AIR 973 1977 SCR (2) 685

1977 SCC (2) 55

CITATOR INFO :

D 1977 SC1285 (26)

R 1979 SC 798 (4,7,12,13,14,15,17,19,20)

ACT:

Monopolies & Restrictive Trade Practices Act, 1969--ss.

2(0) and 33--Scope of.

Agreement--If amounts to a restrictive trade
practice--Tests for deciding.

HEADNOTE:

Section 2(o) of the Restrictive Trade Practices Act, 1969 defines "restrictive trade practice" to be a trade practice which tends to bring about manipulation of prices or conditions of delivery or to affect the flow of supplies

in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions. Section 33 provides that any agreement relating to a restrictive trade practice falling within one or more of the categories (a) to (I) specified in sub-s.(1) thereof shall be registered. Section 37 enacts that the Monopolies and Restrictive Trade Practices Commission may inquire into any restrictive trade practice, whether the agreement relating thereto had been registered or not. Section 38 when the Commission finds that such restrictions are necessary or justified, in the circumstances mentioned in the section, it may permit such restrictions.

The appellant is a manufacturer of heavy and medium commercial vehicles. The appellant enters into an agreement with dealers in regard to sale of its vehicles. Clause 1 (a) of the agreement provides that a dealer shall buy from the Regional Sales Office of the company a new Tata diesel truck for resale within the territory described in accordance with the provisions of the agreement. Clause (b) provides that the agreement shall not preclude the company from entering into any dealership agreement with any other person or persons within the said territory. Clause 3 prohibits the dealer from selling the vehicles either directly or indirectly to any person outside the territory. Clause 6(a) provides that the dealer shall maintain an organisation for the sale of the vehicles in accordance with the directions of the appellant. Clause 14 prohibits the dealer from handling or selling vehicles manufactured or supplied by any other company.

In a petition under (iii) of the Act, the Registrar of the Restrictive Trade Practices alleged that cls. (1) and (3) of the agreement between the appellant and its dealers provided for territorial restrictions or allocation of areas or market, cl. (6) provided for resale price maintenance, cl. 14 provided for exclusive dealership and all these clauses of the agreement showed that the appellant was indulging in restrictive trade practices relating to allocation of territories or areas among its dealers and that the appellant was not willing to abandon the restrictive trade practices.

The Commission held inter alia. that cls. (1) and (3) of the agreement. constituted restrictive trade practices and, therefore, void.

It was contended on behalf of the respondent that irrespective of the injurious or beneficial consequences of a trade practice which may restrict competition, an agreement may fall within the definition of that term (1) of the Act. An injurious or beneficial result of the restriction is relevant only for purpose 37 and s. 38 and not for the purpose 33 of

Allowing the appeal,

HELD: The agreement in the present case was not within the vice of restrictive trade practice and was not registra-

ble.

686

(1) An agreement will be registrable when it will have both the effect of restricting competition within the meaning of s. 2(0) and also deal with the subject matter described in s. 33(1)(a) to (I). A practice which is not restrictive under s. 2(0) of the Act cannot be a restrictive 'trade practice only because of cls. (a) to (I) of s. 33(1). Section 33 does not provide statutory illustrations to s. 2(0) of the Act but only enumerates some types of trade practices which, if they are restrictive within s. 2(0), require registration.

[693 F-G]

(2) The definition of restrictive trade practice is an exhaustive and not an inclusive one. The decision whether a trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on doctrine that any restriction as to area or price will per se be a restrictive trade practice. The question in each case is whether the restraint is such as regulates and thereby promotes competition or whether it is such may suppress or even destroy competition. To determine this question three matters are to be considered, namely, (1) what facts are peculiar to the business to which the restraint is applied, (2) what was the condition before and after the restraint was imposed, and (3) what was the nature of the restraint and what was its actual and probable effect. [693 D-F]

(3) When the authorities under the Act want to challenge any agreement or any practice as a restrictive trade practice, it has to be established that it is a restrictive trade practice within the definition of s. 2(0). If it is found that it is a restrictive trade practice, it has to be registered under s. 33. It is only after an agreement had been registered that there is an enquiry under Chapter VI of the Act. The enquiry under s. 37 is to find out whether a restrictive trade 'practice is prejudicial to the public interest. [692 H, 693 A]

(4) The two terms of restriction on dealers, namely, one confining sales within the territory and the other confining dealers to dealing in only the appellant's vehicles are not prejudicial to public interest. The territorial restriction is also in public interest and the Commission was in error in thinking that it was not so. [701 C-D]

In the instant case, the supply of commercial vehicles is far below the demand and the gap between supply and demand is growing. The vehicles of the appellant were in great demand not only in the country but outside the country as well. Clauses relating to territorial restriction do not constitute 'restrictive trade practice because the domestic market is spread all over the country, to meet the needs of the users of vehicles the appellant has a countrywide network of dealers who maintain service stations, workshops, requisite equipment, machinery and

trained personnel. The appellant ensures that the vehicles are only sold by dealers who have the requisite facilities and organisation to give after sales service. The appellant gives a warranty in respect of the vehicles. A geographical network is natural to the industry which the appellant has set up. The appellant has zonal offices throughout the country. If the territorial restriction is removed, there will be a tendency for person to book orders in all areas thus starving the consumers of a particular area of their equitable share and disrupting the flow of vehicles in both areas. If the dealer is not assured of a steady demand in his territory he may have no incentive or may not find it economic to organise proper after sales-service. Some of the dealers have even maintained mobile service vans. [694 H, 695 A]

The exclusive dealings of the appellant do not impede competition but promote it. Such dealings lead to specialisation and improvement in after-sales service. The exclusive dealership agreements do not restrict distribution in any area or prevent competition. By making its dealers exclusive, it cannot be said that there is prevention, distortion or restriction of competition in the territory in which the dealer operates. Any manufacturer of vehicles similar to those of the appellant is also free to appoint dealers of its choice in the same territory covered by the appellant's dealers. The channels for outlet for vehicles have not been blocked. [699 F-G]

687

When there is acute scarcity of the goods and there is no possibility of dealers selling the product at less than the permissible price, it would be irrational to talk of territorial limits restricting competition. Territorial restriction promotes competition between the different manufacturers in every part of India. [700 B-C]

Clauses (1) and (3) are in the interest of the consumer and ensure an equal distribution as far as possible of the goods at a fair price. Clauses (6) and (14) do not amount to a restriction in competition because other manufacturers could appoint other persons to deal in their commercial vehicles. It is also in public interest to see that vehicles of other manufacturers are sold in the same territory by other dealers. [701 B-C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1117(NCM) of 1976.

(From the Judgment dated the 25.7.1975 of the Monopolies & Restrictive Trade Practices Commissioner New Delhi in R.T.P.E. No. 1 of 1974) N.A. Palkhivala, F.S. Nariman, Ashok H. Desai, Ravinder Narain, B. Dadachanji, O.C. Mathur, S. Swarup, Talat Ansari, Shri Narain, John and D.N.

Mishra, for the Appellant. Lal Narain Sinha, Mrs. Shayamla Pappu, G.A. Shah, R.N. Sachthey, Girish Chandra and B.B. Sawhney, for the Respond- ent.

R. Narain, J B. Dadachanji, O.C. Mathur, S. Swarup, Talat Ansari, Interveners for M/s. Hindust*an Livers Ltd., Ashok Leyland Ltd. Escorts Ltd.

K. J. John, for M/s.

Hindustan Livers Ltd.

Anil B. Divan, R. Narain, LB.

Dadachani, O.C. Mathur, S. Swarup, Talat Ansari, S. Narain, Interveners for CIBA Geigy of India Ltd.

Ashok, M. Desai R. Narain J. B. Dadachanji, O.C. Mathur, Talat Ansari, S. Swarup & D.N. Mishra, Interveners for Batliboi & Co. (P) Ltd. The Judgment of the Court was delivered by RAY, C.J.--This appeal is under Section 55 of the Monop- olies and RestrictiveTrade Practices Act, 1969 (referred to as the Act) against the judgment and order of the Monopolies and Restrictive Trade Practices Commission (referred to as the Commission) dated 25 July, 1975.

The principal question for consideration in this appeal is whether the agreement between the appellant referred to as Telco and its dealers allocating territories to its deal- ers within which only the dealers can sell bus and truck chassis referred to as the vehicles produced by the company constitute a "restrictive trade practice". Section 2(o) of the Act defines "restrictive trade prac- tice" to be a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular (i) which tends to obstruct the flow of capital or resources into the stream of produc- tion or (ii) which tends to bring about manipulation of prices, or conditions or delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.

Section 33 of the Act provides that any agreement relat- ing to a restrictive trade practice falling within one or more of the categories (a) to (1) specified in sub- 2section(1) thereof shall be subject to registration. Section 37 of the Act provides that the Commission may enquire into any restrictive trade practice, whether the agreement, if any, relating thereto has been registered under Section 35 or not which may come before its enquiry, and if, after such enquiry it is of opinion that the prac- tice is prejudicial to the public interest the Commission may, by order direct that (a) the practice shall be discon- tinued or shall not be repeated; (b) the agreement relating thereto shall be void in respect of such restrictive trade practice or shall stand modified in respect thereof in such manner as may be specified in the order.

Section 38 of the Act provides that a restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied of any one or more circumstances mentioned in that section. The circum- stances mentioned inter alia are these. The restriction is reasonably

necessary having regard to the character of the goods to which it applies to protect the public against injury in connection with the consumption, or installation or use of these goods. The removal of the restriction would deny to the public, as purchasers, consumers or users of any goods, other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements for operations resulting therefrom. The restriction is reasonably necessary to counteract measure taken by any one person not party to the agreement with a view to preventing or restricting competition in or in relation to the trade or business in which the persons thereto are engaged. The restriction is reasonably required for purposes in connection with the maintenance of any other restriction accepted by the parties whether under the same 'agreement or' under any other agreement between them, being a restriction which is found by the Commission not to be contrary to the public interest upon other grounds other than specified in this paragraph. The restriction does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so. The Commission is also to be satisfied that the restriction is reasonable having regard to the balance between the circumstances and any detriment to the public or to persons not parties to the agreement being purchasers, consumers or users of goods produced or sold by such parties or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods resulting or likely to result from the operations of restriction.

The expressions purchasers, consumers and users include persons purchasing, consuming or using for the purpose or in course of trade or business or for public purposes. Section 38 of the Act is described in the phraseology of restrictive trade practices as providing "gateways" to trade. The essence of the section is that when it is found by the Commission that such restrictions are necessary or justified in the circumstances mentioned in the section restrictions are permitted. Again the balancing clause after clause (h) in section 38 of the Act, indicates when the restriction is not unreasonable having regard to the balance between the circumstances mentioned in the section and detriment to the public resulting from the operation of the restriction.

Telco is a public limited company and is a leading manufacturer of heavy and medium commercial vehicles. The capital investment required for a new factory in this trade is of a high order. At present there are only four principal manufacturers of commercial vehicles. These are The Hindustan Motors Ltd., Premier Automobiles Ltd. and Ashok Leyland Ltd. and Telco.

The supply of commercial vehicles is said to be below the demand. The scarcity of supply is particularly accentuated in the case of Telco's vehicles as they are in great demand all over the country and abroad. The export of Telco was over 80% of the total exports of commercial vehicles from the country during the year 1974-75. The marked consumer preference for Telco's vehicles has been maintained because of the high quality of its products and also because of elaborate and comprehensive net work of after-sales service provided by Telco's dealers. Telco has of its own initiative introduced certain procedures for a fair and wide geographical distribution of its vehicles which seek to ensure that the new vehicles are supplied not only to the urban areas of the country where there is a high demand but also to the remote areas such as Tripura, Nagaland, Himachal Pradesh etc. Telco has notified to its dealers the maximum price for each model of vehicle which they could charge to consumers. In May, 1972 Telco introduced a procedure to regulate the

booking of orders by its dealers and effecting the delivery of vehicles against such orders with a view to ensuring distribution of its vehicles in the chronological order in which orders had been registered with the dealers.

When Telco sells vehicles it has the responsibility of providing facilities for servicing and repairing the vehicles marketed by it. It is essential that in the interest of the consumers such facilities are widely distributed throughout the country. Even in remote areas where the demand of new vehicles is less, it is necessary to provide facilities for after-sales service in order to enable the owners of the vehicles to keep them in operation. These facilities are provided by Telco through all India net work of 68 dealers, 69 service centres of sub-dealers and 13 zonal offices of Telco. Each dealer has to maintain premises for a show-room and a service station and to keep special tools as well as a comprehensive range of spare parts supplied by Telco. Further a dealer has also to employ technically qualified personnel some of whom have been trained by Telco in its Apprentice School at Jamshedpur. In addition Telco maintains its own staff of trained engineers and mobile vans in each of its zonal offices. The Registrar, Restrictive Trade Agreements made an application under Section 10(a) (iii) of this Act before the Commission for enquiry under Section 37 of the Act into restrictive trade practices alleged therein. The allegations in the petition were these. Clauses (1) and (3) of the agreement between Telco and its dealers provide for territorial restriction or allocation of area or market and clauses 6 and 13 provide for resale price maintenance and clause 14 provides for exclusive dealership. The Registrar submitted that Clauses 1, 3, 6 and 14 show that the company is indulging in restrictive trade practices inter alia relating to allotment of territories/areas among its dealers and exclusive dealings and Telco is not willing to abandon the restrictive trade practices. It is significant to notice that no particulars of such alleged restrictive trade practices were set out in the application. Clauses 1, 3, 6 and 14 in so far as they are appropriate to the present appeal are as follows :--

"1. (a) The Dealer agrees to buy from the Regional Sales Office of the Company regularly from time to time on principal to principal basis all such new Tata diesel truck and bus chassis with or without cab and/or body (hereinafter referred to as "the said vehicles", for resale within the territory de-

scribed hereunder (hereinafter called "the said territory") in accordance with the provisions of this. Agreement.

(b) This Agreement shall not preclude the Company from entering into or continuing any dealership agreement or agreements with any other person or persons within the said terri-

tory for sale of the said vehicles and resale by that person thereof in the said territory, this Agreement with the Dealer does not constitute him a selling agent of the Company in the said territory, much less a sole selling agent.

3. The Dealer shall not, either directly or indirectly and either alone or in conjunction with others, promote the sale of or sell any of the said vehicles to any person or party outside the said territory,

nor shall' he sell the same to any person within the said territory if the said vehicles are intended to be used outside the said territory.

6. (a) The Dealer shall, at his own expense, maintain within the said territory such organisation for the sale of the said vehicles as may, in the opinion of the Company which shall be binding, be deemed to be necessary to adequately cover the said territory and ensure the best possible results.

14. Except with the written permission of the Company first obtained, the Dealer shall not during the pendency of this Agreement either directly or indirectly engage in or promote the sale of or use, handle or sell any truck or bus chassis, which is not manufactured or supplied by the Company."

Telco denied that any of the alleged clauses amounted to restrictive trade practices. Telco submitted as follows:

First, though alleged clauses imposed restrictions on the dealers these did not amount to restrictive trade practices within the meaning of the Act.

Second, Clauses 1 and 3 which deal with certain defined territories allocated to the dealers are intended to avoid unequal and unfair distribution of the vehicles among the customers.

Third, any restriction as to maximum price at which goods can be resold to the Telco's dealers particularly when Clause 6 (1) (ii) specifies what is implicit therein, namely, that the dealer may sell below the maximum price fixed by Telco cannot possibly amount to restrictive trade practice.

Fourth, Clause 14 which prohibits a distributor from dealing in products of other manufacturers would normally not be restrictive trade practice unless there are special circumstances which exist and indicate that the agreement has the effect of preventing, distorting or restricting competition.

Telco finally submits that none of the restrictions imposed in Clauses 1,3,6, and 14 are unreasonable having regard to the balance between the circumstances set out in section 38 of the Act and any alleged detriment to the customers of Telco and or the competitors of Telco allegedly resulting or likely to result from the operation of these restrictions.

10--112SC1/77 The Commission held that the moment an agreement contained a trade practice falling within any of the clauses in Section 33(1) of the Act, the trade practice must be regarded as a restrictive trade practice. The Commission held that all the clauses alleged in the petition of the Registrar amounted to restrictive trade practices. The Commission further said that in regard to Clauses 6 and 13 in the light of the assurance given by Telco that in its future price lists it would specifically state that the dealer is free to charge on the resale of Telco's vehicles, prices lower

than the maximum prices fixed by Telco, no order was required to be passed regarding the alleged practice of maintenance of minimum resale prices.

The Commission further held that although the contractual term that the dealers, could deal only in Telco's vehicles was a restrictive trade practice, it was not against public interest as it fell within subclauses (a), (b) and.

(h) and the balancing clause of Section 38(1) of the Act.

The Commission however held that the practice of allocation of territories to Telco's dealers was not justified. In the result the Commission declared that Clauses 1 and 3 of the Agreements in so far as they related to allocation of any territory or area or market to any of the dealers for the distribution of the vehicles constituted restrictive trade practice and, therefore, void and restrained Telco from continuing or repeating the practice. Before the Commission Telco contended that the application of the Registrar was not in accordance with Regulation 55 of the Monopolies and Restrictive Trade Practices Commission Regulations, 1974, referred to as Regulations. Under the Regulations an application under section 10(a)(iii) of the Act must contain facts which, in the Registrar's opinion, constitute a restrictive trade practice and, if it is in relation to any agreement, set out, such portions of the agreement as may be necessary to bring out the facts complained of. It has to be stated that in the present case Telco is right in contending that beyond making mere references to clauses of the agreement and bald allegations that the clauses constitute restrictive trade practice, no facts or features are set out in the petition to show or establish as to how the alleged clauses constitute restrictive trade practice in the context of facts. The Solicitor General contended as follows. First, the definition of restrictive trade practice includes all trade practices permissible or forbidden provided they restrict competition or even tend to restrict competition. The instances set forth in the definition of restrictive trade practice emphasize the factors which go to establish a restrictive trade practice. Clauses (i) and (ii) in Section 2(o) of the Act afford graver instances of restrictive trade practice.

Second, Section 33 of the Act requires an agreement falling within the Clauses thereof to be registered. In short an agreement which amounts to a restrictive trade practice will be first registered and then an enquiry will be made under Chapter VI of the Act as to whether the restrictive trade practice is prejudicial to the public interest. Irrespective of the injurious or beneficial consequence of a trade practice which restricts or may restrict competition, it may fall within the definition. Injurious or beneficial result of the restriction is relevant only for purposes of Sections 37 and 38 of the Act. Section 33 of the Act states that any agreement relating to a restrictive trade practice falling within one or more of the categories mentioned therein shall be subject to registration in accordance with the provisions of Chapter V of the Act. Clauses (a) and (d) in subsection (1) of Section 33 are relevant in the present case. These are, inter alia, (a) any agreement which restricts or is likely to restrict by any method the persons or classes of persons to whom goods are sold or from whom goods are bought and

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

restrictive trade practice is an exhaustive and not an inclusive one. The decision whether trade practice is restrictive or not has to be arrived at by applying the rule of reason and not on that doctrine that any restriction as to area or price will per se be a restrictive trade practice. Every trade agreement restrains or binds persons or places or prices. The question is whether the restraint is such as regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine this question three matters are to be considered. First, what facts are peculiar to the business to which the restraint is applied. Second, what was the condition before and after the restraint is imposed. Third' what is the nature of the restraint and what is its actual and! probable effect. Section 33(1) of the Act deals with registration of certain types of restrictive trade practices which have the subject matter described in categories mentioned in clauses

(a) to (1) of Section 33(1) of the Act. An agreement will be registrable, when it will have both the effect of re-stricting competition within the meaning of Section 2(o) of the Act and also deal with the subject matter described in Clauses, (a) to (1) of sub-section (1) of Section 33 of the Act. 'Clauses (a) to (1) aforesaid describe some species of agreement which require registration. if they .are within the genus of restrictive trade practice defined in Section 2(o) of the Act. A practice which is not restrictive under section 2 (o) of the Act cannot be restrictive trade practice only because of Clauses (a) to (1) of sub-section (1) of Section 33 of the Act. Section 33 does not provide statutory illustrations to Section 2(o) of the Act but only enumerates some types of trade practices which. if they are restrictive within Section 2(o) of the Act require registra- tion.

Section 33 fixes categories of restrictive trade practices. Section 33 states that any agreement relating to a restrictive trade practice falling within one or more of the categories mentioned therein shall be subject to registration. Therefore, before an agreement becomes registrable it has to be a restrictive trade practice in accordance with the definition of Section 2(o) of the Act. At the threshold it has to be found out whether an agreement constitutes a restrictive trade practice. In Section 33 it is stated, for example, that any agreement which restricts, or is likely to restrict, by any method the persons or clauses of persons to whom goods are sold or from whom goods are bought is one of the categories of a registrable restrictive trade practice. In the present case it has to be found out first whether the agreement of exclusive dealership between Telco and the dealers containing the restriction on the dealer not to sell the commercial vehicles of Telco in other territories falls within the vice: of a restrictive trade practice.

Under the Act, action can be taken against a restrictive trade practice. Therefore, when the authorities under the Act want to challenge any agreement or any practice as a restrictive trade practice, it has to be established that it is a restrictive trade practice within the definition of the Act. If it is found to be a restrictive trade practice, the next stage is to register agreements relating to a restrictive trade practice. Section 33 states that any agreement relating to a restrictive trade practice failing within one or more of the categories mentioned. therein shall be subject to registration. The authorities have to examine the agreement and find out whether it fails within the vice of a restrictive trade practice before the authorities can ask that the agreement be registered under Chapter V of the Act.

It is only after an agreement has been registered that there is an enquiry under Chapter VI of the Act. This enquiry under Section 37 of the Act is to find out whether a restrictive trade practice is prejudicial to the public interest. Section 38 of the Act lays down the circumstances under which a restrictive trade practice is presumed to be in the public interest and not to be deemed to be prejudicial to the public interest.

In the present case the question is whether the dealer-ship agreement between Telco and the dealers whereby the dealers are not permitted to sell the commercial vehicles outside their zones amounts to a restrictive trade practice. The questions posed are: Does it prevent distort or restrict competition in any manner; Does it affect the flow of supplies in the market relating to goods or service in such manner as to impose on the consumers unjustified costs or restrictions.

The evidence about the features of the trade is this. The medium, and heavy vehicles in the trade are restricted to those licensed by Government for manufacture in the country. The capital investment required for a new factory is of a very high order, namely, almost Rs. 100 crores. At present the only manufacturers of commercial vehicles are Telco which produces Tats Vehicles, Hindustan Motors Ltd., which produces Hindustan Vehicles, Premier Automobiles, which produces Premier Vehicles and Ashok Leyland Ltd., which produces Leyland vehicles. The supply of commercial vehicles is far below the requirement of the industry. The gap between the demand and the supply is increasing with the passage of time as the trade is developing at a faster pace than the growth in the number of vehicles produced. The Government of India estimated during the year 1974-75 the production of 56,300 medium and heavy vehicles. The production, however, is now likely to be of the order of 35,000. The Fifth Five Year Plan for the production is said to be increased to 80,100. It is said that against this target the installation capacity today is 46,300 vehicles. Even if the expansion programme is fully implemented the installed capacity by the end of the Fifth Five Year Plan will be only 66,975 vehicles per year.

The scarcity which is a feature of this trade is accentuated in the case of Telco's vehicles because they are in great demand all over the country and even in the export market. In 1974. it is said that Telco exported vehicles amounting to 86% of the total export from the country. The export earnings are said to be Rs. 7.29 crores for 1101 vehicles. At the time of arguments it was suggested that Telco exports now vehicles worth Rs. 10 crores. The clauses relating to territorial restriction in the present case do not constitute restrictive trade practice for the following reasons:

The domestic market in India is spread over this vast sub-continent with very diverse conditions of roads, population and demand. It is essential for the community, the consumer and the manufacturer to have an equitable geographical distribution of his vehicles. Vehicles may be required for operation in any part of India and public interest requires that the channels of communication should be open throughout the country. These vehicles should ply even in the remotest areas like Ladakh, Nagaland, etc. A user of Telco vehicles expects to get all over the country the service of a high standard enjoined by Telco upon its dealers. Telco on its part also needs a country-wide network of dealers so that sales take place and the dealers can maintain the service stations, spare part stocks and workshops with the requisite equipment,

machinery and trained personnel all over the country. This also enables the consumers to rely on Telco's vehicles since they in turn can expect services, repairs and spare parts all over India. Telco has thus to ensure an all India network of dealers, including those which will serve remote areas. It is evidence that commercial vehicles is a highly complex mechanical product. When Telco sells a vehicle it also has a responsibility that the vehicle is kept running and maintained in the optimum condition Telco must preserve its reputation and ensure that the vehicles are only sold by dealers who have the requisite facilities and organisation to give the proper after-sales service. Unlike most consumer products, a commercial vehicle involves a continuous relationship between a dealer and a consumer. The consumer looks to the dealer, for keeping the vehicle running and for all attendant facilities like service stations, workshops and spare parts. Reliability and repair of a vehicle, which represents a substantial investment for the consumer, is vital also to the public as a whole and there must be constantly available throughout the country a network of dealers with adequate repair and maintenance service. Even before the delivery of a commercial vehicle to the consumer, there is a meticulous pre-delivery inspection and service by the dealer. After delivery, Telco gives three free services. Telco also gives a warranty for a period of six months from the date of registration or 12 months from the date of delivery of vehicle from the factory or for a period in which the vehicle has run for a distance of 32,000 kilometers, whichever expires earlier.

There are outstanding distinctions between a car dealer and a commercial vehicle dealer. The peculiar characteristics of dealers' in commercial vehicles are these: The purchase of a car in India rarely represents the substantial or the bulk of the investment of a purchaser. The purchase of a commercial vehicle, however, represents the substantial and often the only capital investment of the owner. A chassis manufactured by Telco is sold to the customer at almost a lakh of rupees and the body costs him about Rs. 15,000/- for a truck and about Rs. 40,000/- for a bus. Over 80% of persons owning trucks are individual owners having not more than two trucks and mostly only one truck. The vehicle is normally constantly on the road and is put to the maximum possible use with often more than one driver plying it. Thus a vehicle plies on an average over a lakh of kilometers per year. The heavy investment also makes it necessary that a vehicle should be constantly on the move. The owner can ill-afford to waste time and requires easily accessible and prompt Service Stations, Workshops and stocks of spares. The purchaser regards the truck as a life-time investment. The purchaser looks to the dealer for prompt after-sales service and repairs. Since 80% of truck operators are individual operators and often have scant mechanical knowledge, they have to depend upon the dealer for keeping the truck moving with the necessary trained personnel, workshop, service stations and stocks of spares. As a result of these characteristics, the relationship between a dealer and the truck purchaser is much more constant than with the car purchaser. The standard of service he expects is more vigorous and prompt.

Vehicles of Telco are in keen demand, both because of their quality as also because of the assurance of efficient after-sales service, by the network of Telco dealers. These requirements cannot be met unless there is a network of dealers with specific territories. It is essential from the angle of the consumer, Telco and the public that there should be widest and equitable geographical distribution of the vehicles of Telco. Public interest itself requires that the vehicles should not be concentrated in metro centres or urban areas where there is a high demand for them, to the detriment of the remote, areas or semi-urban areas. The consumer also plies trucks all over the country and expects that where-ever he goes, whether to Kerala or Assam, there should be a dealer, a service station, a workshop, trained personnel and spare parts which can attend to Telco trucks.

Urban area centres like Bombay, Delhi and Calcutta, have a very large demand as compared to the rest of the country. But at the same time Telco. has to ensure sales in places like Kashmir, Nagaland. and Tripura, where the demand is much less. In fact, in some of these areas, there are no alternative means of communication and transport like rail- ways and the life of the community is largely dependent upon road transport. Even where the demand is less, there has to be a dealer with the necessary facilities and organisation for after-sales-service Telco appoints dealers. for different territories in India. The geographical network is natural to the industry itself. The purchaser will purchase and get his vehicle serviced in his own territory. The purchaser looks to a dealer in his own territory with whom he has relationship and who will give him credit facilities, who will render after-sales-service and from whom he can purchase spares, who will handle warranty claims and with 'whom he can have constant relationship for purchases in future. Unless a 'dealer is assured of customers in his own area and zones; he will not have the necessary incentive to maintain the optimum level of service stations, workshops and spare part stocks, nor can the dealer plan his resources including technical personnel, capital equipment and financial resources for his future commitment.

Telco regards after-sales service of crucial importance to serve its consumers. It is natural and cheaper for a purchaser to buy and service his vehicles in his own territory. After-sales-service of Telco is fairly elaborate and complex and it is because of the standard of this service that Telco has been 'able to maintain the reputation. Each, dealer is required to provide one premises for show-room, service station, workshop, spare parts, shop, canteen and also (a) rest house for drivers; (b) equipment and machinery for maintenance and repairs; (c) set or sets of special tools specially designed for carrying out repairs to Telco's vehicle; (d) Technical personnel including person- nel trained by the appellant at its factory in Jamshedpur and. (e) adequate stock of spare parts to meet the potential demand in the territory.

Telco has set up 13 zonal offices throughout India at New Delhi, Kanpur, Ahmedabad, Indore, Bombay, Bangalore, Madras, Vijayawada, Bhubaneswar, Jamshedpur, Gauhati, Jalandhar and Jaipur. If the territorial restriction is removed, there will

be a tendency for persons to book orders in areas thus starving the consumers of that area of their equitable share and disrupting the flow of vehicles in both areas. This will create pockets of artificial scarcity and dislocate the network. If the dealer is not assured of a steady demand in his territory, he may have no incentive or may not find it economic to organise proper after-sales- service. This would also result in dealers diverting their supplies to metro centres starving the semi-urban and rural areas.

Network of dealers and service stations has a direct relation with the territorial assurances given to each dealer. It is as a result of such assurances that a dealer is able to maintain the whole chain of dealership network, service stations, stocks of spare parts, trained per-

sonnel, equipment, special tool kits and given the optimum service as laid down by Telco to its vehicles. Some of the dealers have even maintained mobile service vans. The dealer has to invest a large amount in providing all these facilities. The dealer is familiar with his territory and in view of the potential sales, takes steps to improve his organisation. If these clauses are omitted, the dealer would not make investment and would neglect the service facilities to the detriment of the consumer. In the light of scarcity in the supply of vehicle's and the need to distribute Vehicles to all the dealers in India, Telco makes equitable distribution of its products by taking into account these factors: (a) Population of commercial vehicles in the dealer's territory; (b) Orders from customers pending with the dealer; (c) Preference for Tata diesel vehicles as against other makes in the territory of the dealer (d) Past sales performance of the dealer; (e) Effective after-sales-service provided by the dealers; (f) Special requirements of the territory during the erection of Government Projects such as steel plants, construction of dams etc.; (g) Emergency requirements of the territory on account of drought, flood relief etc; (h) Government recom- mendations for meeting certain specific requirements; (i) Dependence of the particular territory on road transport and

(j) Requirements of State Government and nationalised trans-

port undertakings which are procured through dealers. The demand for the vehicles has always exceeded the supply making it imperative for Telco to ensure equitable distribution of the vehicles to the various parts of the country. There are many commercial agreements under which the territories are divided among distributors and 'such agreements do not constitute restrictive trade practice, where the whole object is to ensure fair, efficient and even distribution particularly of a commodity which is in short supply and in great demand. If these were not done and it was permitted for one dealer to encroach on the territory of another this would affect the flow of vehicles into the market leaving some territories unsupplied. In order to prevent this undesirable position that dealers were appointed for different territories and care was taken consistently to see that all parts of the country are treat- ed equally and fairly.

The exclusive dealings do not impede competition but promote it. Such dealings lead to specialisation and improvement in after-sales-service. The exclusive dealership agreements do not restrict distribution in any area or prevent competition. The customer has the choice of buying any make he likes. The advantage of exclusive dealership is that a dealer specialises in his own type of vehicle with all the attending advantages of trained personnel, special service stations, workshops and spare parts. Each set of special tools costs approximately Rs. 55,000. The set is suitable for servicing one vehicle at a time. Some dealers like the United Motors Pvt. Ltd., Bombay have four sets at Colaba, Wadi Bunder, Jogeshwari and Chembur. The investment of United Motors is approximately Rs. 24 lakhs. It is estimated that one service station with special tools of Telco and workshop equipment will cost as much as Rupees five lakhs.

It is by specialising in each make of vehicle and providing the best possible service that the competition between the various makes is enhanced. It is practically not possible for the same dealer to have parallel lines of service stations, workshops, spare parts, trained personnel for different makes. It is also not practical for the dealer to maintain different and competitive standards laid down by different companies which may differ from manufacturer to manufacturer. If a dealer has more than one franchise, the competition between the various makes will be reduced. It will be difficult for the manufacturer to make the dealer responsible for his make and concentrate on it. There may be conflicts between his responsibility for after-sales service.

Telco commenced appointing dealers in 1954. At that time 25 or 26 dealer's were appointed. The number increased to 68. There are also sub-dealers. Each dealer is required to make a security deposit varying from Rs. 1 lakh to Rs. 6 lakhs. Telco pays interest on deposits and security deposits. A dealer has to invest a minimum of Rs. 5 lakhs in his establishment. The range of investment would vary from Rs. 5 lakhs to Rs. 50 lakhs depending upon the largeness of the place.

Dealer Apprentices are trained by Telco in its factory at Jamshedpur. Telco also trains Trade Apprentices. The dealer also pays the apprentice stipend. If territorial restrictions are removed, there will be unequal distribution of vehicles in various territories. While there will be shortage in some territories, there will be larger supplies in others. Vehicles are supplied by Telco according to territorial requirements. Various factors are taken into consideration in assessing the requirements of territories.

By making its dealers exclusive to Telco, there cannot be said to be any prevention, distortion or restriction of competition in the territory in which a dealer operates, either between manufacturers of the same type of vehicles or between dealers in these vehicle. Any manufacturer of vehicles such as those of Telco may manufacture and sell its vehicles in a territory in which Telco's dealers operate. Any other manufacturer of vehicles similar to those of Telco is also free to appoint dealers of its choice in the same territory covered by Telco's dealers. The channels for outlet for vehicles have not been blocked by the fact that the dealers appointed by Telco are exclusive to Telco nor it can be said that Telco has by its exclusive arrangement with its dealers affected the flow of supplies of vehicles into the market. If Telco sold themselves in each territory it could not be said that Telco was pursuing any restrictive trade practice. Would the position change if Telco asked their dealers not to sell Telco bus chassis outside the dealer's territory? Just as Telco could not complete with

itself similarly dealers would not compete with one another.

The competition would be between Telco products and the products of the other manufacturers Premier, Hindustan and Leyland. 'Restrictive trade practice is based on reason embodied in Section 2(o) of the Act. When trucks are in short supply and dealers are restrained from selling at above the maximum price they cannot sell below the maximum price and compete with one another. Dealers of the same manufacturer do not compete with one another in every case irrespective of the market conditions or the character of the product sold. Competition between dealers appointed by the same manufacturer can be reduced when there is a practical possibility of such competition as for example, When the goods are in abundance. When there is an acute scarcity of goods and there is no possibility of dealers selling the product at less than the permissible price, it would be irrational to talk of territorial limits restricting competition. Restriction on competition postulates the existence or the possibility of competition. On the facts proved in the present case the only competition possible is between the dealers and the manufacturer's. The territorial restriction promotes competition between the four manufacturers in every part of India while it has no effect of any theoretical competition between the dealers because such competition between dealers does not and cannot exist. The question of competition cannot be considered in vacuo or in a doctrinaire spirit. The concept of competition is to be understood in a commercial sense. Territorial restriction will promote competition whereas the removal of territorial restriction would reduce competition. As a result of territorial restriction there is in each part of India open competition among the four manufacturers. If the territorial restriction is removed there will be pockets without any competition in certain parts of India. If the dealer in Kashmir is allowed to sell anywhere in India wealthy cities like Delhi, Bombay, Calcutta will buy up trucks allocated for Kashmir and the buyer in Kashmir will not be able to get the trucks. The other three manufacturers whose trucks are not in equal demand will have Kashmir as an open field to them without competition by Telco. Therefore, competition will be reduced in Kashmir by the successful competitor being put out of the field. The real reason for exclusive dealership is that instead of diminishing competition between four manufacturers each dealer tries to do his best for his own trucks, bus and thus reduce keen competition among the four manufacturers. If one dealer deals in trucks of one or more manufacturers one cannot be expected to compete with itself it is, therefore, clear that exclusive dealership promotes instead of retarding competition.

Clauses 1 and 3 are in the interest of the consumer and ensure equal distribution as far as possible of the goods at a fair price. These provisions do not tend to obstruct the flow of capital or resources into the stream of production or to bring about manipulation of prices or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions.

In the present case the restriction imposed by Telco on dealers not to sell bus and chassis outside their territories does not restrict competition for the foregoing reasons.

The other term of exclusive dealership in clauses 6 and 14 of the agreement between Telco and the dealers that the dealer will not sell commercial vehicles of other manufacturers, does not amount to a restriction in competition because other manufacturers can appoint other persons to deal in

their commercial vehicles. It is also in public interest to see that vehicles of other manufacturers are sold in the same territory by other dealers. Therefore, there will be competition between the manufacturers of different commercial vehicles and as far as exclusive dealership of Telco commercial vehicles is concerned, it will be in public interest' and not be a restriction in competition.

The two terms of restriction on dealers, namely, 'sale being confined within the territory and the other being confined to dealing in only Telco vehicles are not prejudicial to public interest. The Commission found that exclusive nature of dealership of being confined to Telco vehicles is not prejudicial to public interest. The territorial restriction is also, in public interest and the Commission was in error in thinking that it is not so.

For the foregoing reasons the appeal is accepted. The decision of the Commission is set aside. We hold that the agreement in the present case is not within the vice of restrictive trade practice and is, therefore, not registrable. We make it clear that in a given case sale of commodities being confined to a territory may amount to a restrictive trade practice. In the special features and facts and circumstances of the exclusive dealership agreement between Telco and the dealers the territorial restriction imposed on the sellers not to sell vehicles outside their territories is not a restrictive trade practice. Parties will pay and bear their own costs.

P.B.R. Appeal allowed.