IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : MAXIMUM RETAIL PRICE

WP(C)6517/03 & WP(C) Nos.14691-16927/05

Date of Hearing : January 17, 2007

Date of Decision : March 05, 2007

THE FEDERATION OF HOTELS & RESTAURANTS ASSOCIATION OF INDIA & ORS. ....Petitioner

Through Mr. Lalit Bhasin with Ms. Bhavna Kohli, Mr. Mudit Sharma & Mr. Abhishek Dimri, Advs.

Versus

UNION OF INDIA & ORS. ...Respondent

Through Mr. Jayant Nath, Sr. Adv. with Mr. R.K. Jha, Adv. UOI Mr. Sandeep Gupta, Adv. for Respondent No.2

WITH

WP(C) No.9528/03 & WP(C) Nos.13775-14072/2005

NATIONAL RESTAURANT ASSOCIATION OF INDIA .... Petitioner

Through Mr. Anip Sachthey with Mr. Sanjeev Rajpal & Mr. Mohit Paul, Advs.

Versus

UNION OF INDIA & ORS. .... Respondent

Through Mr. Jayant Nath, Sr. Adv. with Mr. R.K. Jha, Adv. for UOI Mr. J.R. Midha with Mr. Maneesh K. Shukla, Advs. for Respondent No.2

1. The question that arises in these petitions is whether it is impermissible for the Petitioners to charge their customers/guests the any price above the maximum retail price (MRP) mentioned on mineral-water packaged and bottled by third parties. This conundrum is common both to hotels and restaurants. The character and nature of the service provided by hotels has already received jural scrutiny in State of H.P. -vs- Associated Hotels of India, AIR 1972 SC 1131 [also reported as The State of Punjab -vs- Associated Hotels of India Ltd, (1972) 1 SCC 472 : (1972) 2 SCR 937]. The Constitution Bench of the Supreme Court made the following enunciation of the law which in my view conclude the debate and is better extracted than paraphrased by us:-

13. What precisely then is the nature of the transaction and the intention of the parties when a hotelier receives a guest in his hotel? Is there in that transaction an intention to sell him food contained in the meals served to him during his stay in the hotel? It stands to reason that during such stay a well equipped hotel would have to furnish a number of amenities to render the customer's stay comfortable. In the supply of such amenities do the hotelier and his customer enter into several contracts every time an amenity is furnished? When a traveller, by plane or by steamship, purchases his passage-ticket, the transaction is one for his passage from one place to another. If, in the course of carrying out that transaction, the traveller is supplied with drinks or meals or cigarettes, no one would think that the transaction involves separate sales each time any of those things is supplied. The transaction is essentially one of carrying the passenger to his destination and if in performance of the contract of carriage something is supplied to him, such supply is only incidental to that service, no changing either the pattern or the nature of the contract. Similarly, when clothes are given for washing to a laundry, there is a transaction which essentially involves work or service, and if the laundryman stitches a button to a garment which has fallen off, there is no sale of the button or the thread. A number of such cases involving incidental uses of materials can be cited, none of which can be said to involve a sale as part of the main transaction.

14. The transaction in question is essentially one and indivisible, namely, one of receiving a customer in the hotel to stay. Even if the transaction is to be disintegrated, there is no question of the supply of meals during such stay constituting a separate contract of sale, since no intention on the part of the parties to sell and purchase food stuff supplied during meal times can be realistically spelt out. No doubt, the customer, during his stay, consumes a number of food stuffs. It may be possible to say that the property in those food stuffs passes from the hotelier to the customer at least to the extent of the food stuffs consumed by him. Even if that be so, mere transfer of property, as aforesaid, is not conclusive and does not render the event of such supply and consumption a sale, since there is no intention to sell and purchase. The transaction essentially is one of service by the hotelier in the performance of which meals are served as part of and incidental to that service, such amenities being regarded as essential in all well conducted modern hotels. The bill prepared by the hotelier is one and indivisible, not being capable by approximation of being split up into one for residence and the other for meals. No doubt, such a bill would be prepared after consideration of the costs of meals, but that would be so for all the other amenities given to the customer. For example, when the customer uses a fan in the room allotted to him, there is surely no sale of electricity, nor a hire of the fan. Such amenities, including that of meals, are part and parcel of service which is in reality the transaction between the parties.

15. Even in the case of restaurants and other such places where customers go to be served with food and drink for immediate consumption at the premises, two conflicting views appear to prevail in the American courts. According to one view, an implied warranty of wholesomeness and fitness for human consumption arises in the case of food served by a public eating place. The transaction, in this view, constitutes a sale within the rules giving rise to such a warranty. The nature of the contract in the sale of food by a restaurant to customers implies a reliance, it is said, on the skill and judgment of the restaurant-keeper to furnish food fit for human consumption. The other view is that such an implied warranty does not arise in such transactions. This view is based on the theory that the transaction does not constitute a sale inasmuch as the proprietor of an eating place does not sell but "utters" provisions, and that it is the service that is predominant, the passing of title being merely incidental (Corpus Juris Secundum, Vol. 77, 1215-1216). The two conflicting views present a choice between liability arising from a contract of implied warranty and for negligence in tort, a choice indicative of a conflict, in the words of Dean Pound, between social interest in the safety of an individual and the individual interest of the supplier of food. The principle accepted in cases where warranty has been spelt out was that even though the transaction is not a sale, the basis for an implied warranty is the justifiable reliance on the judgment or skill of the warrantor and that a sale is not the only transaction in which such a warranty can be implied. The relationship between the dispenser of food and one who consumes it on the premises is one of contractual relationship, a relationship of such a nature that an implied warranty of wholesomeness reflects the reality of the transaction involved and an express obligation understood by the parties in the sense that the customer does, in fact, rely upon such dispenser of food for more than the use of due care. (See Cushing v. Rodman, 104 American L.R. 1023 = 62 F.R. 2nd Srs. 864, 868). A representative case propounding the opposite view is the case of P.W. Woolworth Co. v. Wilson, 74 F.R. 2nd Srs. 439 citing Nisky v. Childs Co. 103 N.J. Law 464 wherein the principle accepted was that such cases involved no sales but only service and that the dispenser of food, such as a restaurant or a drug store keeper serving food for consumption at the premises did not sell and warrant food but uttered and served it and was liable in negligence, the rule in such cases being caveat emptor.

16. In England, a hotel under the Hotel Proprietors Act, 1956 is an establishment held out by the proprietor as offering food, drink, and if so, required, sleeping accommodation, without special contract, to any traveller presenting himself and who appears able and willing to pay a reasonable sum for the services and facilities provided. This definition, which is also the definition of an inn, still excludes, as formerly, boarding houses, lodging houses and public houses which are merely alehouses and in none of which there is the obligation to receive and entertain guests. An innkeeper, that is to say, in the present days a hotel proprietor, in his capacity as an innkeeper is, on the other hand, bound by the common law or the custom of the realm to receive and lodge in his inn all comers who are travellers and to entertain them at reasonable prices without any special or previous contract unless he has some reasonable ground of refusal. (Halsbury's Laws of England, 3rd Ed., Vol. 21, 445-446). The rights and obligations of hotel proprietors are governed by statute which has more or less incorporated the common law. The contract between such a hotel proprietor and a traveller presenting himself to him for lodging is one which is essentially a contract of service and facilities provided at reasonable price.

17. The transaction between a hotelier and a visitor to his hotel is thus one essentially of service in the performance of which and as part of the amenities incidental to that service, the hotelier serves meals at stated hours. The Revenue, therefore, was not entitled to split up the transaction

into two parts, one of service and the other of sale of food stuffs and to split up also the bill charged by the hotelier as consisting of charges for lodging and charges for food stuffs served to him with a view to bring the latter under the Act.

2. In Northern India Caterers (India) Ltd. -vs- Lt. Governor of Delhi, [1979] 1 SCR 557 the Bench comprising their Lordships P.N. Bhagwati, V.D. Tulzapurkar and R.S. Pathak, JJ. extended the above ratio even to restaurants, in these words:-

Like the hotelier, a restaurateur provides many services, in addition to the supply of food. He provides furniture and furnishings, linen, crockery and cutlery, and in the eating places of today he may add music and a specially provided area for floor dancing and in some cases a floor show. The view taken by the English law found acceptance on American soil, and after some desultroy dissent initially in certain states it very soon became firmly established as the general view of the law. The first edition of American Jurisprudence sets forth the statement of the law in that regard, but we may go to the case itself, Electa B. Merrill v. James W. Hodson, from which the statement has been derived. Holding that the supply of food or drink to customers did not partake of the character of a sale of goods, the Court commented:-

The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is cared for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire – ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothings to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor in the service rendered.

3. This very question again came up for the consideration of the Constitution Bench in K. Damodarasamy Naidu & Bros. -vs- State of T.N., (2000) 1 SCC 521 and the following extract thereof is instructively topical:-

4. A review petition was filed in respect of the judgment in Northern India Caterers and all three Judges found that it should be dismissed. The order of the majority noted that it appeared from the submissions that were made in the review petition that the States were apprehensive that the judgment in Northern India Caterers would be invoked by restaurant-owners in those cases also where there was sale of food and title passed to the customers. It seemed to the two learned Judges

who constituted the majority, having regard to the facts on which that judgment rested, undisputed as they had remained throughout the different stages of the litigation, and the considerations which they attracted, that no such apprehension could reasonably be entertained. Where food was supplied in a restaurant and it was established upon the facts that the substance of the transaction, evidenced by its dominant, object, was the sale of food and the rendering of service was merely incidental, the transaction would undoubtedly be exigible to sales tax. In every case it would be for the taxing authority to ascertain the facts when making an assessment under the relevant sales tax law and to determine upon those facts whether a sale of the food supplied was intended. Krishna Iyer, J., concurring with the majority, said that the judgment under review squarely applied to the cases of high-style restaurants or residential hotels which rendered a bundle of special services for a consolidated sum.

4. The first two decisions partly prompted the Constitution Forty-sixth Amendment Act, 1982 which inter alia amended Article 366 of the Constitution by inserting clause (29-A) therein. By a deeming fiction the supply, by way of or as part of any service or in any other manner whatsoever of goods being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, was subject to tax on the sale of the purchase of goods. This analysis inexorably leads to the conclusion that consumption of articles of food or drink in hotels and restaurants do not constitute a sale, otherwise the constitutional amendment would not have been necessitated. The contention of Mr. Lalit Bhasin, learned counsel for the Hotels, that the supply of food-stuff and drinks in hotels and restaurants are not in the nature of sale is, therefore, irresistible and unquestionable. Therefore, what calls for consideration is whether there is any other regime established by statute which governs or restricts the prices that can be charged for food-stuffs and drinks supplied to customers in hotels or restaurants. According to learned counsel for the Respondent this regime has been established by The Standards of Weights and Measures Act, 1976 and the Rules framed thereunder(SWM Act in brief).

5. The Gazette of India, Ext., Pt.II, S.1, dated 8.4.1976 contains a concise statement of the Objects and Reasons of the SWM Act. It recounts that India is a signatory to the Metre Convention in the context of which unanimous recommendation came to be made suggesting the replacement of the Standards of Weights and Measures Act, 1956 by a more comprehensive legislation on the subject. The intendment of the Bill was to provide for consumer protection in respect of packaged commodities by providing for the proper indication on the package of net quantity by weight, measures or number, the identity of the commodity contained therein, name of the manufacturer as well as the price of the package. The Preamble to the SWM Act is “to establish standards of weights and measures, to regulate inter-State trade or commerce in weights, measures and the other goods which are sold or distributed by weight, measure or number. ......”. In terms of Section 2(v) “sale” means - ”the transfer of property in any weight, measure or other goods by one person to another for cash or for deferred payment or for any other valuable consideration”. It seems to me that a perusal of the Objects and Reasons of the Bill and the Preamble of the Act cannot but lead to the conclusion that the SWM Act is concerned only with the packaging of articles, as much as the size, number, weight and even the recommended price is required to be clearly stated. As has

already been pointed out the Legislature could have borrowed the definition contained in clause 29-A of Article 366 of the Constitution, but has not considered it expedient to do so.

6. This is also evident on a reading of Section 39 of the SWM Act, which is the fasciculous dealing with commodities in packaged form intended to be sold or distributed in the course of inter-state trade or commerce. It prohibits a person to make, manufacture, pack, sell, or cause to be packed or sold; or to distribute, deliver, or cause to be distributed or delivered; or to offer, expose or possess for sale any commodity in packaged form unless such package bears thereon a definite, plain and conspicuous declaration (i) of the identity of the commodity, (ii) the net quantity, (iii) accurate number, (iv) unit sale price, (v) sale price of the commodity. This Section does not permit any person to sell, distribute or deliver for sale a package containing a commodity which is filled less than the prescribed capacity of such package. Mr. Bhasin was at pains to point out that no prohibition has been imposed by the statute to sell any commodity in excess of the price stated on its package.

7. Section 83 of the SWM Act empowers the Central Government to 'make rules for carrying out the provision' of the Act. In exercise of these powers the Central Government has promulgated "The Standards of Weights and Measures (Packaged Commodities) Rules, 1977 [hereinafter referred to SWM Rules]". Mr. Jayant Nath, learned Senior Counsel for the Union of India and Mr. Midha, learned Standing Counsel for the Government of NCT of Delhi, have drawn attention to sundry definitions contained in the SWM Rules and to Rule 23, all of which are reproduced for ease of reference:-

2 (d)"dealer", in relation to any commodity in packaged form, means a person who, or a firm or a Hindu undivided family which, carries on directly or otherwise, the business of buying, selling, supplying or distributing any such commodity, whether for cash or for deferred payment or for commission, remuneration or other valuable consideration, and includes a commission agent who carries on such business on behalf of any principal, but does not include a manufacturer who manufactures any commodity which is sold or distributed in a packaged form except where such commodity is sold by such manufacturer to any other person other than a dealer.
2 (o) "retail dealer", in relation to any commodity in packaged form, means a dealer who directly sells such packages to the consumer and includes, in relation to such packages as are sold directly to the consumer, a wholesale dealer who makes such direct sale.
2 (q) "retail sale", in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer.
2(r) "retail sale price" means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and where such price is mentioned on the package, there shall be printed on the packages the words[Maximum or Max. retail price].... inclusive of all taxes [or in the form MRP Rs..... inclusive of all taxes.]]
Explanation.--For the purpose of this clause "maximum price" in relation to any commodity in packaged form shall include all taxes local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing forwarding and the like, as the case may be]

2 (w) “wholesale dealer”, in relation to any commodity in packaged form, means a dealer who does not directly sell such commodity to any consumer but distributes or sells such commodity through one or more intermediaries.
Explanation.--Nothing in this clause shall be construed as preventing a wholesale dealer from functioning as a retail dealer in relation to any commodity, but where he functions in relation to any commodity as a retail dealer, he shall comply with all the provisions of these rules which a retail dealer is required by these rules to comply.

23. Provisions relating to whole sale dealer and retail dealers.--(1) No whole sale dealer or retail dealer shall sell, distribute, deliver, display or store for sale any commodity in the packaged form unless the package complies with, in all respects, the provisions of the Act and these rules.
(2) No retail dealer or other person including manufacturer, packer and wholesale dealer shall make any sale of any commodity in packaged form at a price exceeding the retail sale price thereof.]
Explanation.--For the removal of doubts, it is hereby declared that a sale, distribution or delivery by a wholesale dealer to a retail dealer or other person is a “retail sale” within the meaning of this sub-rule.]
(4) Where, after any commodity has been pre-packed for sale, any tax payable in relation to such commodity is revised, the retail dealer or any other person shall not make any retail sale of such commodity at a price exceeding the revised retail sale price, communicated to him by the manufacturer, or where the manufacturer is not the packer, the packer and it shall be the duty of the manufacturer or packer, as the case may be, to indicate by not less than two advertisements in one or more newspapers and also by circulation of notices to the dealers and to the Director in the Central Government and Controllers of Legal Metrology in the States and Union Territories, the revised prices of such packages but the difference between the price marked on the package and the revised price shall not, in any case, be higher than the extent of increase in the tax or in the case of imposition of fresh tax higher than the fresh tax so imposed:

Provided that publication in any newspaper, of such revised price shall not be necessary where such revision is due to any increase in, or in imposition of, any tax payable under any law made by the State Legislatures:

Provided further that the retail dealer or other person shall not charge such revised prices in relation to any packages except those packages which bear marking indicating that they were pre-packed in the month in which such tax has been revised or fresh tax has been imposed or in the month immediately following he month aforesaid:
Provided also that where the revised prices are lower than the price marked on the package the retail dealer or other person shall not charge any price in excess of the revised price, irrespective of the month in which the commodity was pre-packed.]
(5) Nothing in sub-rule (4) shall apply to a package which is not required under these rules to indicate the month and the year in which it was pre-packed.
(6) No retail dealer or other person shall obliterate, smudge or alter the [retail sale price], indicated by the manufacturer or the packer, as the case may be, on the package or on the label affixed thereto.
(7) The manufacturer or packer shall not alter the price on the wrapper once printed and used for packing.]

8. In view of the decisions rendered in Associated Hotels and Northern India Caterers the SWM Act should necessarily have contained a deeming definition calculated to bring within its statutory sweep services and supplies offered even in hotels and restaurants in the context of the catering or lodging services offered on their premises to its customers. However, it does not do so. Nevertheless, Rule 23 of the SWM Rules proceeds to proscribe retail dealers, manufacturers, packers and wholesale dealers from making any sale of a commodity in packaged form at a price exceeding the retail sale price thereof. Significantly, an Explanation has been subsequently inserted in Rule 23(2) declaring that the sale, distribution or delivery by a wholesale dealer to a retail dealer or other person is a retail sale within the meaning of that sub-rule. However, even at this stage the Legislature did not consider it expedient to specifically include supplies made in hotels and restaurants. It is, therefore, logical as well as reasonable to conclude that the Competent Authority refrained from doing so fully mindful of the law laid down by the Supreme Court in Associated Hotels and Northern India Caterers. It is equally logical to assume that the Competent Authority did not do so since it was alive to the fact that no sane man would walk into an expensive and exclusive hotel or restaurant only to purchase food-stuff or drinks otherwise readily available in the market. No doubt, a simple sale may transpire in shops and hotels or in 'Take-Aways' with which the petitions are not concerned. It is in this context that Mr. Bhasin has vehemently argued that the Rules are ultra vires the Act. Since the latter only mandates that prices be mentioned on the package whereas the former travels impermissibly further by stipulating that prices higher than those displayed on the package cannot be charged therefore, Rule 23(2), if it seeks to regulate the supply of food-stuff and drinks in hotels and restaurants, must be struck down.

9. There is a plethora of precedents prescribing the parameters of delegated legislation, such as the Rules before us, which precedents unequivocally state that the frontiers of Rules cannot be wider further or broader than those established by the statute or Act under whose umbrella the Rules have been created. Attention has rightly been drawn by Mr. Bhasin to Bharathidasan University -vs- All-India Council for Technical Education, (2001) 8 SCC 767 in which the Supreme Court has opined that where powers to make rules and regulations are confined by the statute to certain limits, rules and regulations which are not within those limits must be ignored by the Court.

10. Mr. Jayant Nath has relied on the definitions and provisions of the SWM Act to contend that the supply of mineral water in hotels and restaurants is fully covered by the said Act and Rules. He has placed reliance on paragraphs 36 to 41 of ITC Ltd. -vs- Commissioner of Central Excise, New Delhi, (2004) 7 SCC 591. The Apex Court has observed that the “SWM Act as well as the Packaged Commodities Rules have been enacted to protect the consumers who are entitled to pay only such price as has been printed thereon. The purpose of printing the MRP on cigarette packages is to achieve a standardisation of prices throughout the country and to inform consumers of the appropriate price of the product. There is no scope for “underdeclaration” because the consumer can insist on the retailer abiding by the printed MRP. Provisions for penalties under the Act on the retailer ensure this. It is not open to the retailer who may be proceeded against for selling above the printed MRP to contend that it was incorrect or false, nor can the retailer defend any violation of the printed MRP by asking for an enquiry into its reasonableness”. The Apex Court had also noted that in the event that the retailer or manufacturer violates Rule 23(2) of SWM Rules “he is liable to be proceeded against and may be fined upto an extent of Rs.2000/- per package under Rule 39 of the Packaged Commodities Rules and Section 67 of the SWM Act”. These observations were

made without any reference to Associated Hotels and Northern India Caterers; the assumption was that the transaction was a 'sale of goods'. The question before the Court centred around the rate at which excise duty was chargeable on packaged cigarettes. It was not controverted that the engagement was in the nature of a sale between a customer and a dealer defined under the SWM Act. Most importantly, the vires of the Rules had not been assailed on the grounds that they travelled beyond the Act and were, therefore, ultra vires to it. This decision is, therefore, of no avail to the Respondents.

11. Mr. Nath further contended that even if the Sale of Goods Act was not applicable to the transactions in question, they fall within the concept of distribution and delivery as defined in Section 2 of the Act. This argument flies in the face of the ratio of Associated Hotels and Northern India Caterers. For this very reason a decision in Mumbai Bidi Tambaku Vyapari Sangh -vs- Union of India, 2003(4) Bom. C. R 300 : AIR 2003 Bombay 153 and T.T. Pvt. Ltd. -vs- Union of India, AIR 1991 Karnataka 79 are of no avail.

12. In India Photographic Co. Ltd. -vs- H.D. Shourie, (1999) 6 SCC 428 the company was selling Kodak films without the price being printed on the packages containing the films. The contention was that Rule 6(2) of SWM Rules were applicable as the photographic films were being sold by the distributor and not by the manufacturer. It was in these circumstances that the Supreme Court observed that acceptance of "such a plea would result in frustrating the provisions of the 1986 Act and thereby encourage the retailers or distributors of foreign-made goods to charge prices according to their convenience without letting the consumer know the actual price of the commodity". In all humility their Lordships have articulated a summation of the SWM Act; it enjoins a declaration of weight, measure, number and price. It imposes punishment where a declaration has not been made or has been incorrectly made.

13. Mr. Midha has supported the contention of Mr. Nath and has also taken me through the provisions of the SWM Act and the Rules. He emphasised, in particular, on the definition of sale contained in the SWM Act which, as has already been seen, envisages a transfer of property. This is conspicuously absent in the case of service or supply of eatables and drinks by hotels and restaurants. Mr. Midha has also laboured on Rule 5 of the SWM Rules and the fact that the commodities mentioned in the Third Schedule included aerated soft drinks, mineral water and drinking water. This may be so but the sweep and intendment of the SWM Act and Rules are palpably obvious from the fact that in respect of these commodities it is the packaging thereof which has been specifically dealt with. A reading of Section 33, to which my attention was invited by Mr. Midha, fortifies the conclusion that the Act is primarily concerned with the display of weight, measure, number, MRP etc. on the packaging and does not travel further to punish the charging of a price in excess of the stated MRP. Mr. Midha further adverted to the practice adopted in hotels and restaurants including the opening of the bottle before its service and availability of other drinking water at no charge. These factors are irrelevant to the exercise of interpretation of a statute. Similarly, Mumbai Bidi Tambaku Vyapari Sangh, on which reliance has been placed by Mr. Midha, does not further the cause of the Respondents since this Judgment would be applicable if there was an ambiguity in the statutory provisions. If that were so, an interpretation which would further the cause of consumer protection would indubitably be preferred by the Court.

14. It is also relevant to note that Entry-50 of the Union List in the Constitution of India covers “establishment of standard of weight and measure” whereas price control is explicitly covered by Entry-34 of the Concurrent List. Packaging and pricing must, therefore, not be treated as legal synonym, which is, in fact, the essence of the Respondents arguments.

15. This discussion would not be complete without some reference to the decisions of the State Commission : Delhi under the Consumer Protection Act, 1986 ('CP Act' in brief) where the charging of prices beyond the MRP have been held to violate the statute. I had renotified these petitions for arguments on 2.3.2007. Mr. Bhasin, Mr. Sachtey and Mr. Midha have, however, stated that for the decision in these petitions the CP Act would not have to be considered. Prima facie, however, it appears to me that learned counsel for the parties had obviously not brought to the notice of the Commission the decisions of the Supreme Court in Associated Hotels and Northern India Caterers which leave no room for argument that supply or service of eatables and drinks in hotels and restaurants does not partake of the nature of a 'sale' in common legal parlance. Hence, when a person goes to a hotel or restaurant and while he is there orders and consumes such commodities this does not fall within the definition of consumption as contained in Section 2(d) of the CP Act. Forcing the provisions of CP Act in such circumstances would run counter to the law lay down in Associated Hotels and Northern India Caterers. These observations are obviously made en passant.

16. In the above analysis I hold that charging prices for mineral water in excess of MRP printed on the packaging, during the service of customers in hotels and restaurants does not violate any of the provisions of the SWM Act as this does not constitute a sale or transfer of these commodities by the hotelier or Restaurateur to its customers. The customer does not enter a hotel or a restaurant to make a simple purchase of these commodities. It may well be that a client would order nothing beyond a bottle of water or a beverage, but his direct purpose in doing so would clearly travel to enjoying the ambience available therein and incidentally to the ordering of any article for consumption. Can there by any justifiable reason for the Court or Commission to interdict the sale of bottled mineral water other than at a certain price, and ignore the relatively exorbitant charge for a cup of tea or coffee. The response to this rhetorical query cannot but be in the negative. Although the vires of Rule 23 have been assailed, I do not find it necessary to answer that challenge since the provision relates to sales between dealers and neither the hotels and restaurants of the one part and customers of the other falls within this categorisation.

17. The argument addressed by Mr. Bhasin would also enure to the benefit of Petitioner/Restaurateur in WP(C) No.9528/2003 and WP(C) Nos.13775-14072/2005.

18. These Petitions are allowed in the above terms. There shall, however, be no orders as to costs. All pending applications also stand disposed of.

Sd/-
VIKRAMAJIT SEN,J