
(2014) 12 RAJ CK 0206

In the Rajasthan High Court

Case No : Civil Writ Petition Nos. 3233, 3235, 3236, 3237, 3238, 3242, 3243
and 3250/2014

Ambuja Cements Ltd.

APPELLANT

Vs

The State of Rajasthan

RESPONDENT

Date of Decision : 19-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Rajasthan Value Added Tax Act, 2003 — Section 20, 20(1), 20(3), 20(4), 3
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 19

Citation : (2014) 12 RAJ CK 0206

Hon'ble Judges : Sunil Ambwani, Acting C.J.;Prakash Gupta, J

Bench : Division Bench

Advocate : S. Ganesh, Senior Advocate, U.A. Rana, Dinesh Mehta and Lalit Pareek, Advocate for the Appellant; Punit Jain, V.K. Mathur and Falgun Buch, Advocate for the Respondent

Judgement

Sunil Ambwani, Actg. C.J.

1. We have heard learned counsel appearing for the petitioners and learned counsel appearing for the respondents-State of Rajasthan.

2. The petitioner No. 1 is a Public Limited Company registered under the Indian Companies Act, 1956 with its registered office at Ambujanagar, Taluka Kodinar, District Ghirsomnath, Gujarat. The petitioner No. 2 is shareholder and Vice-President of the Company.

3. In all these writ petitions, the petitioners have challenged the order dated 7.4.2014 and the demand notice of the same date served on the petitioners on 23.4.2014, whereby a total demand of Rs. 34,30,44,244/- (including interest) has been raised, by way of enforcement of the undertaking given by the petitioner-Company, pursuant to the Notification dated 22.2.2002. The order dated 7.4.2014 passed by the Assistant Commissioner, Commercial Taxes Department, Beawar (Rajasthan) has been challenged on the grounds that the

undertaking is not enforceable against the petitioner-Company and that the petitioner-Company is not liable to pay any amount under the said undertaking. The petitioner-Company has also challenged the demand as patently without jurisdiction and without authority of law, as well as on the ground that the impugned order is not an order passed under the provisions of the Rajasthan Value Added Tax Act, 2003. The petitioner-Company has also challenged the Notification dated 22.2.2002, under which the undertaking was given. On these grounds, the writ petitions have been filed under Article 226 of the Constitution of India, without availing the statutory remedies of appeal and a second appeal to the Rajasthan Tax Board.

4. Brief facts giving rise to these writ petitions are that in the year 1996, the predecessor of the petitioner-Company, namely, DLF Cement established a new cement manufacturing unit at Rabriyabas at a total cost of Rs. 400 crores and commenced production on 10.9.1996. A Rajasthan Sales Tax New Incentive Scheme for Industries, 1989 (for short, the Incentive Scheme of 1989") was issued by the State Government vide Notification dated 6.7.1989, providing for grant of partial exemption of Rajasthan Sales Tax (RST) and also Central Sales Tax (CST) to the new industrial undertakings, subject to fulfilment of stipulated conditions. Under the Incentive Scheme of 1989, before or after the amendment dated 10.12.1996, the benefit available to a "Large Scale Cement Unit" was and continued to be 25% of the sales tax liability. The petitioner-Company applied, on which, the Eligibility Certificate was issued to it for grant of incentive to the extent of 25% for 11 years, as it had commenced commercial production before the amendment dated 10.12.1996. The petitioner-Company availed the incentive of 25% of the sales tax liability from 27.3.1997 to 21.2.2002.

5. The petitioner-Company challenged the Eligibility Certificate dated 25.3.1998 granting exemption to the extent of 25% in RST and 75% in CST. The Rajasthan Tax Board by its order dated 29.3.2000 remanded the case back to the State Level Screening Committee (SLSC) for reconsideration of the review petition filed by the petitioner-Company. On 9.10.2001, the SLSC rejected the review petition of the petitioner-Company.

6. M/s. Binani Cements set up a new cement manufacturing unit in 1997 at Pindwara, Rajasthan. It claimed 75% RST exemption. By judgment and order dated 2.7.2001, the Rajasthan High Court directed the respondents-authorities to grant 75% RST exemption to M/s. Binani Cements treating it to be a "prestigious unit" covered by entry-IV of Annexure-C to the Incentive Scheme of 1989. The order was challenged by the State of Rajasthan in the Supreme Court by way of filing SLP.

7. The order of the High Court directing that M/s. Binani Cements may be allowed exemption to the extent of 75% created an imbalance in the market giving undue advantage to M/s. Binani Cement over other seven manufacturing Companies. Since the Supreme Court in the SLP filed by the State of Rajasthan did not grant any stay order, M/s. Binani Cements was entitled to and started

availing incentive of 75%. The petitioner-Company and other Cement Companies in the State of Rajasthan, in the special situation, made representations to the State Government to remove the disparity, on which a Notification dated 22.2.2002 in the case of the petitioner-Company and other similar special Notifications were issued in respect of other large scale cement units, giving the similar incentives to such units, on furnishing the following specific undertaking:--

"3. That the company shall have to give an undertaking in writing to the effect that it will deposit the benefit availed by it exceeding 25% of its tax liability, in case the judgment of the Rajasthan High Court in the matter of M/s. Binani Cement is modified as per any order, judgment etc. issued by the Supreme Court of India."

8. An undertaking in terms of Clause-3 of the Notification dated 22.2.2002 was given by the petitioner-Company on 19.3.2002 unequivocally to repay the additional benefit claimed in case of public contingency mentioned therein. The undertaking given by Shri N.P. Ghuwalewala on 19th March, 2002 is quoted below:--

"Whereas, the Board for Infrastructure Development & Investment (BIDI) in its meeting held on 10th January, 2002 has decided to allow the benefit of Exemption of sales tax to the extent of 75% of Rajasthan Sales Tax to M/s. Ambuja Cement Rajasthan Ltd. (formerly known as M/s. DLF Cement Ltd.) and the decision has been given effect to vide Notification No. F.4(10) FD/Tax-Div./02-138 dated 22.2.2002 issued by the Finance Department, Government of Rajasthan under section 15 of the Rajasthan Sales Tax Act, 1994, subject to such Orders as may be passed by the Hon''ble Supreme Court in respect of SLP filed by the Rajasthan State Government against the Order/judgment of the Hon''ble High Court of Rajasthan, Jodhpur dated 2.7.2001 in the matter of Commercial Taxes Officer v. Binani Cement Ltd. & Anr. The Company in the premises undertakes as follows:

In consideration of the above, I Narendra P. Ghuwalewala S/o late Shri Purshottam K. Ghuwalewala, Managing Director of M/s. Ambuja Cement Rajasthan Ltd. duly authorized by Board of Directors of the company in this regard, do hereby undertake that in the event any judgment passed by Hon''ble Supreme Court in the above mentioned SLP overrules the order/judgment passed by the Hon''ble High Court of Rajasthan, Jodhpur, M/s. Ambuja Cement Rajasthan Ltd. will pay without demur or loss to the exchequer, the sum equal to the difference between tax benefit actually availed and tax as determined by the Hon''ble Supreme Court in respect of the period during which the said differential benefit has been availed by Ambuja Cement Rajasthan Ltd. The payment of difference of tax as availed (75% instead of 25%) as herein referred, shall however be without prejudice to the rights & remedies available under the law to Ambuja Cement Rajasthan Ltd.

In the event that exemption under Rajasthan Sales Tax Act to the extent of 75%

is revoked by the Hon"ble Supreme Court in the above referred matter of Binani Cement Ltd., pursuant to the SLP filed by the Rajasthan State Government against the order/judgment of the Hon"ble High Court of Rajasthan, Jodhpur dated 2.7.2001 in the above matter, then the exemption as originally availed upto 25% by M/s. Ambuja Cement Rajasthan Ltd. (formerly as DLF Cement Ltd.) vide eligibility Certificate dated 29.3.1997 w.e.f. 27.3.1997 shall stand restored indisputably."

9. M/s. Ambuja Cement Rajasthan Limited (ACRL) was declared a sick industrial company under The Sick Industrial Companies (Special Provisions) Act, 1985, on which by order dated 20.6.2001, the Board for Industrial Financial Reconstruction (BIFR) commenced proceedings for revival of the Company. A scheme for revival of ACRL, a sick company, was sanctioned by the BIFR vide its order dated 7.1.2004, having considered the cut- off date as 30.6.2002. The BIFR appointed ICICI Bank as Monitoring Agency, to monitor the progress of the implementation of the Sanctioned Scheme-2004 (SS-04), which provided the merger & amalgamation of the sick company with M/s. Gujarat Ambuja Cement Limited (GACL); the employees of the ACRL have to be taken over by the GACL; cement unit of ACRL to function as a division of GACL; GACL to contribute Rs. 217.50 crores towards rehabilitation of ACRL division and also to undertake and to arrange for fresh borrowings of Rs. 170 crores to be utilized for retiring the old debts; and reliefs and concession from the Government of Rajasthan (GOR) and Rajasthan State Electricity Board (RSEB). The cost of the Scheme provided for internal accruals at Rs. 5543 lacs, borrowings for repayments to Banks based on the corporate guarantee/comfort letter issued by GACL of Rs. 17000 lacs and short fall funded/to be funded by GACL at Rs. 21750 lacs, total Rs. 44293 lacs.

10. An application was made by ACRL to BIFR to carry out the amendments in three paragraphs, of which the relevant paragraph of SS-04 reads as follows:--

"Para 7.1(ii), page-7 of the SS-04

Government of Rajasthan (GOR), vide their notifications dt. 24.10.03 & 12.11.03 i.e. prior to sanction of the scheme, had agreed to extend the sales tax incentives @ 75% of Rajasthan Sales Tax (RST) on the sale to be made by transferred unit upto 26.03.08, which was not incorporated in the SS and instead the word "to consider" has been prefixed in respect of this relief, which leaves a scope to GOR for reconsideration of the decision already taken by them. The company requested the Board to delete the word "to consider" by the word "to grant" for this period. The MA (ICICI) has also recommended for issuance of this amendment by the Board."

11. The BIFR in its order dated 20.11.2006 noted as follows:--

"The Bench, on consideration of the facts, merits of the case, materials on record and also the submissions made by the concerned agencies present in the today"s hearing, notes that the merger of the company M/s. ACRL with the healthy company M/s. GACL has already taken place w.e.f. 1.6.2004 and thereby, the

sick company M/s. ACRL has lost its identity. The Bench further notes that the prescribed provisions of the SS-04 have been substantially implemented by the concerned agencies, including that of by the new/incoming promoter(s) and also by the GOR. As the sick company "M/s. Ambuja Cement Rajasthan Ltd." (ACRL) has lost its identity and ceases to be a "sick industrial company", in terms of the prescribed provision(s) of the Act, the Bench, hereby, discharges the sick company "M/s. Ambuja Cement Rajasthan Ltd." (ACRL) from the purview of the SICA and issues the following further directions for compliance by the concerned agencies:--

i) ICICI is hereby relieved of the responsibility of the MA.

ii) The unimplemented provision(s) of the SS-04, for the unexpired period of the scheme, would remain in full force and would continue to be implemented by the concerned agencies and the same would be monitored by the company. The GOR would also consider granting reliefs in terms of para (s) 7.1.(ii) and 7.1(v) of the SS-04.

iii) The Special Director, appointed by the Board on the company's "Board of Directors" (BOD), if any, would stand discharged with immediate effect.

iv) The company would complete the necessary formalities with the concerned ROC, as may be required."

12. It is to be noted from the order of BIFR dated 20.11.2006 that the merger became effective on 1.6.2004, after which the sick company (ACRL) lost its identity. The provisions of SS-O4 were substantially implemented by the concerned agencies and also by the Government of Rajasthan. The BIFR consequently discharged the sick company-M/s. ACRL from the purview of SICA and issued orders that the unimplemented provisions of SS-O4 for the unexpired period of scheme, would remain in full force and would continue to be implemented by the concerned agencies and which could be monitored by the company. The Government of Rajasthan would consider granting of reliefs in terms of Paras 7.1(ii) and 7.1 (v) of the SS-O4. Para 7.1(ii) of SS-O4, quoted above, provided that the Government of Rajasthan to consider to extend the sales tax incentive @ 75% of the RST on the sales to be made by the transferred unit upto 26.3.2008.

13. The BIFR issued a corrigendum dated 27.5.2004 as follows:--

14. On 29.6.2004, the petitioner-Company intimated the Commercial Taxes Department about the amalgamation of ACRL with the petitioner-Company, with the request of issuing a fresh Eligibility Certificate. On 25.4.2005, the petitioner-Company addressed a letter to the Principal Secretary, Government of Rajasthan pointing out that in view of the sanction of revival scheme by the BIFR, the undertaking dated 19.3.2002 submitted by the petitioner-Company does not continue to remain operative or relevant, after the sanction of the revival scheme by the BIFR. The petitioner-Company did not receive any reply to the letter, on

which a letter was addressed to the Chief Minister of Rajasthan on 15.6.2005 again specifically stating that the undertaking dated 19.3.2002 had become infructuous, after the BIFR order. Once-again, as no response was received to this letter also, on 7.1.2005, the petitioner-Company again addressed a letter to the Chief Secretary, Government of Rajasthan stating that the undertaking given by it had become infructuous, after the order of the BIFR.

15. The Rajasthan Value Added Tax Act, 2003 (for short, "the Act of 2003") came into force on 1.4.2006 repealing the Rajasthan Sales Tax Act, 1994 (for short, "the Act"). On the enactment of the Act of 2003, the State Government issued a Notification dated 31.3.2006, under which the exemption from RST and CST, which was in existence prior to 1.4.2006 was converted into deferment benefit and was continued in terms of the Notification. The petitioner-Company filed an application, pursuant to the new provisions for availing benefit of tax deferment, which was granted with effect from 1.4.2006 for a period of six years for deferment of VAT. An amended Eligibility Certificate was issued to the petitioner-Company on 21.6.2006 granting the tax deferment benefit, on which the petitioner-Company started recovering the full amount of RST and CST from its customers and deferred payment of portion thereof to the Tax authorities in terms of the Notification dated 31st March, 2006 read with amended Eligibility Certificate dated 21.6.2006.

16. The State Government issued a Notification dated 9.3.2007, giving option to the assessee to whom tax deferment benefit was granted, permitting them to pay the present discounted value of the deferred amount, computed, as set out in the Notification, in full and final settlement of the total deferred amount payable by the assessee. This Notification was subsequently amended on 24.8.2007, whereby the computation of the value of the deferred amount was amended/modified.

17. The petitioner-Company wrote to the Director, Commercial Taxes Department on 3.9.2009 giving full particulars of the prepayment, which was to be made by the petitioner-Company under the Notification for tax deferment benefit, which was amended on 24.8.2007. Since no objection was received from the Director, Commercial Taxes Department, the petitioner-Company made prepayment in September, 2009 and communicated the pre-payment made to the Commissioner, Commercial Taxes on 10.9.2009 alongwith the copies of the challan/receipts. Once-again, no objection was received from the Commercial Taxes Department and thus, in accordance with Clause-4 of the Notification dated 9.3.2007, which expressly provides that pre-payment made by the assessee in terms of the Notification would operate as a full and final settlement of the entire deferment amount payable by the assessee to the Department, the petitioner-Company discontinued making payment of instalments of the deferred tax. It is stated that to the knowledge of the petitioner-Company, no objection or demand for payment of deferred amount was thereafter received from the VAT authorities, which according to the petitioner, has resulted in complete discharge/

settlement of petitioner-Company's entire tax deferred liability.

18. On 19.2.2004, the Supreme Court rendered judgment in Commercial Tax Officer, Rajasthan Vs. Binani Cements Ltd. and Another, holding that in the context of the provisions of the Incentive Scheme as amended with effect from 10.12.1996, M/s. Binani Cements Ltd. was entitled to claim RST exemption to the extent of 25% and not 75%. The Supreme Court held that Annexure-C to the Notification, which made the Scheme for tax incentive applicable to the new industrial units, industrial units going in for expansion or diversification and sick units provided for quantum of sales tax exemption under the new incentive scheme. Item 1-E introduced by an amendment in 1996 to the Scheme is subject specific provision. The amendment removed "new cement industries" from non-eligible Annexure-B and placed it into Annexure-C amongst eligible industries. It classified the cement units for eligibility of tax exemption into three categories, namely, small, medium and large. The said categories are comprehensive whereby small and medium cement units have been prescribed to have maximum FCIs of Rs. 60 lacs and Rs. 5 crores, respectively and large to be over FCI of Rs. 5 crores. The maximum ceiling for large cement units was purposefully left open and thereby reflects that, intention clearly was to provide for an all-inclusive provision for new cement units so as to avoid any ambiguity in determination of appropriate provision for applicability to new cement units to seek exemption, which left no doubt that what is specific has to be seen in contradistinction with the other items/entries. The provision more specific than the other on the same subject would prevail and therefore, against items 1, 4, 6 and 7, which deal with units of all industries and not only cement, item 1E restricted to only cement units would be a specific and special entry and thus would override the general provision.

19. The Supreme Court held that M/s. Binani Cements was eligible in Item 1E as a large new cement unit in accordance with its FCI being above Rs. 5/- crores. The judgment of the Rajasthan High Court was set aside and the appeal filed by the Revenue was allowed.

20. On 21.2.2014 and 24.2.2014, notices were issued by the Assistant Commissioner, Commercial Taxes demanding the differential amount under RST Act for the years 2001-2002 to 2005-2006 and under the VAT Act for the years 2006-07 to 2008-09, on which the Writ Petitions No. 1563/2014 and 1564/2014 were filed challenging the demand notices. The writ petitions were disposed of on 26.2.2014 directing the respondents to consider the petitioner-Company's submissions and to pass orders thereafter.

21. The assessment orders-cum-demand notices dated 7.4.2014 were passed by the Assistant Commissioner, Commercial Taxes confirming the demands raised under the RST Act for the periods from 2001-02 to 2005-06 and the VAT Act for the periods from 2006-07 to 2008-09. The petitioners have challenged the assessment orders and demand notices by way of filing these writ petitions.

22. An application was filed by the petitioner-Company before the Commercial Taxes authorities for rectification of the assessment orders in respect of the deferment period (2006-07 to 2008-09) as the said orders did not take into consideration the per-payments made by the petitioner-Company, in terms of the Notifications dated 9.3.2007 and 24.8.2007.

23. On 29.5.2014, interim orders were passed by the Court requiring the respondents to consider and dispose of various contentions raised in the petitioner-Company's application for rectification of mistakes, on which, on 13.6.2014, the rectified assessment orders were passed in respect of the deferment period, making certain corrections and disposing of the contentions raised by the petitioner in its application for rectification of the original assessment order dated 7.4.2014. Amendment applications were filed by the petitioner-Company challenging the legality and validity of the rectified assessment orders dated 13.6.2014, which were allowed on 25.6.2014.

24. In the aforesaid backdrop, the submissions have been made in two parts, namely, for exemption period from 2001-02 to 2005-06 (RST) and for deferment period from 2006-07 to 2008-09 (VAT). Learned counsel for the petitioners has also made submissions in respect of demand of interest.

25. It is submitted that the orders passed by the BIFR on 7.1.2004 sanctioning the rehabilitation scheme (SS-04) clearly provided that the State of Rajasthan would grant the petitioner-Company sales tax exemption to the extent of 75%. The grant of this benefit was an integral part of the rehabilitation scheme, on which the rehabilitation was worked out, as also the debt service coverage ratio, for making the negative net worth of the Company positive. If the Company was required to pay back the GOR 50% of the exemption amount, the rehabilitation scheme would have become completely meaningless. The petitioner-Company's position after the sanction of the rehabilitation scheme was to be governed only with reference to the rehabilitation scheme and not the Notification dated 22.2.2002 and the undertaking dated 19.3.2002. The petitioner-Company was thus not liable to pay the differential amount of sales tax exemption to the extent of 50% to the State Government. The petitioner made its position clear by writing letters to the Chief Secretary of the Government of Rajasthan and the Chief Minister of Rajasthan, to which no replies were given. No objections were raised by the State Government nor it filed any appeal against the order of the BIFR dated 27.5.2004, even after the specific information given to it that by the reason of BIFR order, the undertaking given by the petitioner-Company had become infructuous. The State of Rajasthan by a silence and acquiescence to the petitioner's letters dated 15.6.2005 and 7.7.2005 effectively put the petitioner-Company in a position whereby during the relevant periods, it was absolutely disabled from recovering the deferred amount and making it impossible for the petitioner-Company, by raising demand on 7.4.2014, to recover deferred amount from its customers. The petitioner has relied on the judgments of the Supreme Court in West Bengal Hosiery Association and Others Vs. State of Bihar and

Another, , British Physical Lab India Ltd. Vs. State of Karnataka and Another, and Indian Cement and Others Vs. State of Andhra Pradesh and Others, .

26. For the deferment period (2006-07 to 2008-09), it is submitted that the Notification dated 22.2.2002 was issued under section 15 of the Act, providing for grant of exemption. Under the old Act, there was no statutory provision for grant of deferment of tax. It is submitted that the Notification dated 22.2.2002 and the undertaking dated 19.3.2002 could apply to a situation of grant of exemption. It cannot apply to a situation of grant of deferment and in which the petitioner-Company had after collecting the amount of tax from the customers ultimately paid it over to the Revenue. After the deferment of the tax and its payment to the State Government under the Notification, which provided for payment before the period of deferment is over, the differential of 50% of the tax exemption amount could not be demanded or recovered from the petitioner.

27. It is submitted that where the assessee had availed the benefit of deferment on a larger amount, then the amount, which the State Government seeks to recover and for which there is no machinery or mechanism to enable the State Government to work out and determine the amount, is not payable. The additional benefit availed by the assessee is only the interest value if at all of the additional amount of deferment amount. The Notification dated 22.2.2002 or the undertaking does not provide for any specific rate of interest for raising a demand in such a situation of deferment. The rate of interest has no application to the present case. Neither the Notification nor the undertaking contain any machinery or mechanism for computing/determining and raising a demand against the petitioner in case of deferment. In absence of machinery provisions, a tax statute cannot be made applicable to a particular situation and if the machinery provisions break down then the charge of levy of tax itself fails. For this proposition, the petitioner has relied on the decisions in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, and PNB Finance Ltd. v. CIT (2008 (13) SCC 94).

28. It is further submitted that the condition No. 4 of the Notification dated 9th March, 2007 for deferment of the tax specifically and categorically provides that on the making of prepayments in terms of the Notification, the liability of the dealer shall stand discharged and consequently, the Company is not liable to make any payment and is discharged from all its liabilities.

29. It is submitted that the interest by the tax authorities can be demanded strictly in conformity with the provisions of the statute. If the statute does not clearly or expressly authorize for raising the demand of interest, then no interest can be demanded, even if it is considered to be equitable to pay interest. Reliance has been placed on the decisions of the Supreme Court in Grahak Sanstha Manch and others Vs. State of Maharashtra, , India Carbon Ltd. etc. Vs. State of Assam, and Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, .

30. It is submitted that the only statutory provisions relating to interest are provided in Section 58 of the Act and 55 of the Act of 2003. Both sections permit demand of interest to be raised if it is crystallized tax demand and thereafter, the demanded amount had not been paid within 30 days of the service of the notice. In the present case, the demand was raised for the first time by order dated 7.4.2014, which was served on the petitioner-Company on 23.4.2014 and consequently, no demand can be said to have been raised for any period prior to 7.4.2014. In case the cause of action for the sale tax authorities arose from the judgment of the Supreme Court in M/s. Binani Cement's case (supra) pronounced on 19.2.2014, prior to that, they had no claim. The demand of interest is thus wholly unjustified.

31. Lastly, it is submitted that both the Notification dated 22.2.2002 and the undertaking dated 19.3.2002 provide for payment of differential tax exemption amount of 50% from the petitioner and not of any other amount either by way of interest or otherwise. The said Notification and the undertaking constitute only the source of authority or justification in law for raising the demand and do not authorize the recovery of any amount by way of interest.

32. Learned counsel appearing for the State-respondents submits that it is not in dispute that for the period from 27.3.1997 to 21.2.2002, the petitioner-Company was granted and it availed incentive of only 25% of the sales tax liability, under the Eligibility Certificate dated 29.3.1997 issued under the Incentive Scheme of 1989, which was even after remand by the Tax Board on 29.3.2000 maintained by the SLSC in a review on 9.10.2001. The claim exceeding 25% was never allowed to the petitioner-Company under the Incentive Scheme of 1989. The order dated 9.10.2001 of SLSC was not challenged by the petitioner.

33. It is also not in dispute that the exception of 75% was not granted to the petitioner-Company under the Incentive Scheme of 1989, but it was given under a separate special Notification dated 22.2.2002 issued in exercise of the powers vested under section 15 of the Act. It was an independent exemption, subject to the conditions laid down therein, by way of giving parity with M/s. Binani Cements. The petitioner-Company voluntarily chose to abide by the Notification dated 22.2.2002 and gave an undertaking in compliance thereof, linking 75% exemption with the fate of the judgment in the Special Leave Petition filed by the State of Rajasthan against the judgment of the Rajasthan High Court. The Notification dated 22.2.2002 was issued to maintain parity. As a result of allowing SLP by the Supreme Court vide judgment dated 19.2.2014, the undertaking given by the petitioner-Company came into force and that the contention of the petitioner-Company that it may be allowed exemption, despite the judgment of the Supreme Court dated 19.2.2014, will result into reverse discrimination. Reliance has been placed on the judgments in Duncan Industries Ltd. and Another Vs. Union of India (UOI), , Shyam Telelink Ltd. now Sistema Shyam Teleservices Ltd. Vs. Union of India (UOI), , City Montessori School Vs. State of Uttar Pradesh and Others, and New Bihar Biri Leaves Co. and Others Vs.

State of Bihar and Others, in which it was held that a person cannot question the terms of an agreement after unconditionally accepting the terms and acting and thereby benefiting from the same. The maxim "qui appriobat non reprobatur" (one who approbates cannot reprobate) embodied in the English common law, has been accepted in India. It is akin to the doctrine of benefits and burdens, which at its most basic level postulates that a person taking advantage under an instrument, which both grants a benefit and imposes a burden, cannot take the former without complying with the latter.

34. It is submitted by the respondents that if the undertaking had not been given, the petitioner-Company would not have got benefit from the Notification dated 22.2.2002 and would have been entitled to only an incentive of 25% of tax liability under the Incentive Scheme of 1989. Having enjoyed the benefits under the said Notification, he cannot question the conditions imposed for such grant.

35. The respondents have denied that the orders of the BIFR would in any manner take away the effect of the undertaking, which had linked the petitioner's case with M/s. Binani Cements. It is submitted that the incentive was only upto 26.2.2006 i.e. for a period of 9 years until the tax deferment scheme came into force. The BIFR in its order dated 20.6.2002 had directed the ICICI Bank (Operating Agency) to formulate the rehabilitation scheme, in which the OA would not consider any reliefs and concession from any Government agency in the projected cash flow unless it has been specifically agreed to by them. On 6.9.2002, the petitioner requested for concession from the State Government in the rehabilitation scheme, which included the expansion of incentive upto 31.3.2010. The OA has proposed some amendments in the draft scheme. In the meeting dated 31.3.2003, the State Government sought time for taking a view on the reliefs/concessions sought from the State Government. By letter dated 30.4.2003 (page 33A of the additional documents), the consent to the proposal was declined by the State Government and the extent to which the Government was agreeable was reflected in the statutory Notification dated 24.10.2003 (page 34 of the additional documents) issued in exercise of the powers under section 15 of the Act, by which only the period of incentive was extended by two years from 26.3.2006 to 26.3.2008. The request to relieve the Company from M/s. Binani linkage was rejected. On 12.11.2003 (page 36 of the additional documents), the State Government had agreed to consider for extension of benefit for a further period of three months upto 30.6.2008.

36. It is submitted that the Sanctioned Scheme (SS-04) did not relieve the Company of the "Binani condition". It only provided in para 7.1(ii) to consider providing sales tax incentives @ 75% of RST (i.e. the company shall be only liable to pay sales tax at the rate of 25% of the normal sales tax payable) on the sales to be made by the transferred unit for a period upto 30th June, 2008 effective from the cut off date. The State Government was only required to consider for such relief. No such relief was actually granted.

37. The Company by its letter dated 7.4.2004 had approached the BIFR for

modifications stating that the State Government had already issued Notification dated 24.10.2003 and therefore, there was no need for a consideration from the cut off date upto 30.6.2008 and hence, Clause-7.1(ii) be modified. It was further submitted that in view of the letter dated 12.11.2003, the consideration would be only for a period after what had already been notified since the letter cannot be a modification of a statutory Notification. There was no mention in the request for modification regarding M/s. Binani linkage. By the amendment, directed by the BIFR, issued without giving notice to the State Government, there was no change. The amendment only clarified the amending facts situation by way of a corrigendum dated 27.5.2004. The State Government had already given consent by the Notification dated 24.10.2003 and the letter dated 12.11.2003 and thus, the amendment was not necessary.

38. It is submitted that the deferment Notification was issued under section 20(3) of the Act of 2003. This benefit was available only to those persons, who were availing benefit under the existing scheme. On 20.11.2006, the proceedings before the BIFR were closed. The order, however, referred to the previous proceedings including the amendment dated 27.5.2004. The final directions contained in the order stated that the Government of Rajasthan would also consider the granting of reliefs in terms of Paras 7.1(ii) and 7.1(v) of the SS-04. There was no concession or relief given to the petitioner. The modification proposed was already granted. The other conditions were not modified. The period of incentive, which was limited to 26.3.2006, was extended by another two years upto 26.3.2008. Nothing further was either agreeable to or required to be considered for relieving the Company of the Binani linkage. The extension was already considered and was granted upto 30.6.2008.

39. It is submitted that the petitioner-Company was aware of the contingent liability and was bound by its undertaking to pay as the contingency had arisen. The financial statements of the petitioner-Company recognize the existence of contingent liability for the year 2006-07 onwards. The petitioner never made any effort to be impleaded in the Appeal preferred in the Supreme Court by the Commercial Taxes Department against the judgment of the Rajasthan High Court in the matter of M/s. Binani Cements.

40. So far as the deferment scheme is concerned, it is stated that the deferment scheme for the period 2006-07 onwards was applicable under the Act of 2003 to only those units, which were enjoying incentive or deferment in the previous years, to switch over to the deferment scheme for the remainder of the period of the incentive to the extent of the unavailed EFCI. The Notification dated 31.3.2006 to that effect was issued under section 20(3) of the Act of 2003. The extent of the deferment available to an industrial unit was availing a benefit under a special Notification issued by the State Government, which in case of the petitioner was issued on 22.2.2002. The claim was dependent upon the extent of the incentive enjoyed under the special Notification. Clause (6) of the deferment notification provided:

"(6). The percentage of deferment of tax in the extended period shall be equal to the extent of the percentage of deferment of tax in the year immediately preceding such extension."

41. In view of Clause (6) of the Notification dated 31.3.2006, the extent of the deferment permissible in any year was dependent upon the extent of the incentive available in the preceding year i.e. in the assessment year 2006-07. The Notification providing for deferment under Clause (6) thus was dependent upon and created a linkage between the incentive Notification dated 22.2.2002 and the deferment Notification dated 31.3.2006. The petitioner itself relied upon the Notification dated 22.2.2002 and on that basis, he filed application in Form-A, which specifically referred to the Notification dated 22.2.2002. In the Notification dated 22.2.2002 (clause-3 thereof), the incentive available to the petitioner gets reduced from 75% to 25% for the year 2005-06. The extent of deferment legally permissible for the year 2006-07 was thus 25% in terms of Clause (6) of the Notification dated 31.3.2006. The extent of deferment was thus legally available to the petitioner under the Notification dated 31.3.2006 would also be 25%.

42. The petitioner was availing the benefit of deferment of 75% under clause (I) of the Notification dated 22.2.2002 for the years 2006-07, 2007-08 and 2008-09, which on the reversal of the judgment of the Rajasthan High Court by the Supreme Court in the matter of M/s. Binani Cements, was reduced to 25% and thus, the legal entitlement of the petitioner for deferment under the Notification dated 31.3.2006 was also reduced to 25% and therefore, for these three years, the petitioner had availed additional deferment of 50%, which ought to have been paid to the Department in the relevant years by making monthly/quarterly payments under section 20(1) of the Act of 2003. Since the amount was not paid, the differential 50%, availed by the petitioner, was required to be refunded by the petitioner alongwith interest as mentioned in Section 20(4) read with Section 55 of the Act of 2003.

43. It is submitted that the State Government, in order to get revenue, allowed pre-payment of the deferred tax by issuing Notification dated 9.3.2007. The payment of Rs. 69.31 crores made by the petitioner as pre-payment under the Notification dated 9.3.2007 was towards the settlement of the deferred tax liability. The benefit of pre-payment, however, could be taken only in respect of the tax, which was capable of being legally deferred. The amount of VAT, which has been retained beyond 25% was required to be paid in the respective quarters as prescribed under Section 20(1) of the Act of 2003 and thus, the tax to that extent, which has been retained, has to be returned back with interest as in respect of such retention, the benefit of pre-payment was not available.

44. It is further submitted by learned counsel appearing for the respondents that the amount, which was already delayed could not become part of pre-payment as it would have amounted to double benefit. The amount already delayed would further get postponed by a period of 7 years on which the petitioner now claims

the benefit of early payment. The said claim is therefore, against the terms of the benefit and was impermissible.

45. With regard to the payment of Rs. 69.31 crores by the petitioner, it is submitted by the respondents that by virtue of the orders dated 7.4.2014 and 13.6.2014, the Department has given full credit of the entire amount to the petitioner and the demand now being raised and is challenged is after giving effect to the payment made by the petitioner-Company. The petitioner-Company was given fully credit of the pre-payment Notification in respect of deferment legally available and hence, the liability of Rs. 38.43 crores (which could be legally deferred at 25%) was settled at Rs. 23.10 crores. So far as the balance amount of Rs. 46.21 crores, a credit of the same was given to the petitioner-Company in the years 2006-07 and 2007-08 against the principal and interest payments due from the petitioner for the said orders. The demand raised for the years 2006-07 is only in respect of the interest for the delayed payment, while the demand for the years 2007-08 and 2008-09 is in respect of the remaining principal amount and interest.

46. On the question of payment of interest, it is submitted by learned counsel appearing for the State that the tax under section 20(1) of the Act of 2003 is payable periodically. If the payment is not made on monthly/quarterly basis, the same carries interest, which is payable under section 20(4) of the Act of 2003 and in case of any delay, the amount of interest under sub-section (1) of Section 55 shall also be paid alongwith the amount of tax. Sections 20 and 55 of the Act of 2003 provide as follows:

"20. Payment of tax.- (1) Tax payable under this Act shall be deposited into a Government treasury or a bank authorised to receive money on behalf of the State Government, on the basis of accounts of a dealer in such manner and at such intervals as may be notified by the State Government, and different intervals may be notified for different categories of dealers.

.....

(4) In case of any delay in payment of amount required to be deposited under any of the sub-sections (1), (2) and (3), the amount of interest under sub-section (1) of section 55 shall also be paid along with the amount of tax..."

55. Interest on failure to pay tax or other sum payable.-

(1) Where any person or a dealer commits a default in making the payment of any amount of -

(a) tax leviable or payable; or

(b) any amount of tax, fee, penalty or interest assessed or determined; or

(c) any other amount payable by him,

within the specified time under the provisions of this Act or the rules made or

notifications issued thereunder, he shall be liable to pay interest on such amount at such rate, as may be notified by the State Government from time to time, for the period commencing from the day immediately succeeding the date specified for such payment and ending with the day on which such payment is made."

47. On the interest on disgorgement of the excess Rajasthan Sales Tax incentive, it is submitted that the undertaking given by the petitioner-Company clearly provided that the petitioner would pay without demur or loss to the exchequer, the sum equal to the difference between the benefit "actually availed" and the tax as determined by the Hon"ble Supreme Court. The words "benefit actually availed and to pay without demur or loss to the revenue" make the petitioner-Company liable to pay interest on the principle of restitution. Further, the undertaking is also to the effect that in case the judgment of the Rajasthan High Court in M/s. Binani Cements is reversed, then "... the exemption as originally availed to be 25% by M/s. Ambuja Cements Rajasthan Ltd. (formerly known as DLF Cement Ltd.) vide Eligibility Certificate dated 29.3.1997 with effect from 27.3.1997 shall stand restored indisputably...". Thus, once the original exemption upto 25% is restored, the differential tax has to be repaid by the petitioner-Company without any loss to the exchequer. The entire benefit has to be restored, on which the petitioner is liable to pay interest. It is submitted that time value of the amount retained is a benefit availed by the petitioner-Company and which ought to be restored to the State.

48. It is further submitted that if the tax is allowed to be retained for the period from 22.2.2002 till 7.4.2014, which is the date of the order by which the demand has been raised, it would make the Notification dated 22.2.2002 into a deferment without interest, which was not the purport and colour of the Notification. It would amount to unjust enrichment for the petitioner at the expense of the State. The creditor has to be restituted to the entire extent that differential or short fall will be due. Unless the differential is paid, justice would not be done to the creditor. It only encourages non-compliance and litigation. The petitioner-Company is not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefited is what justice requires. The State has relied on paras 152 to 167 of the judgment in Indian Council for Indian Council for Enviro-Legal Action Vs. Union of India (UOI) and Others, , which provided that restitution must be from the day the creditor is liable to pay.

49. It is submitted that under section 58 of the Act, which is similar to Section 55 of the Act of 2003, the interest on the tax is payable for the period starting from the day immediately succeeding the date specified for such payment and ending with the day on which such payment is made. The date "specified for such payment" would again be the periodical intervals specified by the Notification under section 25(1) of the Act. The period prior to the order of demand, the interest is required to be paid by the petitioner as simple interest and since the petitioner could bonafide claim to retain the simple interest. The demand being

raised from the petitioner is based on an undertaking given by it and hence, the plea that the petitioner is relieved of requirement to repay and honour its own undertaking is not honest.

50. Lastly, it is submitted by learned counsel appearing for the State that it is incorrect to suggest that there is no adjudication of the submissions made by the petitioner in the impugned order. The primary issue to be decided in the case was the effect of the Notification dated 22.2.2002 applicable in respect of the years 2002-2006 in which the incentive was being given. The determination for the years 2006-08 (relatable to the period of deferment) was related to the effect of Notification dated 22.2.2002, which has been extensively dealt with in the impugned order. It has consequential effect on the extent of deferment under the Notification dated 31.3.2006 by virtue of Clause (6) and as such, adjudication had taken place with regard to the percentage of incentive in the order dated 7.4.2014 and once the adjudication was made, the remaining are arithmetical computation of the liability of the payable tax and interest, which has been done in the impugned orders dated 7.4.2014 and 13.6.2014.

51. We have considered the submissions made by learned counsel appearing for the petitioners and do not find any force in them both with regard to the exemption period from 2001-02 to 2005-06 (RST) as well as the deferment period from 2006-07 to 2008-09 (VAT). We also do not find force in the submission that the demand of interest is not legally justified. The reasons for arriving at such conclusion are given as below.

52. The petitioner-Company is a large scale cement unit, which had made a claim as "prestigious unit" under the Incentive Scheme of 1989. It was allowed the benefit as "large scale cement unit", for which the benefit was available before and after the amendment dated 10.12.1996 to the extent of 25% of the sales tax liability vide Eligibility Certificate issued to it. The benefit was granted as predecessor of the petitioner-unit had commenced commercial production before the amendment dated 10.12.1996 for a period of 11 years. The benefit was availed to the extent of 25% of the sales tax liability from 27.3.1997 to 21.2.2002. The predecessor Company was issued the Eligibility Certificate under the Incentive Scheme of 1989. The Company had filed the review petition, which was rejected on which it approached the Tax Board, which remanded the matter on 29.3.2000 and on such remand, the review petition was rejected on 9.10.2001. The predecessor Company did not challenge the order rejecting the review petition by the SLSC and thus, its order had become final.

53. M/s. Binani Cements, a competitor of the Company in the market, was allowed tax incentive by the State Government to the extent of 75% of the tax liability. The petitioner-Company and other Companies as it is usual, instead of challenging the tax incentive on a higher rate, claimed a similar exemption from the State Government, on the ground of undue advantage given to M/s. Binani Cements. The State Government, in order to bring parity, granted a similar incentive of 75% of the tax liability under section 15 of the Act, subject to the

condition of giving an undertaking that in case the benefit given to M/s. Binani Cements is modified, as per any order/judgment issued by the Supreme Court of India in the appeal filed by the State of Rajasthan against the directions of the Rajasthan High Court to continue the exemption of 75% in the case of M/s. Binani Cements, the petitioner-Company would deposit the benefit availed by it exceeding 25% of the tax liability.

54. During the period the tax benefit was in force, the Rajasthan Value Added Tax Act, 2003 was enforced, under which in exercise of the powers under section 20(1), the industrial units, which were given the benefit of the Incentive Scheme of 1989, were given the benefit of deferment of tax equal to the extent of the percentage of deferment of tax in the year immediately preceding such extension. The Notification dated 31.3.2006 issued in exercise of powers under section 20(3) of the Act of 2003, linked the benefits of the tax deferment to the Notification issued in favour of the Companies under section 15 of the Act, with the preceding year.

55. It is admitted by the petitioner-Company that the Notification dated 22.2.2002 was issued under section 15 of the Act in its favour, on a representation made by it on 7.1.2002 to the State Government seeking parity with M/s. Binani Cements. The Notification issued was clearly with the condition and was linked to the case of M/s. Binani Cements pending in the Supreme Court of India and an undertaking was given in unequivocal and specific terms without any demur that the Company will deposit the benefit availed by it exceeding 25% of its liability, in case the judgment of the Rajasthan High Court in the matter of M/s. Binani Cements is modified as per any order/judgment issued by the Supreme Court. The matter pending before the Supreme Court was finally decided on 19.2.2014, in which it was held that M/s. Binani Cements was not entitled to the RST exemption beyond 25% and on which proceedings were initiated against the petitioner-Company.

56. It is not denied nor any argument was raised in which the petitioner may have distinguished its case on merits, from the case of M/s. Binani Cements decided by the Hon"ble Supreme Court on 19.2.2014. The undertaking became effective as soon as the Supreme Court decided the matter on 19.2.2014 and that any benefit retained by the petitioner, if allowed to be retained, would result into reverse discrimination, whereas M/s. Binani Cements would be able to claim incentive only to the extent of 25%, the petitioner despite its undertaking would get incentive of 75%.

57. In *Shyam Telelink Limited v. Union of India* (supra), it was held by the Supreme Court that the terms of the undertaking after it was unconditionally accepted, cannot be altered, as a person seeking exemption on an undertaking, which is agreement, cannot be allowed to reprobate. The doctrine of benefits and burdens postulates that a person taking advantage under an instrument which both grants a benefit and imposes a burden, cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept

and reject the same instrument.

58. Learned counsel for the petitioners gave an emphasis on the proceedings of rehabilitation of ACRL, a sick industrial company, which was later on merged with the petitioner-Company, in terms of the orders passed by the BIFR and the alleged concessions made by the State Government, according to the petitioner, had become part and parcel of the rehabilitation scheme, which was finally accepted and the matter was closed by the BIFR.

59. We have gone through the entire proceedings of the BIFR and do not find that any concession was given by the State Government which may have allowed the benefit of tax exemption beyond the extended period upto 30.6.2008. On the contrary, the consent to any such proposal was declined by the State Government on 30.4.2003 and which was reflected in the statutory Notification dated 24.10.2003 issued in exercise of the powers under section 15 and by which only the period of incentive was extended by two years from 26.3.2006 to 26.3.2008. The only issued before the BIFR was the period of incentive. The question of relieving the Company of its undertaking linking it with the case of M/s. Binani Cements, which was pending in the Supreme Court, was not the subject matter, which was either discussed or considered by the BIFR, nor, in our opinion, the BIFR could have de-linked the petitioner Company" from the case of M/s. Binani Cements and relieved it from the liability in case the matter was decided by the Supreme Court against M/s. Binani Cements.

60. The rehabilitation scheme (SS-04) sanctioned by the BIFR on 7.1.2004 did not provide for sales tax incentive beyond 25% nor there was any clause in the SS-04, which may have relieved the petitioner-Company from Benani effect. Para 7.1 under the heading "Reliefs and Concessions" of the Sanctioned Scheme-04 only provided for a consideration of the sales tax incentive at the rate of 75% of RST on the sales to be made by the transferred unit for the period upto 30th June 2008 effective from the cut off date. This relief was already granted to the petitioner. The BIFR on the application of the petitioner made amendment to the extent of time period of the applicability of the concession. The amendment was nothing more than recording the then prevailing factual situation.

61. Any amendment in the Sanctioned Scheme-04 could be made only by giving notice to the concerned parties. The record of the BIFR appended to the writ petitions, does not show that any notices were issued or that the matter was deliberated upon for grant of any further incentive by way of modification. Since the modification was only clarificatory in nature and reflected the prevailing factual stand with regard to the period of incentive, no notice was necessary nor any deliberation was made by the BIFR before amending the scheme. The amendment did not give any benefit to the petitioner Company beyond the benefit which was already granted.

62. We further find that on 20.11.2006, an order was issued by the BIFR closing the proceedings and which refers to the previous proceedings including the order

dated 27.5.2004. The final directions issued by the BIFR clearly provided that the GOR will also consider granting reliefs in terms of Paras 7.1(ii) and 7.1(v) of the SS-04. The reliefs in terms of Para 7.1(ii) were already granted and the facts and situation were reflected in the amended order of BIFR. There was no concession allowed to relieve the petitioner Company from the conditional grant contained in Clause-3 of the Notification dated 22.2.2002. The extent of modification agreed to by the State Government was contained in the Notification dated 24.10.2003. The other conditions, which were not modified by the said Notification or agreed to in the letter dated 12.11.2003 remained in tact. The period of incentive, which was limited to 26.3.2006 was extended by another two years upto 26.3.2008 and further, agreed to be considered for an extension upto 30.6.2008. The State Government was not required to do anything else as a consequence of the rehabilitation scheme framed by the BIFR.

63. We may observe here that the BIFR under section 19 of the Sick Industrial Companies (Special Provisions) Act, 1985 read with Regulation 33, does not have any power to direct, in the absence of specific consent, the State Government to grant any incentive, which is not a part of the policy of the State Government. In view of the decision of the Supreme Court in State of U.P. and Another Vs. UPTRON Employees Union, CMD and Others, , no direction can be given by the BIFR directing any State to grant or not to grant any incentive or to relieve the petitioner of any statutory liability.

64. We do not find any weight in the submission made on behalf of the petitioner-Company that the Sanctioned Scheme-04 by itself granted to the petitioner the benefit of 75% wholly independently of the Notification dated 22.2.2002 and that the Sanctioned Scheme-04 may be considered or read in the manner in which the petitioner was not required to pay back any part of exemption amount. There is nothing in the Sanctioned Scheme-04, which may have bound the State Government to grant any such concession. We also do not agree with the submission that in case the State Government was aggrieved by relieving the petitioner from its liability in the Sanctioned Scheme-04, it should have challenged the order of the BIFR before the AIFR, which alone had the authority of law to amend or modify the scheme. In our view, the State Government was not required to challenge the order, as there was nothing in the Sanctioned Scheme-04, which could have interpreted in a manner to have allowed the exemption to the extent of 75% of sales tax payable without making the exemption subject to the liability to pay back 50% of the exemption amount in the event the judgment of the Rajasthan High Court in M/s. Binani Cements was amended by the Hon'ble Supreme Court. As found by us in the preceding paragraphs, the Sanctioned Scheme-04 did not provide for any such exemption to the extent of 75% of the sales tax payable and to take away the Binani linkage or Binani effect on the Notification dated 22.2.2002. The question of pendency of the Appeal filed by the State of Rajasthan against the judgment of the Rajasthan High Court providing 75% exemption to M/s. Binani Cements and the undertaking given by the petitioner, in pursuance to the Notification dated

22.2.2002, which clearly provided for giving such undertaking and exemption was dependent on such undertaking, was neither discussed nor considered by the BIFR. Further, in our view, in any case, the BIFR could not have relieved the petitioner Company from its obligations under the Notification dated 22.2.2002 and the undertaking given by the petitioner-Company, which had to come into force only if the judgment of the Rajasthan High Court was modified by the Supreme Court. The BIFR could not foresee the fact nor it could have granted any relief, which may have come into force on any unforeseeable event in future.

65. Coming to the argument of learned counsel for the petitioners on the effect of the deferment scheme, it is sufficient to state that the deferment scheme under the Act of 2003 in the Notification 31.3.2006 linked the deferment to the extent of incentive available to an industrial unit in the year immediately preceding such extension i.e. for the assessment year 2006-07. The percentage of deferment legally available was the same which was available to it under the previous Notification applicable for the year 2005-06, which in case of the petitioner means incentive Notification dated 22.2.2002 and the deferment Notification dated 31.3.2006. The petitioner-Company itself had relied upon the Notification dated 22.2.2002 for the purposes of deferment and for giving the benefit on that basis, application in Form-A was submitted by the petitioner and the Eligibility Certificate was issued to the petitioner for the purposes of deferment of scheme, which was linked to the Notification dated 22.2.2002, for the years 2006-07 to 2008-09. The petitioner Company was availing the deferment of 75% in view of the Notification dated 22.2.2002, which on account of the reversal of the judgment of the Rajasthan High Court by the Hon'ble Supreme Court, was reduced to 25% and thus, the legal entitlement for deferment under the Notification dated 31.3.2006 was reduced to 25% for the years 2006-07 to 2008-09. The petitioner had availed additional benefit of 50%, which was not permissible as an effect of the judgment of Hon'ble Supreme Court in the matter of M/s. Binani Cements. This amount was even otherwise required to be paid to the State in the relevant years on monthly or quarterly basis under section 20(1) of the Act of 2003.

66. The respondent-State has sufficiently clarified and has satisfied us with the effect of the pre-payment of the deferred tax. The State Government in order to get revenue, which was needed by it, issued a Notification dated 9.3.2007 allowing the prepayment of the deferred tax. The benefit of pre-payment Notification could be made only in respect of tax, which could be legally deferred. The amount of VAT which was retained beyond 25% was required to be paid as prescribed under section 20(1) of the Act of 2003. The tax to the extent it was retained and not paid had to be returned back to the State, and in respect of the said amount, the benefit of pre-payment was not available.

67. We find justification in the contention of the State that no pre-payment in respect of the amount which was already delayed was available. The amount already delayed could not be further postponed by a period of seven years, on

which the petitioner claimed for early re-payment. The claim is thus not permissible.

68. In respect of payment of Rs. 69.31 crores, it is stated that by virtue of order dated 7.4.2014 and subsequent order dated 13.6.2014, the State has given full credit of the entire amount to the petitioner and the demand now being raised is after giving credit to the petitioner. We are satisfied from the details of the calculations provided to us that the petitioner was given full credit of the pre-payment Notification in respect of the deferred tax legally permissible and available and thus, the liability of Rs. 38.43 crores (which could be legally deferred at 25%) has been settled at Rs. 23.10 crores. For the balance amount of Rs. 46.21 crores, a credit of the same was given to the petitioner-Company in the years 2006-07 and 2007-08 against the principal and interest payments due from the petitioner Company. The demand raised is only for the year 2006-07 in respect of the interest for the delayed payment, while the demand for the years 2007-08 and 2008-09 is in respect of the remaining principal amount and interest.

69. We are not impressed with the argument that since the demand itself had arisen after the order of the Supreme Court dated 19.2.2014, no interest is payable and that the interest on the excess deferred amount is not liable to be paid and further with the argument that in absence of machinery provisions under the Act, the demand of interest has not been calculated and worked out and is thus, not legally recoverable.

70. We have perused the scheme of the payment of tax under Section 20 and the liability of payment of interest under Section 55 of the Act of 2003. Section 55, which deals with the interest on failure to pay tax or other sum payable, provides that where any person or a dealer commits a default in making the payment of any amount of tax leviable or payable; or any amount of tax, fee, penalty or interest assessed or determined; or any other amount payable by him, within the specified time under the provisions of the Act of 2003 or the Rules or Notification issued thereunder, he shall be liable to pay interest. The liability in the present case arose in terms of Section 20(4) read with Section 55(1)(a) and (c) for the delay in payment within the time specified under the Act from the day immediately succeeding the date specified for such payment and ending with the day on which such payment is made. The petitioner-Company was liable to pay the interest on the excess of the incentive in terms of the undertaking given by it to return the benefit actually availed and to pay without demur the loss to the revenue. The judgment of Hon"ble Supreme Court in M/s. Binani Cements, with which the petitioner's case is linked by undertaking, restored the Eligibility Certificate dated 29.3.1997 with effect from 27.3.1997 and thus, once the original exemption to the extent of 25% was restored, the differential tax has to be paid/disgorged by the petitioner without any loss to the exchequer. The entire benefit had to be restored and on which the petitioner was required to pay interest on the amount withheld by it. The petitioner must restore the amount

retained by it as a benefit, after the judgment of Hon"ble Supreme Court dated 19.2.2014 in M/s. Binani Cement's case and in terms of the undertaking given by it to the State Government. Any other view will amount to grant of unjust benefit to the petitioner-Company at the expense of the State. The petitioner must restitute and re-compensate the State Government in terms of its undertaking which was not diluted, modified or affected in any manner by the order of BIFR or the scheme for deferment of tax. The restitution must be from the date when the petitioner was liable to pay. The principles "unjust enrichment, restitution and compound interest" have been explained in Indian Council for Enviro-Legal Action v. Respondent: Union of India (UOI) and Ors. (supra) as follows:--

"The other important principles which need elucidation are regarding unjust enrichment, restitution and compound interest

143. Dr. Arun Mohan, Senior Advocate of this Court in a recently published book with the title "Justice, Courts and Delays" analytically, lucidly while taking in view pragmatic realities elucidated concepts of unjust enrichment, restitution and compound interest.

144. By the judgment dated 13.02.1996 this Court fixed the liability but did not fix any specific amount, which was ordered to be ascertained. It was on the lines of a preliminary decree in a suit which determines the liability, but leaves the precise amount to be ascertained in further proceedings and upon the process of ascertainment being completed, a final decree for payment of the precise amount is passed.

145. By judgment dated 4.11.1997 this Court, accepting the ascertainment, fixed the amount. The order reads as under:

"9....remedial measures taken on the basis of the NEERI report shall be treated as final."(SCC para 9)

7... We accept the proposal submitted by the Government of India for the purpose of taking remedial measures by appointing National Productivity Council as the Project Management Consultant. In our opinion the Ministry of Environment and Forests, Government of India has rightly made a demand for Rs. 37.385 crores." (SCC para 7)

(emphasis supplied).

146. The exact liability was quantified which the applicant-M/s. Hindustan Agro Chemical Ltd. was under an obligation to pay. The liability to pay arose on that particular date i.e. 4.11.1997. In other words, this was in the lines of a final decree pursuant to a preliminary decree. On that judgment being passed, the position of the applicant in Application No. 44 was that of "judgment-debtor" and the applicant became liable to pay forthwith.

147. Admittedly, the amount has not been paid. Instead, that payment they

sought to postpone by raising various challenges in this Court and in the meantime "utilised" that money, i.e., benefited. As a consequence, the non-applicants (Respondents-states herein) were "deprived" of the use of that money for taking remedial measures. The challenge has now -nearly 14 years later - been finally decided against them.

148. The appellants must pay the amount is one thing but should they pay only that amount or something more? If the period were a few days or months it would have been different but here it is almost 14 years have been lapsed and amount has not been paid. The questions therefore are really three:

1. Can a party who does not comply with the court order be permitted to retain the benefits of his own wrong of non-compliance?
2. Whether the successful party be not compensated by way of restitution for deprivation of its legitimate dues for more than fourteen years? and
3. Whether the court should not remove all incentives for not complying with the judgment of the court?

Answering these questions will necessitate analysis of certain concepts.

149. It is settled principle of law that no one can take advantage of his own wrong. Unless courts disgorge all benefits that a party availed by obstruction or delays or non-compliance, there will always be incentive for non compliance, and parties are ingenious enough to come up with all kinds of pleas and other tactics to achieve their end because they know that in the end the benefit will remain with them.

150. Whatever benefits a person has had or could have had by not complying with the judgment must being disgorged and paid to the judgment creditor and not, allowed to be retained by the judgment-debtor. This is the bounden duty and obligation of the court. In fact, it has to be looked from the position of the creditor. Unless the deprivation by reason of delay is fully restituted, the creditor as a beneficiary remains a loser to the extent of the un-restituted amount.

Unjust enrichment

151. Unjust enrichment has been defined as:

"Unjust enrichment.- A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."

See Black's Law Dictionary, Eighth Edition (Bryan A. Garner) at page 1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience".

152. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of

another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

153. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A Defendant may be liable "even when the Defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, A.2d 217, 232-33).

154. Unjust enrichment occurs when the Defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of *Fibrosa Spolka Akcyjna. v. Fairbairn Lawson Combe Barbour Ltd.*, Lord Wright stated the principle thus:(AC p.61)

"...(A)ny civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

155. Lord Denning also stated in *Nelson v. Larholt* as under: (KB p.343)

"..It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

156. The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment.

Restitution and compound interest

157. American Jurisprudence 2d. Vol. 66 Am Jur. 2d defined Restitution as follows:

"The word "restitution" was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury

caused to, another. As a general principle, the obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."

158. While Section 3 (Unjust Enrichment) reads as under: "The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly."

159. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

160. While the term "restitution" was considered by the Supreme Court in *South-Eastern Coalfields* and other cases excerpted later, the term "unjust enrichment" came to be considered in *Sahakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise and Customs*. This Court said: (*Sahakari Khand* case, SCC p.748, para 31.

"31...."Unjust enrichment" means retention of a benefit by a person that is unjust or inequitable. "Unjust enrichment" occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else."

161. The terms "unjust enrichment" and "restitution" are like the two shades of green - one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders.

162. We may add that restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages, i.e., pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the Court's own process, along with time delay, to do injustice.

163. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether.

164. This view of law as propounded by the author Graham Virgo in his celebrated book on The Principle of Law of Restitution has been accepted by a later decision of the House of Lords (now the UK Supreme Court) in *Sempra Metals Ltd. v. IRC*.

165. In similar strain, across the Atlantic Ocean, a nine-Judge Bench of the Supreme Court of Canada in *Bank of America Canada v. Mutual Trust Co.* took the view:

"There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the Plaintiff should have had a capital sum to invest; the Plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the Defendant will have had the benefit of compound interest. Although not historically available, compound interest is well suited to compensate a Plaintiff for the interval between when damages initially arise and when they are finally paid."

This view seems to be correct and in consonance with the principles of equity and justice.

166. Another way of looking at it is suppose the judgment debtor had borrowed the money from a nationalised bank as a clean loan and paid the money into this Court. What would be the bank's demand?

167. In other words, if payment of an amount equivalent of what the ledger account in the nationalised bank on a clean load would have shown as a debit balance today is not paid and something less than that is paid, that differential or shortfall is what there has been: (1) failure to retribute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment. Unless this differential is paid, justice has not been done to the creditor. It only encourages non-compliance and litigation. Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money. In other words, it is not only disgorging all the benefits but making the creditor whole i.e.

ordering restitution in full and not dependent on what he might have made or benefited is what justice requires."

71. We are not impressed by the last submission made on behalf of the petitioners that there has been no adjudication of the liability of the petitioner-Company in the impugned order and that the interest is not liable to be paid by the petitioner. A perusal of the impugned order would show that the primary issue to be decided, namely, the effect of the Notification dated 22.2.2002 was discussed and considered and by which the competent authority found that the extent of the benefit available to the petitioner-Company would be limited only to 25% i.e. the change in the percentage of incentive, which has consequential effect on the extent of deferment under the Notification dated 31.3.2006, by virtue of Clause (6) and as such, the adjudication with regard to the percentage of incentive available to the petitioner-Company was made in the impugned order.

72. In view of the above discussion, we do not find any merit in the writ petitions filed by the petitioners. The petitioner-Company is clearly, in view of the undertaking given by it on 19.3.2002, in terms of Clause (3) of the Notification dated 22.2.2002, is not entitled to any relief from this Court.

73. All the writ petitions are consequently dismissed with costs.

74. A copy of this order will be placed in all the connected files.