

(1990) 04 KAR CK 0013
In the Karnataka High Court
Case No : Writ Petition No. 20266 of 1979

Bagalkot Udyog Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-04-1990

Acts Referred:

Constitution of India, 1950 — Article 226
Sugarcane (Control) Order, 1966 — Clause 12

Citation : (1991) ILR (Kar) 1962

Hon'ble Judges : N.Y. Hanumanthappa, J;K.A. Swami, J

Bench : Division Bench

Advocate : U.L. Narayana Rao and R. Gururajan, for the Appellant; Ashok Haranahalli, Addl. Stdg. Counsel for Central Govt. and S.R. Nayak, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Swami, J.—In this petition, under Article 226 of the Constitution, the petitioners have sought for the following reliefs:

"a) that this Hon'ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, direction or order under Article 226 of the Constitution of India -

i) directing respondents 1 to 3 their subordinate officers, servants and agents to cancel and/or withdraw and/or set aside the Cement Control Order 1967 as amended from time to time and as presently operative;

ii) in the alternative directing respondents 1 to 3 their subordinate officers, servants and agents -

a) to grant an increase of Rs. 55-12 paise per metric tonne in the retention price on account of increase in cost of production due to factors other than power cut and to grant a further increase in the retention price over and above the aforesaid increase to the tune of Rs. 90.53 paise per metric tonne on account of

increase in production due to power cut that is in all to grant an aggregate increase of Rs. 145.65 in the retention price;

b) in the alternative to direct respondents Nos. 1 and 2 their subordinate officers, servants and agents not to compel and/or require the 1st petitioner to contribute amounts to the Cement Regulation Account;

iii) to grant an additional increase of Rs. 55.12 on account of increase in cost of production and to grant a further increase of Rs. 90.52 on account of power cut;

iv) directing respondents 1 to 3 their subordinate officers, servants and agents not to take steps against the 1st petitioner for the 1st petitioner's failure to contribute amounts to the Cement Regulation Account;

b) In the event of respondents 1 to 3 being directed to grant an increase in the retention price, this Hon''ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, direction or order under Article 226 of the Constitution of India directing respondents 4 and 5 their subordinate officers, servants and agents to effect an increase in prices fixed by them under Clause 10 of the said Order commensurate with the increase granted in the retention price as aforesaid;

c) that this Hon''ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, direction or order under Article 226 of the Constitution of India directing respondents 1 to 3 their subordinate officers, servants and agents to consider the representations of the Cement Manufacturers Association Exs. G1, G2 and G3 hereto and to exercise the power conferred upon them under Clause 12 and grant an upward revision as claimed for in para 61 hereinabove.

d) that this Hon''ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, direction or order under Article 226 of the Constitution of India directing respondents 1 to 3 their subordinate officers, servants and agents to forbear and refrain from taking any steps of any nature whatsoever against the first petitioner for non-contribution by the 1st petitioner to the Cement Regulation Account in accordance with the provisions of the said Act;

e) In the alternative to the aforesaid this Hon''ble Court may be pleased to declare that the said Order as amended from time to time and the Cement Control (Amendment) Order 1979 Ex.C1 hereto are each and all illegal, null ultra vires and inoperative in law;

f) in the further alternative and in the event of this Hon''ble Court coming to the conclusion that the said order and the said Amendment 1979 Ex-A and C1 hereto are valid this Hon''ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ direction or order under Article 226 of the Constitution of India directing respondents Nos. 1 to 3 their subordinate officers, servants and agents -

i) to grant a relief of Rs. 145-65 to the 1st petitioner by way of reimbursement out of the amounts tying with respondents 1 to 3 in the Cement Regulation Account.

ii) in the alternative to (i) above to absolve the 1st petitioner from Its alleged liability to contribute to the Cement Regulation Account and to grant reimbursement to the petitioner No. 1 for the balance so as to make up the total relief to Rs. 145-65 per M.T.;

g) that pending the hearing and final disposal of the petition -

i) respondents 1 to 3 their subordinate officers, servants and agents be restrained by an order and injunction from in any manner acting upon or in furtherance of or in implementation of the said Amendment dated 3rd May 1979 and the various prices fixed thereunder which Amendment is hereto annexed and marked Ex.C1;

ii) respondents 1 to 3 their subordinate officers servants and agents be restrained by an order and injunction from in any manner compelling and/or requiring the 1st petitioner to contribute any amount whatsoever to the Cement Regulation Account;

iii) respondents 1 to 3 their subordinate officers, servants and agents be restrained by an order and injunction of this Hon"ble Court from taking any steps of any nature whatsoever against the petitioners their subordinate officers, servants and agents for non-deposit by it of amounts allegedly required to be deposited in the Cement Regulation Account;

iv) respondents 1 to 3 their subordinate officers, servants and agents be restrained by an order and Injunction of this Hon"ble Court from in any manner acting In furtherance of or in implementation of or in pursuance of the said order. Exhibit-C as amended;

v) in the alternative respondents Nos. 1 to 3 their subordinate officers, servants and agents be directed to grant an Increase In the ex-factory retention price to the tune of Rs. 145.65;

vi) in the alternative to (v) above, respondents 1 to 3 their subordinate officers, servants and agents be directed by an order and injunction of this Hon"ble Court to absolve the 1st petitioner from its alleged liability to contribute to the Cement Regulation Account and to grant an increase to the extent of the amount of balance so as to make up an aggregate increase to Rs. 145.65 per M.T. in the retention price;

vii) respondents 1 to 3 their subordinate officers, servants and agents be directed by an order and mandatory injunction of this Hon"ble Court to grant an increase in prices fixed by them under Clause 8 of the said Order commensurate with the increase granted in the ex-factory retention price in accordance with the orders passed under Clause (v) and (vi) above;

viii) respondents 1 to 3 their subordinate officers, servants and agents be directed by a mandatory order and injunction of this Hon''ble Court to grant a relief of Rs. 145.65 to the 1st petitioner by way of reimbursement out of the amounts lying with respondents 1 to 3 in the Cement Regulation Account;

ix) in the alternative to Clause (viii) above to absolve the 1st petitioner from the alleged liability to contribute to the Cement Regulation Account and to grant reimbursement to the extent of the balance so as to make up the total relief to Rs. 145.65 per M.T. to the 1st petitioner;

h) for interim and/or ad-interim reliefs in terms of prayer (g) above;

i) for facts and

j) for such further and other reliefs as the nature and circumstances of the case may require;

Prayer for interim and/or ad-interim reliefs:

that pending the hearing and final disposal of the petition:

i) respondents 1 to 3 their subordinate officers, servants and agents, be restrained by an order and injunction from in any manner acting upon or in furtherance of or In Implementation of the said Amendment dated 3rd May 1979 and the various prices fixed thereunder which amendment is hereto annexed and marked Ex.01;

ii) respondents 1 to 3 their subordinate officers, servants and agents be restrained by an order and injunction of this Hon''ble Court from in any manner acting in furtherance of or in implementation of or in pursuance of the said order Ex.A hereto as amended;

iii) respondents 1 to 3 their subordinate officers, servants and agents be restrained by an order and injunction from in any manner compelling and/or requiring the 1st petitioner to contribute any amount whatsoever to the Cement Regulation Account;

iv) respondents 1 to 3 their subordinate officers, servants and agents for non-deposit by them of amounts allegedly required to be deposited in the Cement Regulation Account."

2. Though several reliefs are sought for in the petition as referred to above, at the outset Sri U.L. Narayana Rao, learned Counsel for the petitioners submitted that the validity of the Cement Control Order 1967, need not be gone into in the light of the statement made in the Statement of Objections filed by the respondents that the validity of the Cement Control Order has been upheld by the various High Courts. This submission is placed on record. Therefore, it is not necessary to go into the validity of the Cement Control Order.

3. Sri U.L. Narayana Rao, learned Counsel for the petitioners further submitted that the contentions enumerated in paragraph 59A of the Petition alone need be

considered. Those contentions are as follows:

"i) the fixation of the retention price at Rs. 205/- is neither legal nor valid and is arrived at without taking into consideration the production capacity of the petitioner-factory and also the cost of production;

ii) that the compulsion imposed upon the first petitioner to contribute amounts to the Cement Regulation Account is also illegal and it has resulted in causing constant loss to the first petitioner;

iii) that the respondents 1 to 3 have failed to give an adequate increase covering cost of production and also ensure reasonable return;

iv) that the respondents have failed to exercise the power to review the said retention price under Clause 12 of the Cement Control Order, 1967 (hereinafter referred to as the "Control Order");

v) that there is a failure on the part of the State Government to increase the wholesale and retail price as required by Clause 10 of the Control Order."

4. At the outset, the last contention can be disposed. The petitioners are the manufacturers of cement. They are neither wholesale nor retail sellers. Further, the wholesale and retail prices are fixed by the State Government and the same have nothing to do with, and have no bearing on, the retention price and the prices, at which a producer may sell, are provided under Clauses 7 and 8 of the Cement Control Order. Under Clause 10 of the Cement Control Order, State Governments are empowered to fix the wholesale and retail prices of the cement. The petitioners are manufacturers of cement. The cement manufactured by them has to be delivered to an agency, as may be ordered by the Central Government at the price fixed under Clauses 7 and 8 of the Cement Control Order. Therefore, it is not possible to appreciate the contention of the petitioners that as the State Government has not revised the wholesale and retail prices and that has affected the petitioners in many ways. Therefore, this contention need not be gone into in this Petition because it is not relevant as far as the petitioners are concerned.

5. Learned Counsel for the petitioners placed reliance on a Division Bench Decision of the High Court of Delhi in THE ASSOCIATED CEMENT COMPANIES LTD. AND ANR. v. UNION OF INDIA AND ANR., Civil Writ Petition No. 2719/1981 c/w Civil Writ Petition Nos. 213/1982, 113 and 1825/1983 and 2719/1981 dated 28th September 1984 In that Decision, the Revision of price was made uniformly and not on 3 tier basis as provided under the Cement Control Order. Therefore, on that ground it was held that the Revision was bad. Such a situation does not arise in the case on hand. Hence the aforesaid Decision cannot be of any assistance to the petitioners.

6. The first contention is that the determination of retention price at Rs. 205/- is invalid or illegal as it is made on the basis that the licensed capacity of the first petitioner Factory is 3.60 lakh tonnes. Though the licensed capacity of the

Factory was 3.60 lakhs tonnes at the time of commencement as per Annexure-S-5 dated 15-4-1971; but it came to be reduced to 2.25 lakh tonnes as the first petitioner-Factory surrendered 1.35 lakh tonnes licensing capacity, the licensing capacity of the Factory was reduced and limited to 2.25 lakh tonnes by the order dated 29th March 1979, produced as Annexure-S-6 passed by the Government of India; that the cost of production is closely connected with the licensed capacity of the Factory, whereas the High Level Committee in its Report submitted in December 1988 has proceeded on the basis that the licensed capacity of the first petitioner-Factory is 3.60 lakh tonnes; that this has resulted in placing the first petitioner-Factory in the group for which retention price is fixed at Rs. 205/-. It is submitted that this is unreasonable and this has caused great loss to the factory. In support of this contention the petitioners have also produced the data as to costs of production for the period from July 1979 to September 1979 as Annexure-F, which reads thus:

"Bagalkot Udyog Limited July 1979 to September 1979 Cost of Production Cost per tonne of Cement

July 1979

August 1979

September 1979

Weighed average cost for three months per tonne of cement

Rs. P

Rs. P

Rs. P

Rs. P

Salaries, Wages & Bonus

39.48

37.94

48.86

41.62

Stores & Spare parts

31.62

24.49

39.54

31.26

Power

26.88

26.30

32.78

28.43

Coal

56.67

56.10

70.50

60.45

Gypsum

4.97

5.00

5.00

4.99

Slag

-

7.52

13.05

6.67

Pozzolana

7.13

5.56

3.87

5.61

Royalty & Cess on Limestone

3.14

3.67

4.03

3.59

Purchased Limestone

2.49

0.91

1.42

1.59

Rent. Rates & Taxes

2.50

2.28

2.94

2.55

Addl. Sales Tax @ Rs. 2.00 per tonne

2.00

2.00

2.00

2.00

Insurance

0.89

0.82

0.05

0.91

Miscellaneous Expenses

7.14

6.52

8-40

7.27

Depreciation

8.57

7.82

10.08

8.73

Interest

14.29

13.04

16.80

14.55

207.95

200.02

260.34

220.12

Cement Production (in Tonnes)

14,000

15,335

11,900

13,745

Cost per tonne of Cement

207.95

200.02

260.34

220.12

Weighted Average Cost of Production for 3 months Rs. 220.12 per tonne

Add; 12% Post Tax Return on Net Worth of Rs. 143 lakhs as on 30- 6-1977 which works out to Rs. 17.16 lakhs per year. On the basis of 1,07,250 tonnes of Cement Production In 1979-1980 It works out to Rs. 16/- per tonne of cement. With tax liability It works out to Rs. 40/- per tonne. So Post Tax Return per tonne of cement has to be allowed.

RS. 40.00

Present Retention Price

Rs. 260.12

Deficit

Rs. 205.00

55.12

We have verified the above particulars of the Company from the relevant records produced before us and we certify that the above particulars are correct

Bombay Date: 14 Dec. 1979

For V.K. BESWAL & CO., Chartered Accountants Sd/- (V.K. BESWAL)"

7. The Cement Control Order is issued in exercise of the power conferred u/s 18(g) and 25 of the Industries (Development and Regulation) Act, 1951 (hereinafter referred to as the "Act"). The Cement Control Order is issued for the purpose of securing equitable distribution and availability at fair prices of any article or class of articles relatable to any scheduled industry.

7.1. Notwithstanding anything contained in any other provision of the Act, by a notified Order, the Central Government may provide for regulating the supply and the distribution thereof, and trade and commerce therein. Therefore, the Cement Control Order provides that the cement manufactured from the factories should not be moved-from the premises of the factories, except with the previous permission in writing of the Central Government. Similarly, Clause 4 provides that the Central Government may by order require any producer to sell cement to such person or class of persons or to transport cement to such destinations as may be specified in the order, which may provide for regulating or prohibiting any class and or commercial or financial transactions relating to the sale and/or purchase of cement, payments thereof etc. The Cement Control Order further directs every producer to maintain the accounts of production etc. Clause 7 specifies the ex-factory price which is retention price admissible to the producer for the different varieties of cement. According to the schedule of rates fixed, the first petitioner-Factory is entitled to Rs. 205/- as the retention price as it is placed in the second-tier out of the three tiers in which the cement factories existing on 3rd May 1979 are divided.

8. Clause 8 of the Cement Control Order provides the details as to the price at which the producer may sell, it also provides that in the case of packed cement, there shall be added to the price referred to in the Clause such charges as may be fixed by the Central Government in respect of packing in jute bag or in any other containers, different charges may be fixed for the use of new and serviceable second-hand jute bags and for the use of such other containers. It also provides for allowing by the Central Government rebate, discount or commission in the price of cement sold by the Government through the Directorate General of Supplies and Disposals or intended for export out of India The Explanation to Clause 8 explains the expression "free on rail destination - railway ...station". It states that "free on rail destination railway station" means the price including the cost of transport by the cheapest mode except where any other mode of transport has been specified by the Central Government under Clause (4) at the destination point. The definition of the aforesaid expression is important because it is on the basis of this definition only a producer is required to contribute or pay into the Cement Regulation Account as provided by Clause 9

of the Control Order.

9. As already pointed out Clause 10 provides for wholesale and retail price which need not be referred to. Clause 11 of the Cement Control Order provides for maintenance of the Cement Regulation Account, The Controller has to maintain this account. The amounts paid by the purchaser under Clause 9 and such other sums of money as the Central Government may, after due appropriation made by the Parliament by law in this behalf, grant from time to time, shall have to be credited to this account. The other provisions contained in Clause 11 need not be referred to except Sub-clauses (2) and (4). Sub-clause (4) relates to disbursement of balance in the Cement Regulation Account. It directs that the balance, if any, remaining unspent in the Cement Regulation Account shall be disbursed in accordance with such directions as may be given by the Central Government in this behalf. Sub-clause (2) of Clause 11 provides that it is open to the Controller to reimburse the expenses as may be incurred by the producers of cement for the purpose of increasing the production, for securing the equitable distribution and availability at fair prices of cement.

10. Clause 12 of the Control Order empowers the Central Government to vary the prices and to alter the schedule. As the petitioners have constructed an argument on the basis of Clause 12 of the Control Order that it is incumbent upon the Central Government to revise the retention price of each factory taking into consideration the costs incurred by each factory and other relevant circumstances as and when it is brought to the notice of the Central Government. and it is further contended that the Central Government in the instant case has failed to do so even though specific request is made by the petitioner, it is necessary to reproduce Clause 12 of the Control Order which reads thus:

"The Central Government may, having regard to any change in any of the factors relevant for the determination of price of cement, such as increase or decrease in the cost of production or distribution, by notification in the official Gazette, vary the price fixed in this Order or alter the Schedule to this order as appear to it to be necessary."

Clause 13 of the Control Order need not be referred to as the same is not relevant for our purpose. Clause 14 of the Cement Control Order prescribes the procedure regarding claim for reimbursement by producers. Every producer shall have to make an application regarding his claim for any reimbursement towards equalising freight or equalising concession in the matter of export price to the Controller who may, in settling the claim, require the producer to furnish all details relating thereto, including the cost of freight incurred, excise duty, if any, paid etc.

11. It is relevant to notice that the Control Order came to be issued after the High Level Committee submitted its Report in December 1978. On considering the Report made by the High Level Committee, the Central Government passed a Resolution dated 3rd May 1979 produced as Annexure-D resolving that the price

for controlled commodities fixed should be subject to review once in every three years.

The Central Government in its Resolution accepted the retention prices as recommended by the High Level Committee on the basis of three tier system at Rs. 185/-, Rs. 205/- and Rs. 220/- per tonne for each tier comprising the production units as indicated by the Committee replacing the existing retention prices covering 53 units. It also resolved that the production units in hilly areas would continue to yet additional retention price. It also further resolved that new undertakings and substantial expansions would receive a retention price at Rs. 295/- per tonne; that the price for Portland Pozzolanic Cement and Portland Slag Cement will continue to be the same as for ordinary Portland Cement. It also resolved to continue the subsidies and consider annually the impact on the retention prices of the various elements of the manufacturing costs in the light of the recommendations of the High Level Committee. It also resolved that the above prices should be in force for a period upto 31st March 1982. Lastly it resolved that as a result of the implementation of the above recommendations of the High Level Committee as accepted, the destination price of cement exclusive of Excise Duty and packing charges should be revised from Rs. 293.26 to Rs. 318.94 per tonne.

13. It is in terms of these decisions, the Control Order 1967 has been amended. Before the retention prices came to be fixed on 3 tier basis, the High Level Committee issued a questionnaire to all the factories including the first petitioner-Factory for eliciting the information on all the matters having a bearing on the fixation of retention prices and other connected matters. The petitioner-Factory also submitted its replies to the questionnaire. In addition to this, the High Level Committee examined the individual cases of 19 factories and formulated its opinion. It has stated that the 28 cement factories which existed then, be divided into 3 divisions or 3 tiers. The Committee took into consideration all the factors such as cost of production, profitability, capacity of production, coal consumption, salaries and wages, stores, spares, depreciation packing materials, working capital, fair return subsidy and transport reimbursement, contribution for research, effect of variation in capacity utilisation on fair price and the range, estimated price cost of distribution of cement in bulk, usage of furnace oil instead of coal and the necessity of captive power wherever there is power cut. The Committee examined several alternatives regarding fixation of price, which the factory shall get. On taking into consideration all these aspects, it opined as follows:

"The fixation of a uniform ex-factory price and the present system of freight pooling could have distorted the matter of location of factories in the past. An analysis of this (Chapter 6) does establish that the will, in all probability, lead to sub-optimal locations. Moreover, this method does appear to have seriously effected the liability of cement plants erected prior to 1956 near the centres of consumption that were able at that time to derive the advantage of incurring a

lower freight on cement and thereby off-set the higher cost of limestone, etc., which advantages were removed as a result of the uniform ex-factory price with the type of freight pooling established in 1956. Such factories have continued to experience high costs and the more recent uniform ex-factory prices have led to a serious erosion in their viability to the point that they are virtually "sick plants". The fixation of FOR price for factories so that the net realisation to the factory depends on its marketing zone (the system prevalent prior to 1956) could correct this situation. It has been represented to the Committee that in the existing situation of a physical shortage and regional imbalance, distribution control is unavailable and this does not permit the determination of a fair marketing zone for each factory so that this method of establishing FOR prices cannot be introduced at this stage. The Committee considered various forms of establishing FOR prices and in these circumstances it reluctantly agrees that the basic structure of the present system of control on prices and distribution despite its obvious disadvantages, appears the most practical in the limited period 1979-82. For similar reasons, it also considers it will not be correct to move away from a uniform destination price for all the districts which has been the prevailing pattern for almost 20 years (a change in this pattern must follow consideration of the merits of this system in not only cement but in several other industrial products such as steel).

Taking into consideration the terms of reference, the Committee feels that the pricing policy for the period 1979-82 in which control on prices and distribution are considered unavoidable should fulfil the following basic objectives:

maximisation of production from existing factories with removal of bottlenecks and the adoption of appropriate rehabilitation and modernisation measures for a rapid increase in production from the existing assets;

provision of adequate incentives for further investment in the industry to meet the increasing domestic demand fully and to produce additional quantities for exports;

adequate return to factories that have undertaken large scale expansion from which commercial production is likely to commence during the pricing period;

adequate return to factories which are being planned and should commence commercial production either towards the close of the pricing period or very soon thereafter :

optimum utilisation of all types of pozzolanic materials and blast furnace along to reduce costs and lead to economics in the use of limestone which is a non-renewable resource and specially encourage the use of fly ash as a polyclinic material which would otherwise cause environmental pollution;

encourage the optimum location and size of plants as established in the investment planning analysis; reduction of the present regional imbalance in cement production;

It is in this context that the Committee has considered the merits of fixing separate prices for the three major varieties of cement, namely OPC, PPC and PSC, based on the fair price assessed for the factories. The cost of production of PPC and PSC is slightly lower than the cost of production of OPC due to intergrading with cheaper pozzolanic materials like clay and blast furnace slag in the blended cement produced. However, unless there is some incentive for the production of PPC and PSC, manufacturers will not consider it necessary or desirable to increase the production of these types of cement which is highly desirable both from the point of view of minimising the use of non-removable resources like limestone and maximising the use of materials like slag and fly ash which could otherwise cause serious environmental pollution (indeed one could and should ask why the Country should have any OPC at all, there are several Countries where blended cements occupy the Para dominant share of the market and in grace constitute almost 90% of the total production and consumption of cement without any deleterious effects). Moreover, a price differential between these three types of cement, which are as good as each other for most purposes, could also lead to malpractices in the labelling of the three major varieties of cement produced whose prices and distribution should continue to be controlled. Therefore, the Committee recommends that the fair price worked out for OPC (IS Specification 269-76) price should be allowed for the other two types of cement, namely PPC and PSC also, and the slightly higher margin thereby available to the manufacturers of blended cement should provide an important incentive for increasing the production of these types of blended cement which can help to relieve the overall shortage of cement in the Country and also to provide improved technical service to consumers. Moreover, this somewhat higher margin should also enable the manufacturers to pay a somewhat higher price for fly ash used in PPC and PSC also, and the slightly higher margin thereby available to the manufacturers of blended cement provide an important incentive for increasing the production of those types of blended cement which can help to relieve the overall shortage of cement in the Country and also to provide improved technical service to consumers. Moreover, this somewhat higher margin should also enable the manufacturers to pay a somewhat higher price for fly ash used in PSC which could and should lead to increased production of these industrial waste and pozzolanic materials conforming to acceptable specification and also lead to better economy in the storage and transportation of those materials both at the point of their production and at the point of their consumption."

The fair prices of OPC worked out for the costed factories (which include the various schemes of replacement and renovation on which investment is expected in the pricing period costs as well as the benefits that accrue) and the assessed fair prices for the non-coasted units (after setting off the subsidies on the movement of clinker and the additional margins on retention prices, applicable to fablorios located in remote and hilly areas) vary from Rs. 175/- to Rs. 230/- after excluding the few high and low cost factories, that fall outside the range. Although improvements in efficiency and adoption of cost reduction methods

(see Chapter 5) can reduce this differential, nevertheless the fixation of one uniform price for all factories can lead to large benefits to low cost factories whose relatively favourable cost structure is not entirely due to managerial efficiency and impose large penalties on factories whose costs are relatively high but may not seem to be so uneconomic if on FOR price system was in force (so that the net realisation for factories located near the centre of consumption increases). The higher cost factories have indeed been so badly affected that they are close to being classified as "sick" and this is particularly add when imports are made at a price which is over 800% of the price paid to those factories. For these reasons the Committee considers that the basis of fixing and standard ex-factory price should be discarded. Adopting individual retention prices for each factory may appear to be the most fair system in this situation but this entails that the cost of each factory must be studied in detail-which will take considerable time - and moreover this will remove an incentive for cost reduction and here it should be noted that the potential for this is substantial it is for these reasons that the recent report of the Tariff Commission did not recommend the adoption of this system. It is found possible to remove most anomalies while still using the price to exert pressure on relatively high cost factories to reduce costs and to undertake suitable renovation measures by arranging the factories into a number of price tiers. It is possible to argue about the number of tiers that would be most reasonable in this matter. The Committee considered a number of alternatives and has concluded that arranging the factories in three price tiers appears fair as follows:-

Rs. 185/-

Rs. 205/-

Rs. 220/-

While a few specially low-cost factories in each group will have some small benefit over others in that price group, the higher cost factories will have to adopt all possible steps to reduce their costs to earn a reasonable return.

The names of factories recommended for inclusion in each of the above three price levels are indicated below:

Rs. 185 per MT Rs. 205 per MT Rs. 220 per MT

1. ACC - Jomul 1. ACC - Chandra 1. ACC - Bhupendra

2. J.K. Cement 2. ACC - Porbander 2. ACC - Sindri

Works -

Nimbashara

3. Birla Jute Mgf. Co., Satne 3. UPSCC - Churk Mirzapur 3. ACC - Chaibasa

4. Kesoram Cement -Karimnagar (AP) 4. India Cement -Shankar Nagar 4. Andhra Cement Vijayawada

5. Orissa Cement -Rajganpur 5. Jaipur Udyog Ltd. Swai, Madhapur 5. Kalyanpur Lime & Cement Works Ud. Banjari
6. ACC -Mancheria 6. Bagalkot Udyog Ltd., Bagalkot 6. Madras Cements Ltd. Ramnad
7. ACC -Shahabad 7. ACC - Kistna 7. ACC - Dwarka
8. ACC -Kymora 8. Tamilnadu Cements Rajapalayam 8. ACC - Madukarai
9. Saurashtra Cement & Chemical Industries Ltd., Ranavav, Gujarat 9. Birla Jute Mfg., Co., Chittorgarh 9. ACC - Lakheri
10. KCP Andhra Macheria 10. India Cements - Sankari Durg 10. ACC - Khalari
11. ACC - Wadi 11 . Hira Cements Bargarh 11.ACC - Sevalia
12. Dalmia Cement (Bharat) Ltd. Dalmiapuram (T.N) 12. Hindustan Sugar 12. Shree Digvijay Cement Co., Ltd., Ahmedabad
13. Birla Jute Mfg., Co., Durgapur 13. Shree Digvijay Cement Co., Ltd., Sikka (Digvijaygram)
14. Shree Digvijay Cement Co., Ltd., Sewree
15. Dalmia Dodri Cement Ltd., Charkhi Dadri
16. Panyam Cements & Minerals Industries Ltd., Kurnool
17. CCI - Kurkunta
18. UPSCC - Dalla (Mirzapur)
19. Rohtas Industries Ltd., Dalmianagar
20. Centery Cement - Tilda (Raipur)
21. CCI - Bakajan
22. ACC - Banmore
23. Visveswaraya Iron & Steel Ltd., Badravathi
24. Chettinad Cement Corpn. Ltd., Puliur
25. Mysore Cements Ltd., Ammasandra
26. Sone Valley Portland CementCo. Ltd., Jopla
27. Mawmluh Chorra Cements Ltd., Cherrapunji
28. CCI - Mandhar (Raipur)

N.B. In addition to the retention prices indicated above, the existing subsidies on clinker movement in case of Durgapur and Digvijay Cements Ahmedabad and Sowree) will continue.

The existing additional retention prices in case of CCI Bokajan and Mowlauh Cherra factories based on the differential freight on cement applicable to cement factories in remote and hilly areas will also continue in addition to the prices indicated above. ACC - Porbender - special products) and Travancore Cements produce white cement which is not under price control and therefore these two factories are not included in the above groups."

14. In the Statement of Objections at para 41 respondents have stated that the questionnaire was also sent to major cement machinery manufacturers to obtain the likely cost of equipment. Information on cement was also sought from selected foreign countries such as Great Britain, United States of America, Japan, France. The Federal Republic of Germany, China etc. The Committee also received Memoranda from the Cement Manufacturers Association, Indian National Cement and Allied Workers' Federation. The data on actual cost as calculated by the Secretariat of the Committee, the Bureau of Industrial Costs and Prices were checked and verified by the representatives of the manufacturing Companies. Consultations were also held number of times with the Cement Manufacturers Association.

15. Therefore, it is clear that the Expert Body has gone into the matter. It is the settled position of law that fixation of fair price whether it is under the Cement Control Order issued under Sections 18G and 25 of the Act or the Sugar Price Control Order issued u/s 3(3C), of the Essential Commodities Act, it is a legislative act and what is open to the Court is only to see the reasonableness of it and not to go into the economics of it. (See: Shiv Charan Vs. State of Haryana, & Gupta Sugar Works Vs. State of U.P. and Ors, In SEETHARAM SUGAR COMPANY LTD., & GUPTA SUGAR WORKS v. STATE OF UTTAR PRADESH, AND ORS. v. UNION OF INDIA AND ORS., Judgments Today 1990(1) SC 462 has observed at paragraphs 53 and 56 thus:

"53. The impugned orders are undoubtedly based on an exhaustive study by experts. They are fully supported by the recommendations of the Tariff Commission in 1969 and 1973. It is true that these recommendations in some respects were the subject matter of criticism by a subsequently appointed expert body, viz., the BICP. Apart from the fact that the BICP's criticism has not been accepted by the Government, that criticism has not been accepted by the Government, that criticism is not relevant in so far as the impugned orders are concerned because the latter are in regard to an earlier period. These orders are fully supported by the relevant material on record. The conclusions reached by the Central Government in exercise of its statutory power are expert conclusions which are not shown to be either discriminatory or unreasonable or arbitrary or ultra vires. The material brought to our notice by the petitioners does not support the arguments at the bar that the Central Government has not applied its mind to the relevant questions to which they are expected to have regard in terms of the statute. That the sugar factories for the purpose of determining the price of sugar in terms of Sub-section (3C) should be grouped on the basis of

their geographical location is a policy decision based on exhaustive expert conclusions.

XXX XXX XXX 56. The Court has neither the means nor the knowledge, to re-evaluate the factual basis of the impugned orders. The Court, in exercise of judicial review, is not concerned with the correctness of the findings of fact on the basis of which the orders are made so long as those findings are reasonably supported by evidence. In the words of Justice Frankfurter of the U.S. Supreme, Court in *Railroad Commission of Texas v. Rowan & Nichols Oil Company* (311 US 570-577, 85 L ed. 358, 362):

"Nothing in the Constitution warrants a rejection of these expert conclusions. Nor on the basis of intrinsic skills and equipment, are the federal Courts qualified to set their independent Judgments on such matters against that of the chosen state authorities - When we consider the limiting conditions of litigation, the adaptability of the judicial process only to issues definitely circumscribed and susceptible of being judged by the techniques and criteria within the special competence of lawyers it is clear that the Due Process Clause does not require the feel of the expert to be supplanted by an independent view of Judges on the conflicting testimony and prophecies and impressions of expert witnesses."

This observation is of even greater significance in the absence of a Due Process Clause."

16. The contention of Sri U.L. Narayana Rao, learned Counsel for the petitioners is that the licensing capacity of production of the 1st petitioner-Factory has been taken as 3.60 lakhs tonnes and on that basis the first petitioner-Factory has been put in the second tier namely at the rate of Rs. 205/- per tonne and the retention price is fixed at Rs. 205/- per tonne; that it is unreasonable; that the respondents have failed to take into consideration the relevant factors in this regard. Learned Counsel has placed reliance on paragraph 34 of the Judgment of the Supreme Court in *Premier Automobiles Ltd. and Others Vs. Union of India (UOI)*, the Supreme Court in paragraph 34 of the Judgment has observed thus:

"There is a good deal of force in what the Attorney General says. But in our opinion, it is unnecessary to express our view in any great detail in the matter. In our Judgment the very concept of fair price which can be fixed u/s 18G takes in all the elements" which make it "fair" for the consumer leaving a reasonable margin of profit to the manufacturer without which no one will engage in any manufacturing activity. Capacity utilisation of a manufacturing unit, the quality of its product and the maintenance of proper standards at various levels of production are all relevant factors for the determination of the price. Capacity utilisation, however, has to be on the basis of what can be reasonably achieved keeping in view always the practical side. It is common ground that the achievable capacity for production will be an important factor in the matter of fixation of fair price. The larger the production the less the cost and vice versa. We shall, therefore, have to determine whether the conclusions of the

Commission with regard to the capacity of the three manufacturing units for production are based on a correct appraisal of material facts and principles."

17. The learned Counsel stressed on the words that "achievable capacity for production is an important factor in the matter of fixation of fair price". Learned Counsel also placed reliance on another Decision of the Supreme Court in *Saraswati Industrial Syndicate Ltd. and Others Vs. Union of India (UOI)*, specially on para 3 of the Judgment wherein it has been observed that Clause 7(2) of the Sugar Control Order required the Government to fix the price having regard to the estimated cost of production of Sugar on the basis of relevant schedule. The Supreme Court has further observed that the expression "having regard to" obliges the Government to consider relevant data material to which it must have regard. In this regard, it is relevant to notice that the Supreme Court in *Saraswathi Industrial Syndicate Ltd's* case has considered the statutory norms laid down in the order issued under the statute as contained in Clause 7 of the Sugar Control Order reproduced in paragraph 2 of the aforesaid Judgment. It has held that the fixation of the price as per the norms laid down in a statute or an order issued under a statute will be open to challenge on the ground that such fixation does not conform to the statutory norms and the Court will be entitled to examine the same to that extent. But in a case where the Statute namely Industrial (Development Regulation) Act, 1951 or the Rules framed thereunder do not fix the norms for determining the retention price of the Cement Factory, the determination has to be made on reasonable basis. Whether the determination is made on a reasonable basis or not would in turn depend upon, on what basis the determination is made. If the determination is made on making indepth study by the High Level Committee as appointed in the instant case, and that Committee studies all the aspects of the matter and makes a detailed Report and on the basis of that Report the Central Government fixes the retention price, it is not for this Court to go into the matter and record a finding contrary to the one arrived at by the Expert Committee as long as it is not shown that the recommendation of the Expert Committee is unreasonable. No doubt, the Expert Committee has proceeded on the basis that the licensing capacity of the first petitioner- Factory is 3.60 lakhs tonnes per year whereas it was reduced to 2.25 lakhs tonnes with effect from 29th March 1979 as per Annexure-S6. If the licensing capacity alone was made the basis by the Expert Committee to classify the cement factories into 3 tiers probably the argument would have been accepted as correct; but from the Report of the High Level Committee made in the month of December 1978 referred to above and also the licensing capacity of each of the 28 cement factories made available to us shows that even in the 220 tiers the cement factories whose licensing capacity is less than 2.25 tonnes have been included. Similarly in the tier of Rs. 205/-per tonne, the cement factories having more than 3 lakhs tonnes per year are included such as the cement factories having licensing capacity of 9.03 lakhs tonnes and 6 lakhs tonnes have been included. Therefore, it is clear that the licensed capacity of a cement factory has not been made the sole basis for classification or categorisation of

the cement factories into 3 tiers. The classification or categorisation appears to have been made, on taking into consideration all the aspects of the case, but not at any rate only on the licensing capacity of the factory. Therefore, it is not possible to hold that the licensed capacity of the first petitioner-Factory being 2.25 lakhs tonnes per year has been wrongly included in the retention price of Rs. 205/- per tonne. We are also of the view that neither it would be open to us nor the Court would be competent to go into further details such as economics of determination of retention price and to redetermine the category of the first petitioner's Factory, because the Court has no such expertise to undertake such task. Therefore, the Supreme Court in *M/s. Shri Seetharam Sugar Company's* case, observed thus at paragraphs 57 and 58:

"Judicial review is not concerned with matters of economic policy. The Court does not substitute its Judgment for that of the legislature or its agents as to matters within the province of either. The Court does not supplant the "feel of the expert" by its own views. When the legislature acts within the sphere of its authority and delegates power to an agent, it may empower the agent to make findings of fact which are conclusive provided such findings of fact which are conclusive satisfy the test of reasonableness. In all such cases, judicial inquiry is confined to the question whether the findings of fact are reasonably based on evidence and whether such findings are consistent with the laws of the land. As stated by Jagannatha Shetty, J., in *M/s. Gupta Sugar Works* (supra):

"the Court does not act like a Chartered Accountant nor acts like an Income Tax Officer. The Court is not concerned with any individual case or any particular problem. The Court only examines whether the price determined was with due regard to considerations provided by the statute. And whether extraneous matters have been excluded from determination."

58. Price fixation is not within the province of the Courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. As stated by Justice Cardozo in *Mississippi Valley Barge Line Company v. United States of America* (292 US 282-290, 78 L ed. 1260, 1265):

"The structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form...It is not the province of a Court to absorb this function to itself..The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

18. Therefore, we are of the view that it is not possible to agree with the contentions of Sri U.L. Narayana Rao that the categorisation of the first petitioner-Factory into the tier of Rs. 205/- per tonne is liable to be interfered with. Accordingly, the first contention is negatived.

19. As far as the contribution relating to Cement Regulation Account by the first petitioner-Factory is concerned, Clause 9 of the Control Order provides that:

"Every producer shall, in respect of each transaction by way of sale of cement effected by him or in respect of every removal of cement made by him, under Clause 3 pay within one month of the close of the month in which such sales or removals take place, to the Controller, an amount equivalent to the amount, if any by which the free on rail destination price of such cement exceeds the aggregate of the following amount, namely:-

(i) the ex-factory price of such cement calculated in accordance with the rates specified in the Schedule;

(ii) selling expenses calculated at the rate of Rs. 3.71 per tonne;

(iii) the excise duty paid thereon; and

(iv) in the case of packed cement, the charges fixed by the Central Government in respect of packing under the first provision to Clause 8 and where a producer uses second hand jute bags in excess of the limit, if any, specified under the second proviso to that clause such charges as proportionately reduced.

Provided that the expenditure incurred by the producer on freight by the cheapest mode of transport or where any other mode of transport has been specified by the Central Government under Clause (4), by such mode of transport in respect of such transactions shall be reimbursed to the producer by the Controller from out of the Cement Regulation Account referred to in Clause 11.

Provided further that nothing contained in this clause shall apply to the cement moved out of the factories prior to the 1st day of January, 1988 but sold after that date."

20. The validity of the Control Order is not in dispute. The Control Order provides for contribution of money towards the Cement Regulation Account by every producer as provided in Clause 9, it is not possible to hold that compulsion to contribute to Cement Regulation Account by every producer is illegal. It is in accordance with Clause 9 of the Control Order.

21. In addition to this, Cement producer is also benefited by the Cement Regulation Account because Clause 11 of the Cement Control Order provides the manner in which the amount contributed to the Cement Regulation Account has to be maintained and spent, and the amount remained unspent to be disbursed. Thus the Cement Regulation Account in effect is beneficial to Cement producers. Therefore, even though it is compulsory on the part of the producer to contribute amount to Cement Regulation Account in terms of Clause 9 of the Cement Control Order, but the producer is benefited out of such contribution. Therefore, the second contention is also liable to be rejected. It is accordingly rejected.

22. As far as the 3rd contention is concerned, it has to be observed that as per the decision of the Central Government dated 3rd May 1979, produced as Annexure-B the impact of retention prices has to be reviewed every year and

various elements of the manufacturing costs are to be taken into consideration. Therefore, it is not disputed before us that in the year 1980-81 and 1982 there were revisions in the price on the basis of the escalation of certain items going into the manufacturing costs. No material is placed before us as to whether the representation made by the petitioner as per Annexure-S7 dated 3rd October 1979 and also Annexure-F were not taken into consideration when the retention price was reviewed in the year 1980. Therefore, it is not possible to appreciate this contention. The Control Order was issued by the Central Government, on taking into consideration all factors, and also the cost of production, prevailing prior to 3rd May 1979 or to be exact up to the date of the Report of the High Level Committee made in December 1978. Thereafter the retention price has been revised in the year 1980-81 and 1982. The petitioners have not placed before the Court the extent of revision made in the year 1980-81 and 1982. Accordingly contention No. 3 is also rejected.

23. The 4th contention is that as per Clause 12 of the Control Order, the representation made by the petitioner as per Annexure-S7 and the cost of production brought to the notice of the Central Government as per Annexure-F ought to have been considered and the retention price ought to have been revised under Clause 12 of the Control Order. Clause 12 of the Control Order has already been reproduced. According to this Clause, it is open to the Central Government to vary the price fixed having regard to any change in any of the factors relevant for the determination of the price of cement such as increase or decrease in the cost of production by Notification in the Official Gazette. The contention is that under Clause 12, it is also incumbent upon the Central Government to consider the request of each individual factories for revision of the categorisation of the factories fixed under the Control Order. It is not possible to accept this contention.

24. Clause 12 cannot be interpreted in the manner submitted by the learned Counsel for the petitioners. As the object of the Act and Cement Control Order, is to secure the equitable distribution and availability of cement on fair price and regulate supply it is not possible to hold that the price has to be fixed on taking into consideration the individual cases. The policy is to take into consideration the production of cement as a whole and not individual factories. If the individual factories are to be taken into consideration and the price has to be fixed according to the cost of the individual factory the whole object of making available cement at a fair price to consumers and also to ensure regular supply and distribution will be defeated because in that event the price would be according to the cost of production of each factory which in turn depends upon various factors, i.e., one factory may have the high cost of production because of inefficient staff and over-staffing and other problems, and the other factory may have lesser cost of production because it has got efficient staff and is not over-staffed. Therefore, it is not possible to hold that the power under Clause 12 of the Control Order can be exercised to revise the retention price under the Control Order of individual factories separately. Therefore, the 4th contention is also

rejected.

25. For the reasons stated above, all the contentions raised by the petitioners fail. No other contention is urged. Accordingly the petition fails and the same is dismissed.