

(2003) 11 AHC CK 0057
In the Allahabad High Court
Case No : C.M.W.P. No. 43042 of 2002

Duncans Industries Ltd. and Another	Vs	APPELLANT
Union of India (UOI)		RESPONDENT

Date of Decision : 07-11-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Essential Commodities Act, 1955 — Section 3
Evidence Act, 1872 — Section 115

Citation : AIR 2004 All 144

Hon'ble Judges : R.S. Tripathi, J; M. Katju, J

Bench : Division Bench

Advocate : Siddhartha Shankar Ray, S.M.A. Kazmi and Rajeev Dhawan, for the Appellant; B.N. Singh and S.P. Gupta, S.S.C., for the Respondent

Judgement

This Judgment has been overruled by : Duncan Industries Ltd. and Another Vs. Union of India (UOI), AIR 2006 SC 3699 : (2006) 2 JT 294 : (2006) 2 SCALE 284 : (2006) 3 SCC 129

M. Katju, J.—This writ petition has been filed for a writ of certiorari for quashing the pricing policy parameters for the VIIth and VIIIth pricing periods issued by the respondent and communicated to the petitioners by letter dated 4-6-2002 vide Annexure 1 to the petition as well as the impugned fixation of the retention price by communication dated 19-8-2002 vide Annexure 2 to the petition particularly in respect of the parameters/norms mentioned in para 32 of the petition as null and void. The petitioners have prayed for a direction that the pricing policy parameters for the VIIth and VIIIth pricing periods cannot be given retrospective operation, and have prayed for a mandamus directing the respondents to continue to determine and notify the retention prices of the petitioners in accordance with the pricing policy parameters for the VIth pricing period as communicated to the petitioners vide letter dated 24-7-1997/5-8-1997 Annexure 4 to the petition and to continue to make monthly payments to the petitioners on that basis. They have also prayed for a direction restraining the

respondents from recovery of any amount from the petitioner and doing any act in furtherance of the pricing policy parameters for the VIIth and VIIIth periods issued by the respondent and have prayed for refund of an amount illegally realized from the petitioners with interest.

2. Heard learned counsel Dr. Rajeev Dhawan, senior Advocate and Sri S.M. A. Kazmi for the petitioners, and Sri S.P. Gupta for the respondents.

3. The petitioner No. 1 is a company registered under the Indian Companies Act having its registered office at Kolkata. The petitioner No. 2 is a shareholder of the petitioner No. 1 and most of the shareholders are citizens of India. The petitioner company is engaged in the business inter alia of manufacturing urea at its factory located at Panki, Kanpur, U.P. and distribution and sale thereof. Urea is an essential commodity under the Essential Commodities Act. The respondent Union of India introduced and has administered since 1977 a Retention Pricing Scheme (RPS) for pricing of fertilizers. This system was developed with a view to introducing a rational system of pricing of fertilizers. Under the scheme a maximum retail price (MRP) of fertilizers that could be charged to farmers was fixed at low, controlled levels unrelated to the cost of production and distribution of the same. At the same time a reasonable return on the investment by manufacturers was also granted under the scheme to give incentive to businessness. Under the scheme, the Central Government decided to fix a price called the retention price for each manufacturer to cover his cost of production and to yield to him a post tax return of 12% on his net worth. The retention price scheme stated :

"The system provides for a fair ex factory retention price per tonne of urea (hereinafter referred as retention price) for each plant based on a capacity utilization of 80 per cent and a combination of norms and actuals in regard to the consumption of raw materials, utilities and other inputs, maintenance and other costs and provides for a post tax return of 12 per cent on net worth."

4. True copy of the gazette notification dated 1-11-1997 introducing the system of retention price is Annexure 5. It is alleged in para 16 that the Gazette notification dated 1-11-1997 contained a clear and unequivocal representation and assurance by the Central Government to all fertilizer manufacturers to the effect that the price controls in respect of fertilizers would not adversely affect the profitability and return to the fertilizer manufacturer which would remain at a reasonable post tax level of 12% on net worth at a normative capacity utilization of 80%. It is alleged that on the basis of this representation and assurance all manufacturers of fertilizers, including the petitioners, continued their operations otherwise they would have been constrained to close down their business due to the price control. It is alleged in para 17 that urea plants were set up on different feed stocks (raw materials) and different process-routes as per the prevailing Government Policy and therefore their costs of production were also different and unique to each unit. The retention price of a Unit is an ex-factory price per tonne of urea in respect of that unit. The retention price of a unit inter alia comprises of

three components. Variable input costs. Conversion Costs and Capital Related Charges. These components are determined on technical and accounting norms.

5. The variable input costs include variable cost elements which have been given in detail in para 18 of the writ petition. These costs are computed by multiplying the Consumption Norms with the respective prevailing prices, Consumption Norms are standards of consumption of inputs per tonne of urea which are determined in respect of each Unit at reasonable levels of efficiency. The Consumption Norms so determined are specific to a manufacturing unit and are not revised unless there is a change in plant equipment by way of additions or modifications. It is alleged that the last revision in the Consumption Norms was based on the operating data of the year 1986-87. These consumption norms have remained unchanged since then except in cases of those units where changes have been made in the plant configuration. Since prices of variable inputs fluctuate with time, escalation/deescalation of costs of inputs consequent to such price changes are reimbursed in a quarterly basis based on the weighted average price of inputs for the quarter. The component of Conversion Cost includes items like salary and wages, repairs and maintenance, selling costs and other fixed expenses. Repairs and maintenance costs are revised every year. The Conversion Costs are computed using norms fixed using the actual costs for the costed year as the base year. The component of Capital Related Charges includes items like depreciation interest expenditure on debt incurred as well as a 12% post tax return on net worth. This element was expected to be revised once in three years at the commencement of a new pricing period based on the costed year data. The rate of return built into the Retention Price is on a pre-tax return after adjusting for the prevailing rate of income tax, including surcharge as confirmed by the Government's circular dated July 24, August, 5, 1997. The differential between a unit's Retention Price and the maximum retail price both fixed and determined by the Government, is disbursed to urea manufacturers by the Government on a monthly basis as Retention price support.

6. In Para 23 of the petition it is alleged that in the initial years of the Retention Price Scheme the system was operated through 3 year pricing periods. The VIth Pricing period was initially from 1-4-91 to 31-3-94, which was extended up to 30-6-1997. Even thereafter the respondents continued to notify the petitioner company's retention prices on the same basis as existing for the VIth pricing period. It is alleged that the respondents made a promise to the petitioners of continuing the VIth Pricing Parameters till the notification dated 5-11-2001. It is alleged in Para 24 that the petitioner company planned manufacture of urea from its unit on the basis of such policy parameters, relying on the retention prices finalized and notified by the government based on such policy parameters. It is alleged that at no point of time was the petitioner company given to understand that the pricing policy parameters for the period subsequent to 30-6-1997 could change and that also with retrospective effect. It is alleged that the petitioners, based upon this assumption, committed investment which they may not have, had they known that the pricing policy parameters could be changed

retrospectively. It is alleged that such a change would be ex-facie repugnant to the resolution dated 1-11-1977. In Para 25 it is alleged that for the period of the last four and a half years the petitioner company has sold the fertilizer and collected or paid the difference vis-a-vis the retention price made applicable to it through an admittedly rational pricing system constructed and administered by the Union Govt. itself. While the retention prices notified and disbursed to the petitioners for the period up to 30-7-1997 were based on the policy parameters as outlined in the circular dated July 24/ August 5, 1997, all notifications for revision in Retention Prices subsequent to this date also were continued on the same basis as outlined in the aforesaid circular. The petitioner company has in all received 19 notifications revising the retention price since 1-7-1997 vide Annexure 6 to the petition. In Para 26 it is alleged that the petitioner being a public limited company has since the last four years finalized its annual accounts, computed profits, paid corporate taxes as well as declared dividends based on retention prices finalized and notified. In Para 27 it is alleged that on 7-6-2001 the respondent advised the petitioners that payment of subsidy for production from April 2001 onwards being made on the basis of existing system of RPS would be treated as provisional subject to adjustment in future after a final view/ decision on the recommendation of the Expenditure Reforms Commission. This communication dated 7-6-2001 from the Central Govt. referred to changes only after 1-4-2001 and did not envisage any revision in the existing Retention Pricing Policy in the manner communicated through the letter dated 4-6-2002, and in any case in respect of any period prior to 1-4-2001. It is alleged that this communication dated 7-6-2001 clearly spelled out that the pricing policy based on which prices had been notified by the respondents in respect of the period prior to 1-4-2001 was final and not subject to any change. The communication dated 7-6-2001 is Annexure 7 to the petition. It is alleged that the action of the government to revise the retention policy parameters retrospectively from 1-7-1997 is the result of an after-thought and not resulting from any rational policy dispensation. It is further alleged that it amounts to the government going back on its promise of computing Retention Prices on Pricing Policy Parameters for the period at least up to 31-3-2001, in utter disregard to the policy followed in the July 24, 1997 circular as well as all subsequent notifications revising retention price. It is alleged in Para 30 that the letter dated 5-11-2001 for the first time gave an indication of the intention of the respondent to revise Pricing Policy Parameters for the VIIth and VIIIth Pricing Period retrospectively w.e.f. 1-7-1997. Since no cause of action had arisen at that stage, the intention of retrospective revision of the Pricing Policy w.e.f. 1-7-1997 as well as the other components Which had an adverse impact on the determination and fixation of the retention price under the impugned parameters and the impugned fixation were not, and could not have been challenged earlier in Writ Petition No. 43934 of 2001 filed in this Court on 18-12-2001 which is still pending.

7. It is alleged in Para 31 that by a communication dated 4-6-2002 the petitioner was communicated the decision of the respondent on the policy parameters for

the VIIth and VIIIth Pricing periods which inter alia revises retention pricing policy parameters retrospectively w.e.f. 1-7-1997 to 31-3-2000 for the VIIth Pricing Period and 1-4-2000 to 31-3-2003 or till a new pricing policy is announced (whichever is earlier) for the VIIIth Pricing Period. It is alleged that various parameters in the said policy of the VIIth and VIIIth Pricing Period are ex-facie illegal and violative of the Policy Resolution dated 1-11-1977. It is alleged that this policy as communicated by the respondent by its letter dated 4-6-2002 is estimated to be highly adverse and would in all probability threaten the survival of the petitioner company.

8. In Para 32 of the petition the petitioner has referred to several components in respect of the impugned parameters and the impugned fixation and has alleged that these are unjust, unfair, arbitrary, unreasonable and also violative of Articles 14, 19(1)(g), 21 and 300A of the Constitution of India. It is alleged in Para 34 that in any event the impugned parameters and the impugned fixation is bad in law and violative of the principles of natural justice. It is alleged in Para 35 of the petition that the principles of legitimate expectation and promissory estoppel have been violated inasmuch as the basic promise of fixation of the retention price under the resolution dated 1-11-1977 was to provide a post tax return of 12% on the net worth, whereas the impugned parameters and the impugned fixation are designed in a manner which not only deny the post tax return of 12% on net worth but endanger the very existence of the petitioners. It is alleged that consequent to the impugned parameters and the impugned fixation the entire capital of the petitioner company may be wiped out. It is alleged in Para 36 that consequent to the implementation of the intention notification dated 5-11-2001 as referred and the impugned parameters and the impugned fixation the respondent has illegally and arbitrarily withheld/ deducted/recovered from the petitioner company till date in all an amount in excess of Rs. 219 crores by adjusting against monies already paid. As on date the petitioner company apart from the overdraft liability of its bankers of approx. Rs. 200 crores, has to pay a sum of approx. Rs. 80 crores to Indian Oil Corporation for the supply of naphtha and a sum of Rs. 60 crores to KESCO for supply of power. It is alleged that on account of non payment of the dues the power supply of the petitioner company and consequently the plant of the petitioner company had been shut down since April 2002. On account of non payment to Indian Oil Corporation the said Corporation has discontinued the supplies of naphtha. Both KESCO and IOC have filed Court cases against the petitioner company. The properties of the petitioner company stand attached in favour of KESCO. Copy of the attachment order is Annexure 10. Farther, IOC has filed a petition before the High Court of Delhi and has obtained an ex parte order restraining the petitioner company not to alienate its properties. Copy of the ex parte order dated 24-7-2002 is Annexure 11. In Para 38 it is alleged that the impugned communication particularly for its retrospective operation is estimated to result in huge losses for the petitioner. This is against the petitioner company's reasonable and legitimate expectation of earning a return of 12% post tax on net worth promised by the scheme at 80%

normative capacity utilization, since what to talk of return, it results in huge losses for the petitioner company and has resulted in the closure of the unit of the petitioner company which is lying closed since April 2002.

9. The government compels the Urea manufacturing units to operate in a market controlled by its own policies where there are controls on the distribution of Urea, a limit on the maximum price that can be charged from the market, and controls on the quantities that can be produced as well as sold. The action of the government is prejudiced against the petitioners as under the present controlled environment the petitioners have no avenues of exploring opportunities for recouping the losses inflicted by the impugned parameters and the impugned fixation.

10. A counter affidavit has been filed and we have perused the same.

11. In Para 6 of the counter affidavit it has been stated that the government wanted to promote the use of chemical fertilizers and for that end in view it had fixed a maximum price of fertilizers under the Fertilizer Control Order, 1957. This price was based on ex factory price of Rs. 1158/- (as it then was) at which urea could be sold by a manufacturer at its factory gate. To this price some other items (as mentioned in Para 3 of the Retention Price Scheme) were added and the total maximum retail price (MRP) was fixed at Rs. 1550/- per tonne w.e.f. 1-11-1977. The MRP of urea is the maximum price at which urea can be sold to the farmers. The present MRP is Rs. 4830 per metric tonne. In Para 8 of the counter affidavit it is alleged that the Retention Price Scheme is not a statutory scheme. It is based on voluntary agreements executed by the manufacturers of chemical fertilizers. It is an arrangement in the nature of stipulations worked out in such a manner that none of the manufacturers is put to loss for selling chemical fertilizers at the Maximum Retail Price fixed under the Fertilizer Control Order 1985 nor is any manufacturer permitted to make any undue or extra profit than what is provided for in the scheme. Before introduction of the Retention Price Scheme letters were sent on 24-10-1977 to all manufacturers giving the details of the scheme wherein it was specifically mentioned that the Scheme would come into effect from 1-11-1977 on the basis of voluntary agreements on the part of the individual units to participate in this scheme. A copy of such letter is Annexure CA-2. The predecessor in interest of the petitioner gave an undertaking on the given pro forma, copy of which is Annexure CA-3. In Para 10 of the counter affidavit it is alleged that it is on the basis of this undertaking that the petitioner company is operating under the RPS. This undertaking, inter alia, brings out the consent of the petitioner company to abide by the provisions governing the RPS. In Para 11 of the counter affidavit it is alleged that after the introduction of the RPS the RP was fixed for chemical fertilizers of each individual unit. In Para 12 it is alleged that the capacity utilization norm at the time of introduction of RPS was 80% which was changed to 85% in case of naphtha based urea units and 90% in case of gas based urea units from the second year of operation w.e.f. 1-4-1988 coinciding with the commencement of the 5th

Pricing Period. The capacity utilization norms have been further changed w.e.f. 1-4-2002. At present the capacity utilization norm for gas based units is 95% and is 90% for naphtha and other based units. Similarly, certain other norms have undergone changes over the years during different pricing periods. In Para 16 it is alleged that the initial notification dated 1-11-1977 had provided that the Retention Price Scheme could be reviewed. The manufacturers could put their claim for payment for the past period in case their ex-factory price was found to be higher than the MRP. They were entitled to put their claim for the same. In Para 17 it is alleged that in view of the variations in the costs and the ex-factory prices, there was a continuous process of reviewing the Retention Price. For this information of operating data was regularly obtained from the manufacturers, inspections too were made at times, and the job was also assigned to the experts. Steps were taken to find out whether any excess payment of subsidy had been made and if made, to recover the same. This used to be the normal routine job which was also assigned to the experts. This used to be normal routine exercise based on the figures supplied by each manufacturer from time to time or collected from it. It is alleged in Para 18 that the pricing period for determining the Retention Price was initially fixed for the period from 1-11-1977 to 31-3-1979 and thereafter for three years and the pricing periods were notified accordingly. The five pricing periods were notified from time to time and were made effective upto 31-3-1991. The 6th pricing period was to commence from 1-4-1991 and was to remain operative up to 31-3-1994. For various reasons, however, it could not be formulated and notified even up to December, 1994 and was notified in January, 1995 and made effective from 1-4-1991.

12. Dr. Rajeev Dhavan, learned Senior Counsel for the petitioner has made several submissions. These submissions can be broadly divided into two categories.

(a) the retroactive application of the new policy parameters is arbitrary and unreasonable and against the principle of legitimate expectation and promissory estoppel. This retrospective application has resulted in recovery of approximately Rs. 225 crores of subsidy already disbursed to the petitioner and more than Rs. 200 crores which would have been due to the petitioner on account of adjustments of actual costs but were denied.

(b) The prospective application of the new policy parameter is arbitrary and means not only that the petitioner will not get the assured 12% return on net worth of its investment, but will not result in profit to the petitioner at all.

13. As already mentioned above, the subsidy system works on the basis of the payment every month depending on the changes in the input price or actual cost incurred, tax rate, etc. Adjustments in the subsidy have been made periodically and such adjustment are inevitable in the cost system which took into account the actual costs. However, what has been contended by Dr. Dhavan is that there is distinction between the adjustment due to cost variation on the one hand and revision of policy parameters on the other. The latter changes the very basis on

the subsidy and not just the computation of its amount. Between 1997 and 11-4-1994 adjustments were consistently made but there was no basic change in the policy parameters to adversely effect the over-all subsidy payable to the petitioner. Dr. Dhavan has contended that from 1994 to 2002 there was a small change in policy parameters but care was taken to ensure that the overall impact of the changes were positive. Thus for the extended 6th pricing period from 1.4.1994, based on the revised prices notified by the Government by communication dated 7-11-1997, the petitioner raised bills of Rs. 49.97 crores and received payment for the same. However, learned counsel for the petitioner contended that in the new policy of 4-6-2002 and thereafter drastic changes in the policy parameters were introduced which were applied retrospectively from 1-7-1997 which had an adverse impact on the petitioner and led to closure of its unit. Thus Dr. Dhavan has contended that from 1997 adjustment on the basis of actual cost on account of price escalation/de-escalation of inputs etc. and not changes in the policy parameter themselves were made. Where some changes have been made in the policy parameters in the past and applied retrospectively, they have not been wholesale changes of the kind mentioned in the impugned notification, and the Government has ensured that the petitioner obtained the appropriate subsidy. The new policy parameters dated 4-6-2002, however, have been applied retrospective from 1-7-1997 and has also laid down onerous parameters for the future. The retention price has been revised significantly downwards on the basis of the impugned policy of 4-6-2002. Learned counsel submitted that this new policy parameter has had adverse and invidious effect on the petitioner by giving a retrospective effect as it had claimed back legitimately earned subsidy. The Company had in fact closed its account for the year 1997-98 to 2000-01 and on the basis of the subsidy received prior to the notification dated 4-6-2002 and 19-8-2002 the petitioner had already incurred liabilities for the period 1997-98 to 31-3-2002 and had paid dividend, Income Tax, bonus, etc. which cannot be recovered now. Thus the impugned policy parameters dated 4-6-2002 effectively re-opened the entire accounts of the petitioner and has had a devastating effect because the same amount of Rs. 224.87 crores received by the petitioner as subsidy from 1997 to 2002 has become irretrievable and cannot be passed on or adjusted. The petitioner's accounts have already been closed. It is urged that what the Government has done is to have taken this money back by adjusting it against later subsidies, thus effecting both 1997 to 2001 as well as later period with crippling effect. The petitioner's plant has been shut down since April 2002 and creditors have filed Court cases and salaries/lay off payments to the workers cannot be paid. The retroactive revision of the subsidy has resulted in a negative return on the net worth at normative levels what to say of 12% post tax return. Given the price controls under the Fertilizer (Control) Order, there is no scope for retrieving this loss either from the past or the future periods. Learned counsel for the petitioner submitted that the subsidy w.e.f. 1-7-1997 was being disbursed, and the petitioner was never informed by the Government that they would revise downwards the retention price retrospectively. It is alleged that for the first time the petitioner was informed by

the Government vide letter dated 7-6-2001 that the payment of subsidy for production from April 2001 is being paid provisionally. It is therefore contended that at best the retrospective effect of the impugned pricing parameters could be w.e.f. 7-6-2001 or alternatively from 1-4-2001 and not from an earlier date. By the notification dated 5-11-2001 an intimation was given of the revision w.e.f. 1-4-2000 and also that the Government is taking a final decision with respect to revising the policy parameters w.e.f. 1-7-1997. It is therefore contended that even if this letter is regarded as an intimation then too the pricing parameter could have been revised retrospectively only from 5-11-2001.

14. Coming to the second limb of his argument learned counsel for the petitioner submitted that the effect of applying the policy parameters prospectively is. to make a drastic change in the pricing parameters which would adversely affect the future viability of the company.

15. Broadly these changes are as follows:

Item

Changes

(i)

Plant capacity

Change in assessed capacity from 6.95 lakh MT to 7.22 lakh MT from 1-4-2000

(ii)

Normative capacity (Including changes In vintage allowance)

Change is from 80% to 90% (5% of which Is due to graded withdrawal of vintage allowance).

(iii)

Consumption Norms

Change from normative to actuals resulting in drastically reduced subsidy

(Iv)

Life cycle of catalyst

Intrease in life cycle of catalyst to unreasonable levels by 33 to 80%

16. Learned counsel for the petitioner has submitted as follows :

(a) No basis for retention price has been disclosed by the respondents.

(b) The retention price has been reduced by increasing the denominator (e.g. normative capacity), consumption norms for inputs, increase in life cycle of catalyst etc.

(c) By decreasing the retention price, the subsidies have fallen dramatically (and retroactively set off against already disbursed subsidies in the past).

(d) The reduction of subsidies means that the promised return of post tax return of 12% on net worth is not met at the normative level of 80% capacity originally set out by the Government policy or at the higher levels now laid down and is at negative levels.

17. Learned counsel has further submitted that the pricing parameters for the future are contrary to the legitimate expectation of the petitioner since the promise made in the policy of 1-11-1977 was that the manufacturer will get post tax return of 12% on its net worth at a normative capacity of 80%. By virtue of the impugned notification such promise is not achievable and has become illusory and totally unworkable as is evident from the following :

S. No.

Year

%age return on net worth at normative levels after taking Into account the impugned notifications

Normative capacity as advised by respondents pursuant to impugned notifications

1

1997-1998

(-) 6.7 %

5.56 lakh MT

2

1998-1999

(-) 10.4 %

5.63 lakh MT

3

1999-2000

(-) 25.6 %

5.77 lakh MT

4

2000-2001

(-) 23.3 %

6.14 lakh MT

18. Learned counsel for the petitioner has relied on the Constitution Bench decision of the Supreme Court in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, and has submitted that the impugned policy parameters both regarding its retrospective and future effect are arbitrary and hence violative of Article 14 of the Constitution.

19. Learned counsel for the petitioner submitted that the petitioner never voluntarily acceded to the impugned notification. He submitted that even if the petitioner's representative attended the meeting held on 7-8-2002 this does not mean that they have given consent to the pricing parameter dated 4-6-2002. The meeting of 7-8-2002 was only for a limited purpose to advise areas of disallowance within the pricing parameters of 4-6-2002 but the petitioner and others were not permitted to challenge the pricing parameters fixed on 4-6-2002 and they had never given consent to the same. The petitioner has also denied that it committed any fraud in respect of the bills submitted by it. Learned counsel submitted that a manufacturer can raise a bill for subsidy only on the basis of the retention price notified. Hence there is no question of taking extra subsidy. It is denied that there was any suppression of fact as all the relevant data was furnished in the prescribed format. Learned counsel submitted that a fraud cannot be alleged on vague assertions. No specific assertion has been made as to how the petitioner has claimed or were paid any excess subsidy.

20. Learned counsel for the petitioner has also relied on the decision of the Supreme Court in *Tata Cellular v. Union of India*, AIR 1996 SC 11 and submitted that the State cannot act arbitrarily even on its contractual dealings.

21. Learned counsel for the petitioner has relied on the decision of the Supreme Court in *Bejgam Veeranna Venkata Narasimloo and Others Vs. State of A.P. and Others*, In this decision it was held by the Supreme Court that a vested right of a party cannot be disturbed retrospectively by subordinate legislation.

22. In *State of Madhya Pradesh and another Vs. G.S. Dall and Flour Mills and Others*, it was held that a rescission of an earlier exemption can only operate prospectively.

22. In *Eicher Motors Limited and Another Vs. Union of India and Others Etc.*, it was held that the amendment to the Modvat Scheme cannot take away a vested right which has already accrued to the assessee under the existing law.

24. In *State of Bihar v. K.K. Kalra* it was held that the delegated legislation can operate only prospectively and not retrospectively.

25. In *M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others*, it was held by the Supreme Court that where the U.P. State Electricity Board had issued notifications u/s 49 of the Electricity (Supply) Act offering concession by way of rebate in electricity duty to the new industries so as to attract them to the State, and where a new industry had been established acting on such promise, such promise not being contrary to any

statutory provisions would bind the Board, since they have spent large amount of money for establishing infrastructure and industry and had necessarily altered their position relying on the representation of the Board that they would get at least three period rebate of 10% on the total bill of electricity consumed by them. The principle of promissory estoppel was applied by the Supreme Court in this case.

26. Learned counsel for the petitioner has also relied on the decision of the Supreme Court in *The Panipat Co-operative Sugar Mills Vs. The Union of India (UOI)*, for his submission that the Government cannot fix any arbitrary price and the price fixation should ensure a reasonable return to the businessman.

27. Learned counsel has relied on the *Wednesbury* principle referred to in *Tata Cellular Vs. Union of India*, and *Union of India and another Vs. G. Ganayutham (Dead)* by LRs.,

28. In reply to the submissions of the learned counsel for the petitioner Sri S. P. Gupta; learned Senior Counsel for the Central Government has submitted that in the year 1977 the Government of India constituted a Committee under the chairmanship of Sri S. S. Marathe. This Committee consisted of representatives of the industry also, which gave its report in May 1997. After considering this report the Government introduced a system of retention price for fertilizer industry called the Retention Price Scheme (R.P.S.). The details of the same have already mentioned above. The retention price is the ex factory price per tonne of urea fixed for each individual unit for actual cost of urea of that unit plus 12% return on the net worth of that unit. The scheme has been described in the letter dated 21-4-1977 Annexure C.A. 2 to the counter affidavit and has also been published vide notification dated 1-11-1977 vide Annexure 5 to the writ petition. As mentioned in Paragraph 5 of the said notification, the Fertilizer Industries Coordination Committee (FICC) has to maintain the accounts, make and receive the payments and undertake costing and other technical functions, collect and analyze production data, costs and other information, review the retention price periodically after making necessary adjustment whenever necessary, etc. The exercise necessary for fixing the retention price for future pricing period is also undertaken by the committee.

29. Sri S. P. Gupta has hence submitted that the parameters adopted in 1977 for the pricing period by the Marathe Committee was subject to review and change periodically. The retention price has been fixed by the FICC which consists of Secretaries of the Ministry of Agriculture, Finance, etc. as well as representatives of industries. The FICC has power to review the prices also. The retention price is fixed for a fixed period as announced. The first retention period was from 1-11-1977 to 31-3-1979. Thereafter it was fixed for each period of three years. For each pricing period certain norms were, and still are evolved and communicated to the units, for fixing the retention price. These norms were called the parameters for each pricing period. They are common to all the units which join the RPS. The formulation of parameters is the first step in the exercise

of obtaining data and information and for fixation of the retention price. The Marathe committee studied the actual working of the units for the first period i.e. 1-11-1977 to 31-7-1979. It evolved the parameters based on actual utilization of 80% capacity and a combination of norms and actuals regarding consumption of raw material utilities and other inputs, maintenance and other costs and post tax return of 12% on net worth. After the expiry of the first pricing period i.e. 1-11-1977 to 31-3-1979 the FICC was to re-fix the parameters as well as the other norms for the next pricing period as per the notification dated 1-11-1997.

30. Sri S. P. Gupta submitted that the RPS was not formulated under any statute. It was not statutory and it was formulated under the executive power of the Government. The R.P.S. was not compulsory for the units. It was an offer to the units who could accept or not at their will. Joining the scheme was purely voluntary. Each unit was to sign an undertaking to accept the terms and conditions of the scheme vide Annexure C.A. 2 to the counter affidavit. Thus the relationship of the unit which joined the RPS was purely contractual.

31. The predecessor of the petitioner company, Indian Explosives Limited, entered into an agreement under the RPS with the Government of India and has executed an undertaking vide Annexure C.A. 3 to the counter affidavit. It was on the basis of the aforesaid terms and agreement that the petitioner accepted payments on many occasions. On the basis of the same terms of the agreement the petitioner has been subjected to recovery of excess payment for the past periods by adjustments.

32. Learned counsel for the respondent has relied on the following condition in the undertaking Annexure C.A. 3 to the counter affidavit :

"We also undertake and promise to abide by the decision of the committee, which is final and binding on all matters relating to the determination of retention price, net realization, equated freight, etc."

33. Learned counsel for the respondent has submitted that the RPS was operated by fixing the retention price for a particular pricing period. The period of retention price was fixed afresh, and in fact it could be altered even during the pricing period. Although the retention price for the first pricing period was fixed in advance but later on it could not be fixed in advance in the beginning of the subsequent pricing periods. After the fixation of the retention price the unit kept on getting the payments of the subsidies each month according to the retention price in an ad hoc manner. The subsidy payment was made to the manufacturer based on their dispatches for sale. Thereafter the manufacturers submitted their claims for additional price (if the RPS was more than the actual price) on a prescribed form, and in case the retention price was less than the actual price they had to fill up a form for recovery of the excess amount by adjustment or otherwise. The payment and recovery have always been for the past period. The details of such payments over several years in the past are contained in Annexure SCA-1 to the supplementary counter affidavit. The recoveries have

been made in the past on account of changes and variations in the various cost factors vide Annexure C.A. 7 and C.A. 8 to the counter affidavit.

34. Sri S. P. Gupta submitted that many of the units including the petitioner drew larger amount of subsidy despite the decrease in consumption quantity in the cost of production. For instance, it is alleged that the consumption of naphtha, which is the raw material for manufacture of urea, decreased due to improvement of machinery, technology, etc. but the petitioner and others continued to put their claims for, and received higher subsidy, because of the increase in the prices of naphtha on the basis of the initial higher consumption of naphtha. Similar was the position relating to actual operating capacity which was far more than that originally found at 80%. Thus it is alleged that the claims by the petitioner were continued to be made and the payments received on the basis of incorrect data supplied by it. The illustrative example of difference in the claimed capacity and actual capacity is shown as Annexure CA-9 of the counter affidavit. It is alleged that the excess payment to the petitioner and other units ran into several hundred crores rupees. This issue was raised in Parliament as already stated above and letters were written by several concerned persons. Hence the Committee under the Chairmanship of Dr. Y.K. Alagh was constituted to study the issue. The Committee took into account the various materials and information and submitted its report. The impugned policy parameters for the VII and VIII pricing period were formulated by the communication dated 4-6-2002 after taking into account the Alagh Committee recommendations. Prior to this communication several meetings were held in which the representatives of the industries including the petitioner participated. It is alleged that these units did not file any objection against the proposed parameters or fixation of the retention price. The petitioner requested only for considering a few disallowed expenditures and this request was considered and accepted vide Annexure C.A. 15 and S.C.A. 7.

35. Learned counsel for the respondent has submitted that the impugned parameters were fixed only on the basis of actual data supplied by the units as brought to the notice of the Government or FICC. If there is any error in the figure taken for calculation for fixing the parameters which are based on the actual figures supplied by the units every unit has a right to point out the same at any time and get the error corrected. This has been done in the past. Thus the parameter adopted by the Marathe Committee in the first pricing period were applicable only up to 31-7-1989 vide paragraph 2 of the notification dated 1-11-1977, copy of which is Annexure 5 to the writ petition.

36. It is submitted by the respondent that there were 32 subscribers to the RPS and out of them only two subscribers including the petitioners challenged the impugned retention price. The other was M/s. Nagarjuna Fertilizers and Chemicals Limited whose writ petition has been dismissed by the Andhra Pradesh High Court vide Writ Petition No. 18242 of 2002 decided on 25-7-2002. The revision of retention price for the VII and VIII pricing period has resulted in

payment of Rs. 2303 crores (approximately) and a recovery of Rs. 923 crores (approximately). Thus on account of revision of retention price w.e.f. 1-7-1997 the Government has incurred additional expenditure of Rs. 1380 crores vide Annexure C.A. 13. Pending finalization of the retention price period commencing from 1-7-1997 an interim revision of the retention price was made through a communication dated 5-11-2001 vide Annexure 3 to the writ petition. It is alleged by the respondent that 12% post tax return on the net worth has necessarily to be calculated on the actual cost as it may be from time to time and not on assumed and unreal cost. The changes which have been impugned are based on the costs as near as possible to the actual cost.

37. Learned counsel for the respondent submitted that the matter is purely contractual and remedy of the petitioner is to file a civil suit. For this purpose he has relied on the decisions of the Supreme Court in C.K. Achuthan Vs. The State of Kerala and Others, Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., ; Dr. Umakant Saran Vs. State of Bihar and Others, ; Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others, Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, Radhakrishna Agarwal and Others Vs. State of Bihar and Others, etc. He has also relied on the decision of the Supreme Court in Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, where it has been observed (Para 201) :

"The rest of the question relates truly to the civil rights of the parties flowing from the lease deed. Those questions cannot be effectively disposed of in this petition under Article 32 of the Constitution. The question as to whether there has been breach of the covenants under the lease, whether the lease can be forfeited, whether relief against forfeiture cannot be decided just on the affidavits. These are matters which should be tried in regular civil proceedings."

38. In reply to the submission of the learned counsel for the petitioner that the policy parameters and retention price could not be altered retrospectively from 1-7-1997, it has been submitted by the learned counsel for the respondents that it is the retention price which is being enforced from 1-7-1997 and not the parameters. Learned counsel has submitted that the declaration of parameters is nothing but the exercise of taking the first step for determination of the retention price. It is inherent in the retention price scheme that the reimbursement of the short payment as well as recovery of excess payment would always be for the past period. The review of the retention price, which is permissible under the scheme, may be on account of modification in the parameters or in the other norms on which the retention price is fixed. Learned counsel for respondent submitted that the parties to the agreement of the RPS i.e. the units including the petitioner as well as the Government of India have always understood and acted upon the terms and conditions of the RPS to the effect that the RP could be reviewed for the past period, and there is no bar of limitation. This can be gathered from the chart which has been annexed as Annexure SCA-1 to the Supplementary Counter Affidavit in respect of payment to the petitioner for the

past period on account of retrospective review of the retention price. The predecessor in interest of the petitioner drew additional subsidy of Rs. 7.92 crores for the period from April 1988 to Feb. 1991 and in all there are 41 instances of additional payments of subsidy for the past periods as is evident from the chart. The total amount received by the petitioner and its predecessor is Rs. 470.32 crores. Similarly, Annexure SCA-1 is the chart showing instances of recoveries for the past period from the petitioner due to modification in the retention price. This recovery was made on account of retrospective change in the capacity utilization for the past period which was a factor relating to parameters and not merely of the retention price. The total recovery is Rs. 15.36 crores. Recovery was also made from other units on account of retrospective changes in the retention price vide Annexures CA7 and CA8. The past period went back to 7 years for the period 1-7-1994 to 1-4-2001.

39. From the above facts learned counsel for respondent has submitted that it is conclusively established that all the Units including the petitioner, understood the RPS and subscribed to it knowing that there was no bar of limitation for reviewing the retention price either by change in the parameters or other norms for reimbursement of short payment of subsidy or for recovery of excess payments. Hence the petitioner is not entitled to make a grievance about fixing the parameters or norms for the 7th and 8th pricing period from 1-7-1997. The petitioner was estopped from taking this plea because the petitioner has taken payments running into crores on account of the retrospective changes in RP for the past period. Moreover, the parameters or other norms of the retention price are neither statutory nor related to any public law. They are not statutory notifications. The declaration of parameters and changes are wholly contractual in nature.

40. The respondents have also challenged the chart shown by the petitioner regarding the percentage return on the net worth. It is alleged by the respondents that the figures of percentage in the chart are manipulated. They are based on expenditures which are not related to the manufacture of urea. If these expenditures are excluded, the figure of post tax return on net worth will be higher. At no stage prior to the filing of this writ petition did the petitioner allege before the FICC or before the Govt. of India that by the amended RP its return would be reduced to less than 12% post tax return on net worth. The chart shown by the petitioner has been manipulated by assuming in the fourth column (titled as normative) as the assumed normative figures of production, turnover of Urea, variable cost, fixed cost and other items of depreciation, etc. They are not actual figures; and are not permissible in entirety for the purposes of finding out the percentage return as per prevalent policy parameter, due to omission or non consideration of any element of cost which is legitimately due to it. The Government will examine and allow the same as per the applicable policy parameters.

41. As regards the submission of learned counsel for the petitioner that the

petitioner's accounts have been finalized and that liability have been incurred, it is alleged by the respondents that the petitioner could manage to receive crores of rupees of subsidy for several years in the past periods after finalization of the accounts and incurring of liabilities and there is no reason why it cannot manage to pay back a contractual liability for the past period. Payment of contractual liabilities for the earlier years is a common feature in business. Secondly it is alleged that the fault is of the petitioner and not of the respondents because the petitioner ought not to have indulged in concealing the correct data or in not informing its actual installed capacity and its capacity utilization for production. In this way the petitioner has unauthorizedly netted huge profits. The petitioner has disclosed only the figures of normative capacity and not of the actual capacity.

42. Having heard the learned counsel for the parties we find no merit in this petition. As regard the submission of learned counsel for the petitioner regarding the validity of the retrospective application of the retention price from 1-7-1997, the legal position no doubt is that delegated legislation cannot be with retrospective effect unless the statute specially permits it. The relevant decisions in this connection have already been referred to above. However, in the present case the policy parameters and retention price have not been fixed under any statutory provision, as indeed is not disputed by the learned counsel for the petitioner. We have hence to examine whether the petitioner had any legal right for continuation of the policy parameters of the 6th pricing period for the period subsequent to 1-7-1997.

43. It has already been stated above, that the retention prices were for fixed periods as stated in para 23 of the writ petition. The 6th pricing period was from 1-4-1991 to 31-3-1994, but it was extended up to 30-6-1997. It has been admitted in Para 23 of the writ petition that by letter dated 24 July/5 August 1997, copy of which is Annexure 4 to the petition, it was clearly mentioned that the 6th pricing period will remain in force till 30-6-1997 vide Para 1 of the letter dated 24-7-1997/5-8-1997. In Para 2 of this letter it is stated that consumption norms of raw materials and utilities as fixed for the 5th pricing period have been retained for the 6th pricing period.

44. Thus from the aforesaid communication dated 24-7-1997/5-8-1997 it is evident that the Central Government or FICC never made any communication or gave any assurance to the units that the 6th pricing period will continue beyond 30-6-1997, Hence there is no question of application of the principles of promissory estoppel or legitimate expectation for the period after 30-6-1997. Neither the FICC nor the Govt. of India informed the petitioner or the other fertilizers units that the 6th pricing period will continue after 30-6-1997. We therefore fail to understand how the petitioner can claim any right on the basis of the norms for the 6th pricing period for any period after 30-6-1997. The parameters and the retention price after 30-6-1997 were only ad hoc and could be revised and the petitioner and all urea units should have been aware of this.

Merely because the respondents have continued to notify the retention prices even after 30-6-1997 on the basis of the norms for the 6th pricing period it does not mean that the petitioner or the other units have any right to claim for continuation of the benefits of the 6th pricing parameters after 30-6-1997. If the petitioner made any investment assuming that the 6th pricing period would continue beyond 30-6-1997 or closed its accounts and incurred liability on that assumption then the petitioner was doing so at its own risk and it cannot make any claim on the basis of its own assumption.

45. The allegations in para 24 of the petition that at no point of time was the petitioner company given to understand that the pricing policy parameters for the period subsequent to 30-6-1997 could change, and that too retrospectively, is neither here nor there. Since the FICC had clearly informed the units by its letter dated 24-7-1997/5-8-1997 that the norms of the 6th pricing period will continue till 30-6-1997 this itself implies that they were not to automatically continue beyond that date. Hence the retention prices fixed after 1-7-1997 by the notifications which are collectively marked as Annexure 6 to the writ petition were only ad hoc and not final, and hence subject to further revision. At best these notifications were provisional, subject to adjustment in future after the final decision was taken by the Government as communicated by letter D/- 5-11-2001 vide Annexure 3 to the petition. Para 2 of the said letter dated 5-11-2001 states :

"The above revision is purely an interim arrangement and will be subject to the final decision of the Government on the policy parameters for VII and VIII pricing periods which would include the energy consumption norms also, and which would be notified subsequently covering the period from 1-7-1997 onwards."

46. In Para 3 of the said letter it was also mentioned that reduction of subsidy on account of downward revision of retention price would be duly adjusted in the arrears bills or fresh bills to be preferred with FICC.

47. From the facts disclosed in this petition and in the affidavits it is evident that neither the Central Govt. nor the FICC ever communicated to the petitioner definitively that the 6th pricing parameters or retention price would continue after 1-7-1997. No vested right therefore accrued in favour of the petitioner for the period after 1-7-1997.

48. It may be mentioned that the predecessor in interest of the petitioner, Indian Explosives Ltd. had in its undertaking dated 10-12-1987 vide Annexure CA3 to the Counter Affidavit mentioned in Clause 9 of the said undertaking:

"We also undertake and promise to abide by the decision of the Committee, which is final and binding on all matters relating to the determination of retention price, net realization, equated freight, etc."

49. Thus this undertaking is binding on the petitioner which is the successor in interest on Indian Explosives Ltd. The petitioner is hence estopped from going

back on the promise and undertaking of its predecessor in interest contained in Clause 9 of the undertaking dated 10-12-1987.

50. No doubt if there had been some statutory provision then of course the above undertaking, if in conflict with that statutory provision or statutory notification would have been null and void, but in the present case there is no statutory provision or statutory notification under which the policy parameter or retention price has been fixed. Hence the above undertaking is binding on the petitioner.

51. Moreover, it has rightly been pointed out by the learned counsel for the respondents that although the retention price for the 1st pricing period i.e. from 1-11-1971 to 31-3-1979 was fixed in advance, later on it was not and could not be fixed at the beginning of the subsequent pricing periods because the retention price could only be fixed after getting the relevant information and materials. Hence at best only an ad hoc and provisional price could be fixed in advance but this was obviously subject to revision after the relevant material and information was obtained. As rightly pointed out by learned counsel for the respondents, the payments and recoveries have always been made for the past periods vide Annexure SCA-1 to the Supplementary Counter Affidavit which has given all the relevant data in this connection. A perusal of this material makes it clear that the petitioner always received payments and the Government made recoveries for the past period as an ongoing process of the EPS. In the chart which is Annexure-CA 8 to the Counter Affidavit there are some instances in which the retention price has been increased. Normally this would have resulted in payment of additional subsidy, but in fact there were recoveries because of alteration in the other cost factors.

52. In Para 87 of the Counter Affidavit it is alleged that the Govt. of India noticed that many urea units, including the petitioner company, were indulging in deliberate mis-declaration regarding their production capacity. The installed original capacity alone was shown which was less than the actual production.

53. In Para 68 it is stated that with the advent of new technologies and introduction of improved management practices, the capacity utilization levels of urea units have improved considerably. The capacity utilization norm was therefore revised from time to time to reflect the actual operating performances as realistically as possible. The petitioner got subsidy on higher production than the declared capacity.

54. In Paragraphs 26 to 29 of the Counter Affidavit it is stated that the petitioner and other units suppressed the relevant material and data and received excess retention price. Soon after commencement of production, each manufacturer had given the quantity of naphtha required for manufacture of urea, but with improved machinery and technology, the consumption of naphtha became reduced, but yet the manufacturer continued to take subsidy on the basis of the initially supplied operating data for the consumption of naphtha. Other such facts

have already been mentioned in Para 29 of the Counter Affidavit, and for this reason questions were raised in Parliament as stated in Para 31 of the Counter Affidavit.

55. It is not necessary for us to decide in this petition whether there was suppression of the material facts by the petitioner or not for claiming excess subsidy, but there can be no doubt that the petitioner could not claim the benefit of the norms of the 6th pricing period subsequent to 1-7-1997 for the reasons already given above. The pricing policy is fixed for a particular pricing period and no one has a right to claim any benefit from it after the period has expired.

56. Moreover, it has been alleged in Para 41 of the Counter Affidavit that the petitioner's representatives were informed of every detail in writing and orally in the meeting held in FICC or the Government, and it is not that they were kept in the dark about the revision of the retention price of the policy parameters. As stated in Para 63 of the Counter Affidavit, the retention price from 1-7-1997 have been fixed according to the actual cost of production including the norms of each unit including the petitioner, with a provision of 12% post tax return. The details have been given in Para 53 of the Counter Affidavit which need not be repeated. It is alleged therein that the increase in the life of catalyst is based on the technical study on actual life of the catalyst for the industry as a whole, and the petitioner has not produced any proof to show that the life of their catalyst is lower than the norms adopted for the retention price.

57. We agree with the learned counsel for the respondents that all the Urea Companies including the petitioner were aware that the subsidy payments for the period beyond 30-6-1997 were ad hoc and would be finalized subsequently by FICC and the Government. Hence it is not a case of retrospective revision of the retention price or the policy parameters at all. Since the final retention price and final policy parameters for the period after 1-7-1997 was not fixed at all till the impugned communication dated 4-6-2002 there is no question of revision of the same. A provisional or ad hoc decision confers, no right, and its revision does not violate the principles of promissory estoppel or legitimate expectation. The policy parameters for the 6th pricing period were valid only till 30-6-1997 and they had to be replaced by a new set of policy parameters thereafter, and this was done and communicated on 4-6-2002 vide Annexure-1 to the petition, The petitioner was supposed to have kept these facts in mind before finalizing its accounts, declaring dividend paying bonus etc, Hence it is only the petitioner who is to blame if it has not done so.

58. As stated in Para 61 of the Counter Affidavit, before finalizing the retention price the representatives of the units were called for discussion and the work details discussed with them. Hence we cannot agree that there was any mala fide on the part of the respondents, or anything surreptitious or underhand, For fixing the retention price the FICC and the Government have necessarily to collect the relevant data and undertake the cost on that basis. This can only be done after collecting the production data, costs and other information, and on that basis it

can fix the consumption norms, Such norms can obviously not remain sacrosanct for ever but will be subject to periodical revision depending on the change of various relevant factors e.g. capacity utilization, consumption norms, capital addition etc. Hence even if the impugned order dated 4-6-2002 is regarded retrospective, it is evident that the element of retrospective application is inbuilt in the RPS. For the reasons mentioned above, the RPS is a scheme wherein costs are reimbursed, and this can be determined only after they are incurred and finally known. Hence as stated in Para 78 of the Counter Affidavit an ad hoc retention price is given to ensure that the urea manufacturing units continues to get ad hoc subsidy payments regularly so that it does not face any cash/liquidity crunch for the normal operation of its plants. Adjustment for the past payments is thus a necessary feature of the scheme and in fact the petitioner had not raised objection to the same earlier. Until a final retention price is announced the earlier price continues provisionally but this will always be subject to revision or alteration and the units understood this or were expected to understand it. As stated above, a provisional or ad hoc decision confers no right.

59. As has been pointed out by the learned counsel for the respondents, only the petitioner and one other company have objected to the new policy dated 4-6-2002. The petition of the other company has been dismissed by the Andhra Pradesh High Court.

60. No doubt an administrative decision cannot be arbitrary as held in *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, but at the same there must be judicial restraint in interfering with administrative decisions as held in *Tata Cellular Vs. Union of India*, This Court cannot sit as a Court of appeal over the decision of the administrative authorities. Judicial review does not lie against the administrative decision but only against the manner of taking that decision (the *Wednesbury* principle). Judges do not have the necessary expertise in such matters.

61. In *Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc.*, the Supreme Court observed (Para 4) :--

"We start with the observation. "Price fixation is neither the function nor the forte of the Court". We concern ourselves neither with the policy nor with the rates. But we do not totally deny ourselves the jurisdiction to enquire into the question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations kept out of the determination of the price. For example, if the Legislature has decreed the pricing policy and prescribed the factors which should guide the determination of the price, we will, if necessary, enquire into the question whether the policy and the factors are present to the mind of the authorities specifying the price. But our examination will stop there. We will go not further. We will not deluge ourselves with more facts and figures. The assembling of the raw materials and the mechanics of price fixation are the concern of the executive and we leave it to them. And, we will not reevaluate the considerations even if the prices are demonstrably injurious to some

manufacturers or producers. The Court will, of course, examine if there is any hostile discrimination. That is a different "cup of tea" altogether".

The Supreme Court also observed (Para 7) :--

"A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character, not directed against a particular situation. It is intended to operate in the future. It is conceived in the interest of the general consumer public. The right of the citizen to obtain essential articles at fair prices and the duty of the State to so provide them are transformed into the power of the State to fix prices and the obligation of the producer to charge no more than the price fixed. Viewed from whatever angle, the angle is of general application."

62. In *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, the Supreme Court observed (Para 57) :

"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..... 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..... 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."

63. In *P.T.R. Exports (Madras) Pvt. Ltd. and others Vs. Union of India and others*, the Supreme Court observed (Paras 3 and 5) :--

"The power to lay policy by executive decision or by legislation includes power to withdraw the same unless in the former case, it is by mala fide exercise of power or the decision or action taken is in abuse of power. The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The Court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is a settled law that the Court gives a large leeway to the executive and the legislature. Government would take diverse factors for formulating the policy..... in the overall larger interest of the economy of the country. It is, therefore, by exercise of the power given to the executive or as the case may be, the legislature is at liberty to evolve such policies. A prior decision would not bind the Government for all times to come. When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy. The Court, therefore, would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same.

64. As observed by Lord Denning :

"The power to overturn executive decisions must be exercised very carefully, because you have got to remember that the executive, and the local authorities, have their very own responsibilities and they have the right to make decisions. The Courts should be very wary about interfering and only interfere in extreme cases, that is, cases where it is sure that they have gone wrong in law or they have been utterly unreasonable. Otherwise we would get a conflict between the Courts and the government and the authorities, which would be most undesirable. The Courts must act very warily in these matters." (See "Judging The World" by Carry Sturgess and Philip Chubb page 190)".

65. It must be remembered that certain matters are by their nature such as best be left to experts in the field. This Court does not have the technical and administrative expertise in this respect.

66. In the words of Chief Justice Neely : "I have very few illusions about my own limitations as a Judge. I am not an accountant, electrical engineer, financier, banker, stockbroker or system management analyst. It is height of folly to expect Judges intelligently to review a 5000 page record addressing the intricacies of a public utility operation. It is not the function of a Judge to act as a super board, or with the zeal of a pedantic school master substituting its judgment for that of the administrator."

67. In our opinion there should be judicial restraint in fiscal and economic regulatory measures. The State should not be hampered by the Court in such measures unless they are clearly illegal or unconstitutional. All administrative decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely complicated, this inevitably entails special treatment for distinct social phenomena. The State must therefore be left with wide latitude in devising ways and means of imposing fiscal or regulatory measures, and the Court should not, unless compelled by the statute or by the Constitution, encroach into this field.

68. As Justice Frankfurter of the U. S. Supreme Court observed in American Federation of Labour v. American Sash and Door Co. 335 US 538 (1949) :

"Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a Court debilitates popular democratic government. Most laws dealing with social and economic problems are matters of trial and error. That which before trial appears to be demonstrably bad may belle prophecy in actual operation. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed by the legislature than that the law should be aborted by judicial fiat. Such an assertion of judicial power defeats responsibility from those on whom in a democratic society it ultimately rests. Hence rather than exercise judicial review Courts should ordinarily allow legislatures to correct their own mistakes wherever possible."

69. Similarly in his dissenting judgment in *New State Ice Co. v. Liebmann* 285 US 262 (1932) Mr. Justice Brandeis, the renowned Judge of the U. S. Supreme Court, observed that the government must be left free to engage in social experiments. Progress in the social sciences, even as in the physical sciences depends on "a process of trial and error" and Courts must not interfere with necessary experiments.

70. In the same decision Justice Brandeis also observed :

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." (See also *The Legacy of Holmes and Brandeis*" by Samuel Kanefsky).

71. In *M/s Neyveli Lignite Corporation Ltd. Vs. Commercial Tax Officer, Cuddalore and Another*, it was held by the Supreme Court that the retention price scheme for fertilizer initiated in 1977 was clearly an administrative decision of the Government of India which was issued pursuant to the Ministry's resolution to enable the manufacturers to receive subsidy from the Government in case the retention price is more than the price fixed under Clause 3 of the Fertilizer (Control) Order. The subsidy so given is undoubtedly to see that the ultimate consumer gets fertilizer at a reasonable price and the manufacturer is not unduly burdened by the lower fixation of the price of fertilizer.

72. Price fixation is a complex fiscal exercise and hence in our opinion the Court, should not ordinarily interfere with the same unless there is a clear violation of law or clear arbitrariness. As observed by the Supreme Court in *Union of India (UOI) and Another Vs. Cynamide India Ltd. and Another etc.,* , those who are most widely affected by the price fixation are the consumer public and it is for their protection that their price fixation is resorted to,

73. In *Shree Meenakshi Mills Ltd. Vs. Union of India (UOI)*, a Constitution Bench of the Supreme Court after considering a catena of earlier decisions observed that the dominant object and the purpose of the legislation was the equitable distribution and availability of commodities at fair price, and if profit and the producer's return were to be kept in the forefront, it would result in losing sight of the object and the purpose of the legislation. If the prices of yarn or cloth were fixed in such a way to enable the manufacturer or producer to recover his cost of production and secure a reasonable margin of profit, no aspect of infringement of any fundamental right could be said to arise. It was to be remembered that the mere fact that some of those engaged in the industry, trade or commerce alleged that they were incurring loss would not render the law stipulating the price unreasonable. It was observed (Para 76) :

"The control of prices may have effect either on maintaining or increasing supply of the commodity or securing equitable distribution and availability at fair prices. The controlled price has to retain this equilibrium in the supply and demand of the commodity. The cost of production, a reasonable return to the producer of the commodity are to be taken into account. The producer must have an

incentive to produce. The fair price must be fair not only from the point of view of the consumer but also from the point of view of the producer. In fixing the prices, a price line has to be held in order to give preference or predominant consideration to the interest of the consumer or the general public over that of the producers in respect of the essential commodities. The aspect of ensuring availability of the essential commodities to the consumer equitably and at fair price is the most important consideration.

The producer should not be driven out of his producing business. He may have to bear loss in the same way as he does when he suffers losses on account of economic forces operating in the business."

74. In *Secretary of Agriculture v. Central Roig Refining Co.* (1949) 338 US 604 the US Supreme Court observed :

"Suffice it to say that since Congress fixed the quotas on a historical basis it is not for this Court to reweigh the relevant factors and, per chance, substitute its notion of expediency and fairness for that of Congress. This is so even though the quota thus fixed may demonstrably be disadvantageous to certain areas or persons. This Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation."

75. In *Prag Ice and Oil Mills and Another Vs. Union of India (UOI)*, a Constitution Bench of Seven Judges of the Supreme Court observed (Para 50) :

"In the ultimate analysis the mechanics of price fixation has necessary to be left to the judgment of the Executive, and unless it is patent that there is hostile discrimination against a class of operators, the processual basis of price fixation has to be accepted in the generality of cases as valid."

76. In view of the above decisions it is evident that the High Court is hardly in a position to sit as a Court of Appeal over price fixation measures. The Judges are not experts in these economic measures at all and hence should exercise restraint in interfering with the same.

77. In *Rayalseema Paper Mills Ltd. and Another Vs. Government of A.P. and Others*, the Supreme Court observed that the scope of judicial scrutiny would be far less where the price fixation is not governed by statute or a statutory order.

78. No doubt it is true that the manufacturer is entitled to a reasonable profit on his investment (in this case 12% on the net worth) but whether he got, or will get, this profit or not is not possible for this Court to decide considering the facts of the case. We have been presented with a maze of charts, statistics, figures etc. and there is serious dispute between the parties about the same Judges are not professional economists or chartered accountants who can find out from the balance sheet of the company whether the petitioner got 12% profit on the net capital worth or not. The respondents have seriously disputed the facts and figures given by the petitioner and it is not possible for this Court to go into all this bulky material. Writ jurisdiction is hardly the forum for adjudicating on these

conflicting figures and statistics, and the petitioner can avail of any appropriate forum for this purpose where experts can examine and analyze its claim or it can approach the F.I.C.C. in this connection.

79. In the Constitution bench decision of the Supreme Court in *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, it was observed (Para 59) :

"What is best for the sugar industry and in what manner the policy should be formulated and implemented, bearing in mind the fundamental object of the statute viz. supply and equitable distribution of essential commodity at fair prices in the best interest of the general public is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review."

80. It was held in the above decision as well as in *India Cement Ltd. v. Union of India*, AIR 1991 SC 724 that even if some persons are at a disadvantage and suffered losses on account of formulation and implementation of the government policy that is not by itself sufficient ground for interference by the Court.

81. In *Secretary of Agriculture v. Central Roig Refining Co.* (1949) 338 US 604 : 94 Law Ed 381 392, Mr. Justice Frankfurter of the U.S. Supreme Court observed :

"Congress was confronted with the formulation of policy peculiarly with its wide swath of discretion. It would be a singular intrusion of the judiciary into the legislative process to extrapolate restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the Due Process Clause expresses."

82. Before parting with this case we would like to dwell upon the philosophy of judicial restraint which in our opinion is sometimes needed by the judiciary these days.

83. Under our Constitution the judiciary, the executive and the legislature have their own spheres of operation. It is important that these organs do not entrench on each others proper spheres and confine themselves to their own, otherwise there will always be danger of a reaction (as happened in America under President Franklin Roosevelt when the U.S. Supreme Court was striking down the New Deal legislation). The judiciary must therefore exercise self restraint and eschew the temptation to act as a super legislature or a Court of Appeal sitting in appeal over administrative decisions. By exercising restraint it will enhance its own respect and prestige. Of course if an administrative decision clearly violates the law or is clearly arbitrary it will be declared illegal, but otherwise it is not for this Court to sit in appeal over the decisions of the administrator.

84. It must never be forgotten that the Judges are not trained in administration or in economics. Hence a Judge should not act on the belief that he knows better than the administrator or economist on a matter of economic policy because he can never be justifiably certain that he is right. Judicial humility should therefore

prevail over judicial activism in this respect.

85. Judicial restraint tends to protect the independence of the judiciary. When Courts become engaged in social or economic measures almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators or administrators, it follows that judges should be elected like legislators or selected and trained like administrators. This would be counterproductive. The touchstone of an independent judiciary has been its removal from the political and administrative process. Even if this removal has sometimes been less than complete, it is an idle worthy of support and one that had valuable effects. Judicial restraint not only recognizes the equality of the other two branches of the State with the judiciary, but also fosters that equality by minimizing inter-branch interference by the judiciary. In this analysis, judicial restraint may also be called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism's unpredictable results makes the judiciary a moving target and thus decreases the ability to maintain equality with the co-branches. Restraint stabilizes the judiciary so that it may better function in a system of inter-branch equality.

86. We should not be understood to have meant that the judiciary should never interfere with administrative decisions. However, such interference should be only within narrow limits e.g. when there is clear violation of the statute or a constitutional provision, or there is arbitrariness in the *Wednesbury* sense. It is the administrators and legislators who are entitled to frame policies and take such administrative decisions as they think necessary in the public interest. The Court should not ordinarily interfere with policy decisions, unless clearly illegal.

87. Economic and fiscal regulatory measures are a field where Judges should encroach upon very warily as Judges are not experts in these matters. The impugned policy parameters were fixed by experts in the FICC and in the Central Government, and it is not open to this Court to sit in appeal over the decisions of these experts. We have not been shown any violation of law in the impugned order.

88. For the reasons given above this petition is dismissed.