

(1992) 04 AHC CK 0006

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 11055 of 1990

Hari Om Om Prakash Cement Stockist and Others

APPELLANT

Vs

District Supply Officer and Others

RESPONDENT

Date of Decision : 15-04-1992

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 10(2)
Constitution of India, 1950 — Article 123, 14, 19, 19(1), 246
Essential Commodities Act, 1955 — Section 2, 3, 5, 6, 7
Government of India Act, 1935 — Section 107, 88(2)
Industries (Development and Regulation) Act, 1951 — Section 18G, 25
Prevention of Food Adulteration Act, 1954 — Section 16(1)
Uttar Pradesh Sugarcane (Regulation of Supply and Purchase) Act, 1953 — Section 15

Citation : (1992) 4 AWC 292 Supp

Hon'ble Judges : V.N. Mehrotra, J;P.S. Gupta, J;G.D. Dube, J

Bench : Full Bench

Advocate : Tapan Ghosh and Anup Ghosh, for the Appellant;

Judgement

By the Court

The questions referred to the Full Bench are answered as under:-

(1) A licence is required under the provisions of U.P. Cement Control Order, 1973 in respect of a person who wishes to deal in non levy cement;

(2) In case such a person contravenes the terms of the licence, he can be prosecuted for contravening the provisions contained in the above mentioned Cement Control Order and further in case such a person contravenes the provisions of U.P. Essential Commodities (Display of Prices and Stocks and Control of Supply and Distribution) Order, 1977, he can be prosecuted for the same; and

(3) In view of the answer to questions no. 1 and 2, the question No. 3 does not arise.

P.S. Gupta, J.—I have had the advantage of perusing the opinion of Hon''ble G. D. Dubey, J. and Hon''ble V. N. Mehrotra, J. I agree with the opinion of brother Mehrotra but would like to add few words of my own.

2. It is not necessary to state the facts and the various notifications issued by the authorities as they have been mentioned in detail by brother G. D. Dubey in his opinion.

3., The principal submission of the learned Counsel for the Petitioner is that after the amendment was made in Cement Control Order, 1967 (herein-after referred to as the Central Order) on February 28, 1982, the U.P. Cement Control Order, 1978 (hereinafter referred to as the U.P. Order) and U.P. Essential Commodities (Display of prices and stocks and Control of Supply and Distribution) Order, 1977 (hereinafter referred to as the Display Order) stood expressly or impliedly repealed by virtue of Article 254 of the Constitution of India.

4. Cement Control Order, 1967, as well as its amendments in the years 1982 and 1989 have been issued by the Central Government in exercise of powers conferred by Section 18-G and Section 25 of the Industries (Development and Regulations) Act, 1951 (Act No. 65 of 1951). U.P. Cement Control Order as well as its amendment in 1978 and U.P. Essential Commodities (Display of Prices and Stocks and Control of Supply and Distribution) Order, 1977, have been issued by the State Government in exercise of the power conferred by Section 3 of the Essential Commodities Act.

5. Parliament and state legislatures derive their respective power to legislate from the Constitution which divides the legislative powers between them with reference to different Lists in the Seventh Schedule. By virtue of Article 246 Union Parliament has full and exclusive power to legislate with respect to matters in List I and has also power to legislate with respect to matter in list III. The State legislature, on the other hand, has exclusive power to legislate with respect to matters in List II, minus matters falling in List I and List III, and has concurrent power with respect to matters included in List III. In order to examine the applicability of Article 254 of the Constitution, we have to first find out the relevant entry in the seventh Schedule in reference to which the impugned legislation has been enacted. For deciding under which entry a particular legislation falls the theory of pith and substance has been evolved by the courts. If in "pith and substance" a legislation falls within one List or to the other but some portion of the subject matter of that legislation incidentally trenches upon and might come to fall under another List, the Act as a whole would be valid notwithstanding such incidental trenching (see *K.S.E. Board v. Indian Aluminium Co.* AIR 1976 SC 1031 para 5).

6. Entry 52 of List I -- Union List, of the Seventh Schedule reads as follows :

Industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

The Parliament enacted Industries (Development and Regulation) Act, 1951, and its preamble says that the Act has been enacted to provide for the development and regulation of certain industries. Section 2 of the Act lays down that it is hereby declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule. Item No. 35 in the First Schedule mentions "Cement Gypsum prodgcts.

7. The Act has thus been enacted with reference to entry 52 of Union List. In State of U.P. v. M/s. Synthetics and Chemicals Ltd., J. T. 1991 (3) SC 268 it has been observed as follows in para 21 of the report :

Industry as a subject of legislation falls under Entry 24 of List II. But this provision is subject to Entries 7 and 52 of List I dealing respectively with "Industries declared by Parliament by law to be necessary for the purpose of. defence or for the prosecution of the war" and "Industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest". It is Entry 52 of List I that is relevant for the present purpose for it is in respect of that Entry that Parliament enacted the Industries (Development and, Regulation), Act 1951 to provide for the development and regulation of certain industries. This Act contains a declaration by Parliament that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule.

Similar view has been taken in B. Viswanathiah and Company and Others Vs. State of Karnataka and Others, . Therefore, there can be no doubt that Industries (Development & Regulation) Act, 1951, has been enacted with reference to Entry 52 of Union List

8. Entry 33 of List III-Concurrent List, reads as follows :

Trade and Commerce in, and the production, supply and distribution of :

(a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest and imported goods of the same kind as such products.

The Parliament enacted Essential Commodities Act, 1955, and its preamble says that the Act, has been enacted to provide, in the interest of the, general public, for the control of the production, supply and distribution of, and trade and commerce, in certain commodities. The act has thus been enacted with reference to Entry 33 (a) of Concurrent List. In Bishamberdayal Chandramohan v. State of U.P. AIR 1982 SC 33, it has been observed as follows in para 22 :

The Essential Commodities Act, 1955, was enacted by the Parliament in exercise of concurrent, jurisdiction under Entry 33, List III of the Seventh Schedule to the Constitution as amended by the Constitution (Third Amendment Act), 1954....

Similar view was taken in M/s. Hoechst Pharmaceuticals v. State of Bihar AIR 1983 SC 1019 in para 14 of the report. Thus there can be no doubt that the

Essential Commodities Act has been enacted with reference to an Entry in the Concurrent List.

9. It is well settled that for applications of Article 254 of the Constitution, two conditions must be fulfilled, namely, (1) the provisions of the State law and those of the Central law must both be in respect of a matter which is enumerated in the Concurrent List, and (ii) they must be repugnant to each other. It is only when both these requirements are satisfied that the State law will, to the extent of repugnancy, become void. In *M/s. Hoechst Pharmaceuticals case* (supra), it was observed as follows in para 68 of the report: --

The question of repugnancy under Article 254(1) between a law made by Parliament and a law made by the State Legislature arises only in case both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List, and there is direct conflict between the two laws. It is only when both these requirements are fulfilled that the State law will to the extent of repugnancy become void. Article 254(1) has no application to cases of repugnancy due to overlapping found between. List II on the one hand and List I and List III on the other.

Similar view has been taken in *T. Barai Vs. Henry Ah Hoe and Another*, , *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*, , *State of J & K. v. M.S. Farooqi* AIR 1972 SC 1738, *Deep Chand Vs. The State of Uttar Pradesh and Others*, and *A.S. Krishna Vs. State of Madras*, Even if we assume that the Central Order is a law made by the Parliament and U.P. Order and Display order are laws made by the legislature of the State, as contended on behalf of the Petitioners, Article 254 will have no application as both the legislations are not with respect to concurrent List. The question of repeal of U.P. Order and Display Order, therefore, does not arise.

10. Article 254 of the Constitution uses the expressions "law" and "existing law". Article 266(10) of the Constitution defines "existing law" as follows :

"existing law" means any law, Ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any Legislature, authority or person having power to make such a law, Ordinance, order, bye-law, rule or regulation.

Article 267(2) reads as follows :

Any reference in this constitution to Acts or laws of, or made by Parliament, or to Acts or laws of, or made by the Legislature of a State, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, as the case may be;

The definition of "existing law" would show that it not only includes any law or ordinance but also includes order, bye-law, rule or regulation passed or made before the commencement of the Constitution by any legislature, authority or person. Therefore, "existing law" includes subordinate legislation validly made

before the commencement of the Constitution. But while defining laws made by Parliament or legislature of a State only ordinances issued by the President under Article 123 or by the Governor under Article 213 of the Constitution, apart from the Acts or laws made by the Parliament and the legislature have been included. Thus any subordinate legislation like order, bye-law, rule or regulation, passed or made after the commencement of the Constitution cannot be construed as laws made by Parliament or Legislature of a State. The Cement Control Order was made by the Central Government in 1967 and the U.P. Cement Control order and the Display order have been made by the State Government in 1973 and 1977 respectively. Therefore, the Central Order cannot be termed as a law made by Parliament nor the U.P. Order and the Display Order can be termed as Law made by legislature of a State. In *The Chief Inspector of Mines and Another Vs. Lala Karam Chand Thapar etc.*, it was observed as follows in para 20 of the report:-

The true position appears to be that the Rules and Regulations do not lose their character as rules and regulations, even though they are to be of the same effect as if contained in the Act. They continue to be rules subordinate to the Act. and though for certain purposes, including the purpose of construction, they are to be treated as if contained in the Act, their true nature as subordinate rule is not lost. Therefore, the question of repugnancy and implied repeal of the U.P. Order and the Display order does not arise as they are subordinate legislation and not laws enacted by Parliament or State Legislature as contemplated by Article 254 of the Constitution. In *Lakshmi Sugar and Oil Mills Ltd. Case Commissioner ILR 1969 All 744*, the question as to whether Section 15 of the U.P. Sugar Cane (Regulation of Supply and Purchase) Act, 1953, was void on the ground of repugnancy with clause 6 (1) (a) of the Sugar Cane Control Order, 1966, which had been enacted u/s 3 of the Essential Commodities Act, came up for consideration before a Division Bench of our Court. It was held that the Control Order being a delegated legislation cannot repeal the provisions of an Act. The Bench observed as follows at page 750 of the report:-

At any rate the Sugarcane (Control) Order of 1966, having not been made by Parliament but being merely a delegated legislation of the Central Government the latter cannot repeal the clear provisions of S 15 (1) (b) of the U- P. Act, permitting review. or cancellation of a previous order of the Cane Commissioner passed by himself. We have already seen that what Article 254 of the Constitution prohibits is the State law which is repugnant to any provision of a law made by Parliament and not which is merely a delegated legislation, as is the case with the Central Order, 1966. Hence in our view, S. 15 of the U.P. Act, or any portion thereof is not void on the ground of its alleged repugnancy with cl.6 (1) (a) of the Central Sugar-cane (Control) order, 1966. In *The Belsund Sugar Co. Ltd. and Another Vs. The State of Bihar and Others*, it was observed as follows: --

Further, the repugnancy, if any, in the provisions of the Bihar Agricultural Produce- Markets Act, according to the Petitioners, is with the provisions of the

Control Orders made by the Central Government in exercise of the powers conferred by Section 3 of the Essential Commodities Act, Article 254(1) refers to repugnancy between provisions of a law made by the Legislature of a State and that of law made by Parliament and not by the Central Government in exercise of a powers conferred upon it under some law made by Parliament. Control Orders made by the Central Government under the delegated powers are undoubtedly laws binding on the citizens, but they cannot be said to be laws made by Parliament and unless such Control Orders are existing laws they ought not to prevail over laws made by Legislatures of the State, if there by any repugnancy in the provisions of the two on account of Article 254(1) of the Constitution.

The same question was considered by the High Courts of Punjab and Nagpur in reference to Section 107 of the Government of India, Act, 1935 which was *pari materia* to Article 254 of the Constitution of India except that for the word "Parliament", ",Dominion Legislature" and for "State Law" "Provincial Law" was used. In *Piara Kishen Sadhu Ram Vs. The Crown*, , it was held as follows in para 9 of the report :

Section 107 comes into play if and only if there is an inconsistency between a Dominion law and a Provincial law; the help of this section cannot be invoked when there is no conflict between competing statutes and when the conflict is confined to two orders issued by two independent authorities, both acting in exercise of the powers delegated to them by another authority. Nor can a conflict between two such orders be, resolved by a reference to section 107, for it is a well known principle that provisions of law cannot be extended by analogy.

In *Laxmibai v. State of M.P.* AIR 1951 Nag 94 (FB), it was observed as follows in para 73 of the report ; --

It does not include, as does "an existing Indian Law" defined in that very section, an "order, bye-law, rule or regulation" (though it would, by virtue of Section 88(2), include an Ordinance). Clearly, therefore, the Rent Control Order, whatever its effect be by virtue of the provisions of the Regulation of Letting of Accommodation Act, 1946, cannot be classed as a Provincial law for the purposes of Section 107(2), Government of India Act.

Similar view was taken in *Divisional Engineer v. A.P.S.E. Board*, 1979 LIC 915 (FB). Therefore, question of repugnancy and implied repeal do not arise with reference to a subordinate legislation. The Central Order and the U.P. Order as well as the Display Order being in the nature of subordinate legislation the provisions of Act. 254 will not apply and there is no question of implied repeal of the U.P. Order or the Display Order.

11. The problem can be looked into from another angle. The Central Order and both the U.P. Orders have been made in exercise of power conferred by two separate Acts but both enacted by the Parliament. For the purpose of construction they be deemed as if they were in the Act. In *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyya*, Justice Subbarao quoted with

approval the following statement :

Rules made under a statute must be treated for all purposes of construction or application exactly as if they were in the Act and/or to be of the same effect as if continued in the Act, and are to be judicially noticed for all purposes of construction or application.

The same view was taken in *State of Tamil Nadu Vs. Hind Stone and Others*, in para 11 of the report. Therefore, for the purpose of construction the Cement Control Order, 1967, can be deemed to be part of Industries (Development and Regulation) Act while as U.P. Cement Control Order, 1973, and the U.P. Display Order, 1977, can be deemed to be part of Essential Commodities Act. At any rate the U.P. Orders cannot be deemed to be law made by the State legislature or part of an Act made by the State legislature and the question of repugnancy as contemplated by Article 254 would not arise. I am fortified in my view by Full Bench decision of Kerala High Court in *K. C. Pazhanimala v. State of Kerala* AIR 1969 Ker. 154 where it was observed as follows in para 9 :

The impugned order was issued by the State, Government as a delegate of the Central Government empowered by Section 5 of the Essential Commodities Act, 1955. In passing the impugned order the State Government did not purport to act as a delegate of the State legislature or in its own executive sphere. It was made by the State Government in exercise of its power to make sub-ordinate legislation on behalf of the Central Government. The order issued is, therefore, an act of the Central Government. No question of any conflict between Parliament and the State Legislature can, therefore, arise in such a situation.

12 Though in my opinion Articles 254 has, no application to the facts of the case still it may be examined as to whether there is really any repugnancy between the provisions of U.P. Order and the Central Order as considerable arguments have seen advanced by the learned Counsel on this point. What is repugnancy has been matter of decision in several cases by the Hon''ble Supreme Court. *T.S. Baliah Vs. T.S. Rengachari*, on page 703 it was held as follows :

Before coming to the conclusion that there is a repeal by implication the Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together and the repeal of the express prior enactment must flow from necessary implication of the language of the later enactment. It is, therefore, necessary in this connection to scrutinise the terms and consider the true meaning and effect of the- two enactments.

THE matter was considered in detail by the Constitution Bench in *M. Karunanidhi Vs. Union of India* and Another, wherein it was held as follows in para 24 of the report : --

It is well settled that the presumption is always in favour of the constitutionality of a statute and the custodies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to be any inconsistency

between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied :

1. That there is a clear and direct inconsistency between the Central Act and the State Act.
2. That such an inconsistency is absolutely irreconcilable.
3. That the inconsistency between the provisions of the two Act is of such a nature as to bring the two Acts into direct/collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

Again in para 35, the Bench observed as follows :

On a careful consideration, therefore, for the authorities referred to above the following propositions emerge :

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
2. That there can be no repeal by implication unless the inconsistency appears on the face of the, two statutes.
3. That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
4. That where there is no inconsistency but a statute occupying the" same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the fame field.

The provisions of the Control Orders may now be examined in the light of the law laid down by Hon"ble Supreme Court. A close scrutiny of Cement Control Order, 1967, would show that it basically deals with the activities of a producer of cement Clause 3 to clause 9 deal exclusively with the producer of cement. Clause 12 gives the power to the Cental Government to determine the price of cement having regard to any change in any relevant factor like increase or decrease in cost of production. This clause, therefore, applies at the stage of production of cement. Clause 10 no doubt applied to a dealer but it provides that the maximum price at which cement may be; sold by a dealer shall be such as may be fixed by the State Government. So by this clause the power to fix the price of retail sale of cement has been given to, the State Government, U.P. Cement Control Order,- 1973, has been made by the State Government for maintaining supplies and for securing equitable distribution and availability of cement at fair price. It provides that no person shall sell or offer for sale or store for sale or carry on business in retail or loose sale of cement except under and in accordance with the terms and conditions of a licence granted under the order. The Control Order primarily deals with retail and loose sale of cement by dealers.

"Licensed Dealer" has been defined in clause 2 (g) of the order as a person to whom licence has been granted in Form B or D. Except that clauses 4, 8 and 11 of the Order also apply to producers of cement, there is no inconsistency between clauses 4, 8 and 11 of the U.P. Order with any provision of the Central order. Compliance with the provisions of the Central Order and clauses 4, 8 and 11 of the U.P. Order simultaneously is fully possible. Since the Central Order does not contain any provision regarding retail sale of cement by a dealer there is no inconsistency of any kind between the Central Order and the U.P. Order. So far as Display Order, 1977 is concerned learned Counsel for the Petitioners has not been able to point out any inconsistency in the said Order with the Central Order. Clauses 3 and 4 of the Display Order provide for the exhibitin of a price list and stok by the whole-sellers and retailers clause 6 provides that a retailer or a whole-seller shall not withhold from sale any scheduled commodity held in stock; clause 7 provides for issue of receipt to a purchaser and clause 8 provides for maintenance of account books, stock registers and such records relating to the business by the retailers and whole-sellers as may be directed by the State Government. The Central Order has not made any provision similar to those contained in clauses 3, 4, 6, 7 and 8 of the Display Order. No doubt, clause 5 provides that a whole-seller or retailer shall not charge price in excess of that fixed by the Central or State Government for a scheduled commodity and clause 10 of the Central Order also makes provision for maximum price at which the cement may be sold by a dealer but it further lays down that the price shall be fixed by the State Government. In this view of the matter there is no inconsistency at all between the Central Order and the Display Order as the power to fix the maximum price has not been retained by the Central Government but has been entrusted to the State Government In my opinion, therefore, it is possible for a person to comply with the Central Order and the U.P. Order and the Price Display Order simultaneously without any difficulty and thus there is no repugnancy between the aforesaid order.

13. It was next contended that in view of the directions issued by the Cement Controller of India it should be deemed that the power conferred by the Central Government on the State Government u/s 5 of the Essential Commodities Act to make an order u/s 3 of the Act stood rescinded and, therefore, the provisions of U.P. Order stood impliedly repealed with effect from the said date. In this connection it may be noticed that the, State Government had made the Control Order by virtue of the power delegated by the Central Government which alone has authority to delegate such a power u/s 5 of the Act. As observed earlier, a rule or order validly made by virtue of a power conferred by an Act of Parliament is to be treated as part of the Act and has force of law. The power which had been delegated by the Central Government to the State Government can only be revoked or rescinded by the Central Government itself, which is the authority contemplated under the Act and not by any other authority. Cement Controller is not Central Government nor he exercises the power u/s 5 of the Act. In this view of the matter, the order issued by the Cement Controller cannot repeal the

provisions of U.P. Order.

14. Learned Advocate General has further submitted that though there is no inconsistency between the Central Order and the U.P. Order and though Article 254 has no application, yet even if it is assumed that there is any inconsistency between the Central and the State Control Orders, the question of implied repeal would not arise in view of section 6 of the Essential Commodities Act. Section 6 of the Essential Commodities provides that any order made u/s 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act. The contention of the learned Advocate General is that U.P. Cement Control Order as well as the Price Display Order, 1977 have been issued by the State Government in exercise of the power conferred by section 3 of the Essential Commodities Act and, therefore, they would prevail over any other enactment, both Central or State or any rule or order issued thereunder. It is thus submitted that U.P. Orders would prevail over Central Order which has been issued under the Industries (Development and Regulations) Act if there is any inconsistency with the provisions of the aforesaid Control Order. learned Counsel for the Petitioners has submitted that since the U.P. Orders are inconsistent with the Central Order and at any rate they have been issued contrary to the policy of the Central Government as manifested by the direction issued by the Cement Controller of the Central Government as well as by the circular issued by the Secretary of the Department of Food and Civil Supplies, U.P. Government, and therefore, the provisions of the U.P. Order cannot be given effect to and section 6 of the Essential Commodities Act will have no application. In our opinion the submission made by the learned Advocate General is well founded. The U.P. Orders cannot be held to have been impliedly repealed merely because they are contrary to the direction issued by the Cement Controller or the circular of the Secretary of the Department of Food and Civil Supplies, U.P. Government. The orders have been issued in exercise of statutory powers conferred by an Act enacted by the Parliament and a validly made rule or order cannot be said to have been impliedly repealed even if it is inconsistent with the policy of the government till such rule or order is expressly repealed by the authority having such a power of repeal under the Act. It was fully open to the Central Government to rescind the power conferred upon the State Government u/s 5 of the Essential Commodities Act to make an order u/s 3. Till such time the power conferred on the State Government u/s 5 was not rescinded the order validly made by the State Government cannot be said to have been impliedly repealed on the ground that it is inconsistent with the policy of the Central Government. The Central Government has subsequently rescinded the power of the State Government by notification dated 7-8-1990 to make order u/s 3 of the Act with regard to cement and thereafter the U.P. Order stood impliedly repealed and cannot be given effect to. In *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, , the Hon'ble Supreme Court considered the effect of Section 6 of the Essential Supplies (Temporary Powers) Act, 1946 which was *pari materia*

with section 6 of the Essential Commodities Act. In the said case it was held as follows : -

Section 6 does not either expressly or by implication repeal any of the provisions of pre-existing laws; neither does it abrogate them. Its object is simply to bypass them where they¹ are inconsistent with the provisions of the Essential Supplies (Temporary powers) Act, 1946, or the orders made thereunder. In other words the orders made u/s 3 would be operative in regard to essential commodity covered by the Textile Control Order wherever there is repugnancy in this order with the existing laws and to that extent the existing laws with regard to those commodities wilt not operate. By enacting section 6 Parliament itself has declared that an order made u/s 3 shall have effect notwithstanding any inconsistency in this order with any enactment other than this Act. Abrogation or implied repeal is by force of legislative declaration contained in section 6 and is not by force of the order made by the delegate u/s 3....

It is, therefore, clear that U.P. Order as well as the Display Order, 1977, which have both been enacted u/s 3 of the Essential Commodities Act shall prevail even if there is inconsistency with the Central Order as the same has not been enacted u/s 3 of the Essential Commodities Act but has been enacted under the Industries (Development and Regulations) Act.

15. In my opinion the case of Om Prakash Agarwal Vs. State of U.P. and Others, has not been correctly decided as it proceeded on the basis that by virtue of Article 254 of the Constitution the provisions of U.P. Cement Control Order stood impliedly repealed on the ground of inconsistency with the Cement Control Order, 1967. The provisions of section 6 of the Essential Commodities Act were not at all noticed by the Bench.

16. Shri Tapan Ghosh and Shri Sunil Ambwani further contended that both the U.P. Orders violate the fundamental right of the Petitioner to carry on any occupation or trade or business guaranteed by Article 19(1)(g) of the Constitution and, therefore, they are void and cannot be given effect to. The right conferred by clause (1) (g) of Article 19 is subject to clause (6) thereof which lays down that nothing in sub-clause (g) shall prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause. The provisions of U.P. Orders do not impose complete ban upon carrying on the business or trade in cement but are merely in the nature of regulatory provisions. A citizen is free to carry on the business of sale and purchase of cement but only in accordance with the provisions of Control Orders which require the trader to observe some conditions. These restrictions have been imposed in the interest of the general public so that the dealer may not realise excessive price from the consumers and also to ensure the availability of cement, which is undoubtedly an essential article for the public at large.

17. At the outset it may be noticed that Article 31-B of the Constitution provides

that without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void on the ground that such Act, Regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by Part III of the Constitution. Essential Commodities Act, 1955, finds place at serial no. 126 in the Ninth Schedule and, therefore, it is immune from challenge on the ground that it takes away or abridges any of the rights conferred by any provision of part III. In *Vasantlal Maganbhai Sanjanwala Vs. The State of Bombay and Others*, , it was held that a Control Order issued under the provisions of the Essential Commodities Act would also be shielded by the protective umbralla of Article 31-B but subsequently in *Prag Ice and Oil Mills and Another Vs. Union of India (UOI)*, , a Constiution Bench of seven Hon"ble Judges over-ruled this decision by a majority and held that orders and notifications issued under the Act and Regulations placed in Ninth Schedule are not immune from challenge on the ground that they violate fundamental rights of a citizen. Therefore, the constitutional validity of the Control Orders can be examined though the parent Act is immune from challenge.

18. Brother Mehrotra, J. has considered this aspect of the case and has also noticed several decisions of the Hon"ble Supreme Court where the validity of the Control Orders has been upheld. I entirely agree with, the opinion expressed by him and would refer to only two other cases relevant on the point.

19. In *Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others*, the Court was called upon to examine the validity of the notifications by which provisions of U.P. Food Grains (Procurement and Regulation of Trade) Order, 1978. issued under the Essential Commodities Act had been amended and restriction was imposed upon whole-sale dealers by which they could not store more than 250 quintals of wheat and same restriction was imposed upon commission agents and retailers. The notifications were challenged on the ground that they violate Article 19(1)(g) of the Constitution. The Hon"ble Supreme Court while upholding the notifications observed as follows in para 32 of the report :

The fundamental right to carry on trade or business guaranteed under Article 19(1)(g) or the freedom of inter-State trade, commerce and intercourse under Article 301 of the Constitution, has its own limitations. The liberty of an individual to do as he pleases is not absolute. It must yield to the common good; Absolute or unrestricted individual rights do not and cannot exist in any modern State. There is no protection of the rights themselves unless there is a measure of control and regulation of the rights of each individual in the interests of all. Whenever such a conflict comes before the Court, it is its duty to harmonise the exercise of the competing rights The Court must balance the individual"s rights of freedom of trade under Article 19(1)(g) and the freedom of inter-State trade and commerce under Article 301 as against the national interest. Such a limitation is inherent in the exercise of those rights.

Again in para 37, it was held as follows :

These are nothing but regulatory measures to ensure that the excess stock of wheat held by a wholesale dealer, commission agent or a retailer is not transported to a place outside the State or from one district to another. Even if these requirements are construed to be a "restriction" on the inter-State or intra-State trade with limitation so imposed on the enjoyment of the right cannot be considered to be arbitrary or of an excessive nature. Nor can it be said that, such restrictions do not satisfy the test of reasonableness.

Similarly in *Krishan Lal Praveen Kumar and Others Vs. State of Rajasthan and Others*, the Court upheld the provisions of Rajasthan Wheat (Export Control) Order which imposed a ban on a dealer for possessing more than 200 quintals of wheat and further prohibited export of wheat from any place within the State of Rajasthan to any place outside the State except under and in accordance with the permit issued for this purpose on the ground that the provisions of the order were justified to prevent hoarding of food grains and was a reasonable restriction within the meaning of Article 19(6) of the Constitution. In my considered opinion the provisions of the U.P. Order and the Display order ensure availability of Cement to the consumers at a price fixed by the government and, therefore, impose reasonable restriction on the freedom of trade and are fully protected by sub-clause (6) of Article 19 of the Constitution.

20. Shri Tapan Ghosh next contended that U.P. Cement Control Order, 1973 had been made by the State Government in exercise of the power conferred by Central Government u/s 5 of the Essential Commodities Act, vide Ministry of Commerce Notification No. S. O. 1844 dated 18th June, 1966. This delegation of power had been rescinded by the Central Government by Notification No. S.O. 681 (E) dated 13th November, 1974. The U.P. Cement Control Order, 1973, was amended by the State Government on March 13, 1978 and in the amending order it was mentioned that the same was being done in exercise of the power conferred by section 3 of the Essential Commodities Act read with Government of India, Ministry of Commerce's Order No. S.O. 1844 dated June 18, 1966. It is thus submitted that as the delegation of power by the Central Government by S. O. No. 1844 dated June 18, 1966, had been rescinded by the order dated November 13, 1974, the State Government had no power to issue the first amendment order dated March 13, 1978 by which provision of obtaining licence by a dealer was introduced into the U.P. Order. It is true that in the amendment order of 1978 it was mentioned that the same was being done in exercise of the power conferred by Government of India, Ministry of Commerce, Order No. S.O. 1844 dated June 18, 1966, but the words "and all other power enabling him in this behalf" were also mentioned. It is not disputed from the side of the Petitioners that the subsequent notification dated November 13, 1974, issued by the Central Government also conferred power upon the State Government to make an order u/s 3 of the Act. The words "all other powers enabling him in this behalf" will, therefore, include the power conferred by the Central Government

by the notification issued on November 13, 1974. Therefore, at a time when the State Government issued the amending order on March 13, 1978 and on subsequent dates when some more amendments were made, the State Government had ample power by virtue of the delegation made by the Central Government vide notification ho. S.O. 681 (E) dated November 13, 1974. That apart, it is well settled that when an authority make an order which is otherwise within its competence. It cannot fail merely because there is a mistake in reciting a wrong source of power if it can be shown to be within the power under any other provisions -- See *Hukumchand Mills Ltd. Vs. The State of Madhya Bharat and Another*, and *The Vice-chancellor, Jammu University and Another Vs. Dushiant Kumar Rampal*, .

21. It is needless to mention that the position has completely changed after August 7, 1990, when the Central Government rescinded the power conferred upon the State Government u/s 5 of the Essential Commodities Act to make a Control Order with respect to cement. After the said date, the provisions of U.P. Cement Control Order as well as Price Display Order in relation to cement shall not apply.

G.D. Dube, J.

22. The following three questions have been referred to a larger Bench by a Division Bench of this Court :

1. Is a licence required under the provision of State Cement Order for a person who wishes to deal in non-levy cement?
2. If he contravenes the terms of licence, can such a person be prosecuted for contravening the provision contained in State Cement Order and the Display Order?
3. Assuming that the answers of the aforesaid two questions are in negative, can any person dealing with non-levy cement be prosecuted under the Display Control Order for flouting" the provisions contained therein?

23. The aforesaid questions arise in a writ petition challenging the lodging of the first information report u/s 3/7 of Essential Commodities Act (hereinafter referred to as "Act"). It was alleged that on 23-4-1990 the premises of the Petitioner was checked by some officials of the

Supply Department. It was noticed that he was carrying business at a place other than shown in licence. The Petitioners had not exhibited the price list and stocks as required under the U.P. Essential Commodities (Display of Price and stock and control of supply and distribution) Order, 1977 (hereinafter referred as Display Order). It was, therefore alleged that the Petitioners had contravened the provisions of the aforesaid Display order and the U.P. Cement Order, 1973. The Petitioner is said to be dealing in non-levy cement. The Division Bench noticed the cases of *Om Prakash Agrawal v. State of U.P.* 1985 ACC 133 *Bipin Kumar v. District Supply Officer*, 1987 EFR 683, decision of a Division Bench in Civil

Miscellaneous Writ Petition No. Nil of 1986, M/s. Gupta Cement Works and others v. State of U.P. and others decided on 30-5-1986, Civil Misc. Writ Petition No. nil of 1985, M/s. Rajeshwar Kumar Subhash Chandra v. State of U.P. decided on 15-5-1985. The Division Bench referring the matter to a larger Bench noticed that Om Prakash Agarwal's case was a habeas corpus petition in which detention of the Petitioner was challenged. In this case the validity of State Cement Order and Display Order were challenged. In Om Prakash Agarwal and Bipin Kumar's cases these matters were side tracked and not decided. Division Bench observed that in decisions of M/s. Gupta Cement Store and M/s. Rajeshwar Kumar Subhash Chandra relying on Om Prakash and Bipin Kumar's cases, the proceeding under the State Cement Order were declared to be invalid. Consequently the Division Bench felt that in view of these judgments the matter be placed before a larger Bench for considering the validity of U.P. State Cement Order, 1973 and Display Order as far as it pertained to non levy cement.

24. In order to appreciate the controversy in this case and the contentions of learned Counsel for parties it is essential to state the relevant legislative history and the background. It must be noticed that "Cement Industry" comes under item no. 33 of the concurrent list of 7th Schedule of Constitution of India. The relevant portion of item no. 33 reads as under :

23. Trade and commerce in, and the production, supply and distribution of :

(a) The products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest and imported goods of the same kind as such products;

(b)

(c)

(d)

(e)

25. The parliament had enacted "Industries (Development and Regulation) Act, 1951 (hereinafter referred to as Industries Act). Section 2 of the aforesaid Industries Act reads as under:-

2. Declaration as to expediency of control by the Union: -- It is hereby declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule.

26. "Cement" has been included at item no. 35 in the schedule of Industries Act by a notification.

27. In 1967 the Central Government issued "Central Cement Control Order" in exercise of its power conferred u/s 18-G and 25 of Industries Act. The aim of this order was to secure the equal distribution and availability at fair price of cement, the supply and distribution of and trade and 39 -- Suppl. ? 1992 commerce in

cement. A perusal of the order would indicate that it mainly controls the production and distribution of cement by the manufacturers.

28. It is worth noticing that the word "essential commodity" has been defined in section 2 of the Act as under: --

(a) "essential commodity" means any of the following of commodities;

(i) cattle fodder, including oilcakes and other concentrates;

(ii) coal, including coke and other derivatives;

(iii) component parts and accessories of automobiles;

(iv) cotton and woollen textiles;

(iv-a) drugs.

Explanation -- In this sub-clause, "drug" has the meaning assigned to it in clause (b) of Section 3 of the Drugs and Cosmetics Act, 1940;

(v) food stuff including edible oil-seeds and oils;

(vi) iron and steel, including manufactured products of iron and steel;

(vii) paper including newsprint, paper board and straw board;

(viii) Petroleum products:

(ix) raw cotton, and whether ginned or unginned, and cotton seed;

(x) raw jute;

(xi) any other class of commodity, which the Central Government may by notified order declare to be an essential commodity for the purpose of this Act, being a commodity with respect to which parliament has power to make laws by virtue of Entry 33 in List III of the Seventh Schedule to the Constitution.

29. By a Notification published in Gazette of India Part II (Extraordinary) bearing No. S. O. 3594 dated 24th November, 1962 "cement" was added at item no. 8 in the schedule of the Act, in view of the powers conferred on the Central Government by sub clause XI of clause (a) of Section 2 of the Act. Thus "cement" became essential commodity.

30. Sections 3 and 5 of Act which provide for "power to control production" etc. and "delegation of power to state by Centre" read as under:-

3. Power to control production, supply, distribution. etc. of essential commodities;

(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices for securing any essential commodity for the Defence of India or the efficient conduct of military operations it may, by order, provide for regulating or prohibiting the production,

supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by subsection (1), an order made thereunder may provide --

(a) for regulating by licences, permits otherwise the production or manufacture of any essential commodity;

(b) for bring under cultivation any waste or arable land whether appurtenant to building or not for the growing therein of food-crops generally of specified foodcrops and for otherwise maintaining increasing the cultivation of foodcrops generally, or of specified foodcrops;

(c) for controlling the prices at which any essential commodity may be brought or sold;

(d) for regulating by licences, permits or otherwise the storage, transport distribution, disposal, acquisition use, or consumption, of any essential commodity;

(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;

(f) for requiring any person holding in stock, or engages in the production, or in the business of buying or selling, of any essential commodity-fa) to sell the whole or a specified part of quantity held in stock or produced or received by him; or

(b) in the case of any such commodity which is likely to be produced or received by him to sell the whole or a specified part of such commodity when produced or received by him.

To the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other persons or class of persons and in such circumstances as may be specified in the order.

5. Delegation of powers- The Central Government may, by notified order, direct that the power to make orders or issue notifications u/s 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction be exercisable also by-

(a) such officer or authority subordinate to the Central Government, or

(b) such Government or such officer or authority subordinate to a State Government, as may be specified in the direction.

31. It is obvious that under the Act the Central Government had the powers to make orders or issue Notifications u/s 3 of the Act, Section 5 of the Act empowered the Central Government to delegate its powers to the State Government etc. This delegation of powers to U.P. Government u/s 5 was done

by a notification of Government of India, Ministry of Commerce order No. 1844 dated 18th June 1966. This notification reads as under:-

Ministry of Commerce Noti. No. s. o. 1844 dated 18th June, 1966 published in the Gazette of India Extra part II, Section 3(ii), dated June 18. 1966 p. 1031.

In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955)" the Central Government hereby directs-

(a) that the powers conferred on it by sub-section (1) of section 3 of the said Act to make orders to provide for the matters specified in clauses (d), (e), (f), (g) (h), (i), (ii), and (J) of sub-section (2) thereof shall, in relation to all commodities other than foodstuffs and fertilisers (whether inorganic, organic or mixed), be exercisable also by a State Government or, in relation to a Union territory, by the administrator thereof, subject to the following conditions, namely;-

(i) that the delegation of powers under clause (d) shall not extend to inter-State transport or distribution and the powers under that clause shall not be exercised so as to prejudicially affect such transport or distribution in pursuance of any order of the Central Government;

(ii) that all orders under clause (f), shall require the prior concurrence of the Central Government;

(iii) that no order shall be issued in pursuance of the powers hereby delegated if it is inconsistent with any order issued by the Central Government under the said Act;

(b) that all previous orders issued u/s 5 of the Essential Commodities Act in so far as they relate to delegation of powers under the provisions of Section 3(2) referred to in clause (a) above, except orders under the said section 5 relating to fertilisers and the order (relating to foodstuffs) of the Government of India in the Ministry of Food, Agriculture, ? Community Development and Co-operation (Department of Food) No. G.SR. 906 dated the 9th June, 1966, shall stand rescinded.

Provided that, notwithstanding such rescission, any order (hereinafter referred to as the said order, made by a State Government or an administrator or any officer subordinate to that State Government or administrator in pursuance of the orders so rescinded and in force immediately before the commencement of this Order shall be deemed to have been made in pursuance of this Order under the relevant provisions of Section 3 of the said Act and shall continue in force according to its tenor, and accordingly any action taken or thing done (including any appointment made, licence or permit granted or direction issued) under the said order in force immediately before such commencement shall continue in force according to its tenor until and unless it is superseded by any action taken or anything done under any other order made in pursuance of this order and under the relevant provisions of section 3 of the said Act.

32. In exercise of the above delegated powers the Government of . Uttar Pradesh issued U.P. Cement Control Order, 1973(hereinafter referred as "State Order) with the object of "maintaining supplies and for securing the equitable distribution and availability of cement at fair prices. The learned Counsel for the Petitioners Sri Tapan Ghosh drew our attention to the State Cement Order 1973 as it existed on the date of its notification in the gazette. It was urged that in this original order there was no provision for licensing of a dealer in cement. The words "cement" and "dealer" had then been defined in clause (2) of the order as under:-

(a) "Cement" means any valid pore land cement manufactured in India includes blast furnishing slack cement, rapid hardening cement, low heat cement water proof (hydrophobic) cement, oil well cement, or such other variety of cement as state government made from time to time, by notification in the gazette specified for the purpose of this order.

(b) "Dealer" means a person engaged in the business of purchase, sale and storage for sale of cement by retail and duly appointed as dealer or stockist or agent by a cement company.

Under the original order the only restriction was contained in clause 3 which stated that "no person except a dealer shall sell cement by retail". There was no other restriction regarding the sale of cement. The State order 1973 had been issued with the prior concurrence of the Central Government.

33. The delegation order of the Central Government of 1966 had been rescinded by the Central Government on 13th November, 1974 by a notification No. S.O. 681 (E) of Ministry of Industry and Civil Supplies. This notification is as under:-

(a) that the powers conferred on it by sub-section 3 of the said "Act to make Orders to provide for |the matters specified in clauses (d),(e),(f),fg),(h), (i), (ii) and (j) of sub-section (2) thereof shall, in relation to all essential commodities other than foodstuffs and fertilisers (whether inorganic, organic or mixed), be exercisable also by a State Government or, in relation to a Union territory, by the Administrator thereof, subject to the following conditions, namely: --

(i) that the delegation of powers under clause (d) shall not extend to inter-State transport or distribution and the powers under that clause shall not be exercised so as to prejudicially affect such transport or distribution in pursuance of any Order issued by the Central Government;

(iii) that all orders under clause (f) shall require the prior concurrence of the Central Government.

(iii) that no Order shall be issued in pursuance of the power hereby delegated if it is inconsistent with any order issued by the Central Government under the said Act;

(iv) that in making an Order relating to any of the matters specified in clause (j),

the State Government or, as the case may be, the administrator of a Union territory shall authorise only an officer of Government;

(b) that the Order of the Government of India in the Ministry of Commerce No. S.O. 1844, dated the 13th June, 1966, issued u/s 5 of the said Act shall stand rescinded:

Provided that, notwithstanding such rescission, any Order (hereinafter referred to as the said Order) made by a State Government or an administrator or any officer subordinate to that State Government or administrator in pursuance of the Order so rescinded and in force immediately before the commencement of this Order, shall be deemed to have been made in pursuance of this order and under the relevant provisions of section 3 of the said Act, and shall continue in force, according to its tenor, and "accordingly any action taken or thing done (including any appointment made, licence or permit granted or direction issued) under the said Order and in force immediately before such commencement shall continue in force according to its tenor untill and unless it is superseded by any action taken or anything done under any other Order made in pursuance of this Order and under the relevant provisions of sub-section 3 the said Act.

34. The learned Counsel for the Petitioners urged even though the 1966 Order had been rescinded by the Notification dated 13th November, 1974 the State Government had issued the first amendment Order in 1978 by its Notification No. 1652/XXX-AV-2-79(CM)-76 dated March 13, 1978. The opening preamble to this amendment Order declares the source of the power of the State Government in the following words :

Whereas, the State Government is of opinion that it is necessary and expedient so to do for maintaining supplies and for securing the equitable distribution and availability of cement on fair price.

Now, therefore, in exercise of the powers u/s 3 of the Essential Commodities Act, 1955 (Act No. X of 1955), read with Government of India, Ministry of Commerce's Order No. S.O. 1844, dated June 18, 1966 and all other power enabling him in this behalf, the Governor with the prior concurrence to the Central Government, is pleased to make the following Orders.

35. By this amendment a definition of retail sale and licensed dealer were added in the definition clause (2) of the State Order, 1973. These definitions are as under :

(d) "retail-sale" means any sale of cement by a licenced dealer.

(g) "Licensed dealer" means a person --

(i) who, being a duly appointed dealer or stockist or agent of any cement company is granted a licence in Form "B" annexed to this order to carry on the business of purchase storage and sale of cement in retail, or

(ii) who, being a dealer in building materials, is granted licence in Form "D"

annexed to this order to store more than 5 bags of cement for the purpose of carrying on the business of the sale of cement in loose to actual consumers.

In this notification the form of application for license as retail dealer and the form of licence to a dealer for retail-sale were prescribed.

36. It was urged that since the State Government was exercising its power under a delegation order of 1966 which had been rescinded by notification of 13th November 1974, there was no valid (amendment). This amendment of March 13, 1978 should be deemed to be non-existent. Consequently any provision for licensing shall be deemed to have not been incorporated in original State Cement Order, 1973.

37. It was pointed out that the words "and all other powers enabling him in this behalf" occurring in the preamble to the 1973 orders are only superfluous, ornamental as a piece of legislative delicacy and does not validate the notification of March 13, 1978. Since the State Government was stating that it was exercising the powers delegated to it by 1966 orders then it is not open to it to say that by the terms "all other powers etc" it will be deemed to be exercising the power under the delegation order of 13th November 1974. The provision regarding issuance of licence to the cement dealers was added by this amendment of 1978. It was urged that as amendment of 1978 was non-existent, the State Government was not authorised to issue licence and consequently punish a licensee about violation of condition of licence. This contention of learned Counsel shall be discussed at the appropriate place.

38. After this first amendment in 1978 another second amendment had been made by a notification dated August 8, 1978 in which some provisions were added to clause 3 and 4 (b) of the State Cement Order, 1973. In this amendment the correct source of power by the notification of Central Government dated 13th October, 1974 was indicated. The third amendment had taken place in 1978 by the notification dated 13th December, 1978. Again government of Uttar Pradesh had disclosed its source of powers by the notification dated 18th June, 1966 which had been rescinded earlier.

39. At this place it would be worth mentioning that by a notification no. 3935 dated September, 1977 the Government of Uttar Pradesh had issued the Uttar Pradesh Essential Commodities (Display of prices, stocks and Control of Supply and distribution) Order, 1977 (hereinafter referred as Display Order) in exercise of its powers u/s 3 of the Act. In this display order "cement" was shown at item no. 28 of the schedule. By this order the State Government required the retailer to exhibit before commencement of his business on each day at the entrance or some other prominent place of his business premises the detail of stock of different classes of variety of scheduled commodities actually held in stock by him for sale and retail price as fixed or approved by the Central or State Government, if any, or as fixed by the manufacturer, producer or a distributor and where no such price is fixed or approved by the Government or fixed by the

manufacturer, producer or distributor or the price (Inclusive of taxes) on which the scheduled commodity is offered for sale by the retail seller.

40. In 1982 the Central Government amended the Central Cement Order by its notification dated 28th of February, 1982. This was done in exercise of powers conferred on the Central Government by sections 18-G and 25 of the Industries Act 1951. Clause 1 (a) was added] to this order by which the provisions of Central Cement Order, 1967 were to apply only in relation to levy cement except clause 9-A of the Order. By this order the Central Government added new definitions of "levy cement" and "non-levy cement" in Central Cement Orders 1967 which read as under: --

(d) Levy cement amount that part of production of a cement plant with the installed capacity of a cement plant as may be determined by the Central Government from time to time not being more than 66.6 percent of the installed capacity of the cement plant.

(e) "Non-levy cement" means that part of production of a cement plant which is in except of the production mentioned in such clause (d).

41. The other provision of the Central Cement Order, 1967 were also suitably amended as to apply to "levy-cement" only. The rule 9-A of the Central Cement Order related only to the payment to the Cement regulation account on production of non-levy cement. After the aforesaid amendment the State Government of U.P. had not made any consequential amendment in its State Cement Order. Even definition of "non-levy" and "levy-cement" as incorporated in the Central Cement Order were not adopted or added in its cement order by the State Government. However, State Government had issued a radiogram of 8th March, 1982 to all the District Magistrates stating guideline in dealing with the levy cement. It was spelled out as to which person or the authority or concern or institution will be entitled to obtain levy cement. Annexure 2 to the writ petition also indicates that the Controller of cement had sent a wireless to the State Government, in which it had expressed its concern and made request to the State Government in the following words :

It has come to our notice that many States/Union territories have not amended the State Cement Control order to enable non levy cement to be sold in those States/Union territories with the result that the cement producers are facing difficulty in sending non levy cement. In order to ensure that non levy cement is available in maximum possible quantities it is essential that necessary amendment to the State Cement Control order should be made immediately. Request this may be done and we may be informed regarding action taken by return telex. Request this may be done and we may be informed regarding action taken by return telex. Copy of the amended State Cement Control Order may be sent to us and to the Regional Cement Controller of your region. If the State Cement Control Order has already been amended we may be informed accordingly and copies of the amended order sent as above.

42. Despite this request the State did not make any amendment in its State Cement Order. However, by subsequent letters the State Government reiterated that the system of licensing of the dealer in "non-levy" cement shall continue. By its letter No. 4365/29-7-79/cement/82 dated 29th June, 1982 the State Government directed all its District Officers to issue fresh and separate licences entitled "levy" and "non-levy" cement, Guidelines were laid down about fee of licence and eligibility of licensee. There was no change even in the Display Order. As consequence of these situation the prosecution of dealers in "non-levy cement" was done for non-compliance of the terms of licence and the Display Order.

43. The validity of the prosecution has been challenged on the ground that the State Cement Order and Display Order stand impliedly repealed by the notification of the Central Government of 28-2-1982 which has force of law, and the two State Orders which run contrary to the Central Cement Order to the extent of repugnancy are void. It was urged that the intention of Central Government as stated in Central Cement Order should prevail. Consequently, any prosecution of the Petitioner under the State Cement Order or the Display Order was bad.

44. learned Counsel for the Petitioner has also challenged that provision relating to licensing was introduced by the second amendment of 1978 referred to above. Under which the source of power of the State Government was declared as the delegation order of 1966 which had been rescinded by the Central Government in 1974. It has been urged that in view of incorrect mention of source of power the amendment in the State Cement Order falls through and should be deemed to be non-existent.

45. The third contention is that after the amendment of 1982 in the Central Cement Order the provisions of State Cement Order, 1973 stood impliedly repealed by the provisions of the Central Cement Order. It was urged by Sri Tapan Ghosh that the Display Order too as far as it provides for display of price and stock also stood impliedly repealed. It is based on this proviso that similar provisions are contained in form of Licence contained in appendix B of the State Cement Order. Since this form of licence stands repealed it cannot be continued in any other form.

46. Fourth contention is that the restriction imposed by the two state order vis-a-vis "non-levy" cement become violative of article 19(1)(g) of the Constitution.

47. We had the benefit of hearing Sri Sunil Ambwani, Advocate, who is counsel for Petitioners in other writ petitions challenging the validity of the prosecution u/s 3/7 of the Act. Sri Ambwani is, however, of the view that even though State Cement Order is repugnant to the Central Cement Order, yet the Display Order will continue and cannot be held to be repugnant to the Central Cement Order or impliedly repealed.

48. Learned Advocate General had advanced very detailed arguments in reply to

the contentions of two learned Counsel assailing the validity of the State Cement Order and Display Order.

49. Learned Advocate General urged that the error in the first amendment of 1978 in the State Cement Order is of no consequence. His argument was based on certain case laws. It was urged by learned Advocate General that mere mistake in quoting incorrect provision will not invalidate a law if the Government had the powers to enact the statutory provisions.

50. In first case relied upon by learned P. Balakotaiah Vs. The Union of India (UOI) and Others, the facts were bit peculiar. The Appellant was employed in 1939 in Bengal Napur Railway as a clerk. After the State took over the administration of the Railway in 1946, the Appellant opted to serve on the terms set out in a document dated 5-6-1946 and continued in service on the conditions mentioned in that document. Acting in exercise of the powers conferred by Sections 241(2), 247 and 266(3) of the Government of India Act, 1935, the Governor General promulgated certain rules called the Railway Services (Safeguarding of National Security) Rules, 1949. On 6-7-1959 the General Manager of the Railway issued a notice to the Appellant under rule 3 of the Security Rule stating that in view of the facts recited therein there was reason to believe that the Appellant was engaged in subversive activities and calling upon him to show cause why his services should not be terminated. The Appellant sent his explanation denying the allegation. The matter was referred to the Committee of Advisers, who held an enquiry on 8-9-1959, and after hearing the Appellant found that the charges against him mentioned in the notice were true. Acting on this report, the General Manager terminated the service of applicant on 3-4-1951. The Appellant challenged the validity of the security Rules and alleged that they were bad as infringing Articles 14, 19 and 311 of the Constitution of India. The Railway had urged that orders of terminating the services of the Appellant could be sustained under rule 148 of the Railway Establishment Code." The contentions regarding application of the Code were not raised before the Nagpur High Court. However, the Supreme Court had also observed that nowhere it was pleaded at any point of time prior to the matter came before the Supreme Court that the order could be sustained under rule 148 of the Establishment Code.

51. On the above facts the Supreme Court observed :

It was argued that when an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its powers under any other rule, and that the validity of an order should be judged on a consideration of its substance and not its form. No exception can be taken to this proposition but it has not been the contention of the Respondents that the order in question was made under Rule 148 (3) of the Railway Establishment Code and the reference of Rule 3 of the Security Rules in the proceedings might be disregarded as due to mistake.

52. learned Counsel for the Petitioner urged that it was a service matter hence is not applicable to the facts of the present case. This contention is-not tenable because this is a broad principle which has been accepted in AIR 1964 SC 1329 which shall be discussed at its appropriate place where some mistake had been committed in a statutory provision.

53. The second case cited before us is of Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others, the question was regarding removal of the Appellant from the management of the firm in dispute. u/s 10(2) (b) of the Administration of Evacuee Property Act (1950) the custodian was empowered to appoint manager of a certain property. The Deputy Custodian had removed the Appellant from the management and cancelled the appointment order describing himself as Managing Officer-cum-Deputy Custodian of Evacuee Property of southern estate. On this ground it was alleged that the Managing Officer had no power to remove the Appellant. In this context of the matter the Supreme Court observed that the order of the removal of the Appellant from the management can not be held to be invalid even though the concerned officer had also described himself in the impugned order as "Managing Officer". It was observed that the concerned officer was also a custodian and, therefore, had the authority, to pass the impugned order. In this case also relying upon the case of P. Balakotaiah Vs. The Union of India (UOI) and Others, it was observed that even if the authority passes an order which is within its competence it can not fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other rule, and the validity of the order should be judged on a consideration of its substance and not of its form. The Hon"ble Supreme Court observed :

The principle is that the Court must ascribe the act of a public servant to an actual existing authority under which it would have validity rather to one under which it would be void. 54. In the third case Isha Beevi on behalf of the Minor Umaiben Beevi and Others Vs. The Tax Recovery Officer and Addl. P.A. to Collector, Quilon and Others, the facts were quite peculiar. The Appellants were claiming writ of prohibition. It related to some Income Tax matter between the parties. Proceedings of recovery of Tax dues were being challenged on the ground that notice contained some other provisions. In this perspective of the matter the Supreme Court made the following observations to which our attention has been drawn :

The existence of an alternative remedy is not generally a bar to issuance of such a writ or order. But in order to obtain a writ of prohibition from a High Court or this Court an applicant has to demonstrate total absence of jurisdiction to proceed on the part of the officer or the authority complained against. It is not enough if a wrong section is cited in a notice or order if the power to proceed is actually there under the provision.

55. The fourth case relied upon is The Vice-chancellor, Jammu University and Another Vs. Dushiant Kumar Rampal, . In this case the Vice-Chancellor of Jammu

and Kashmir University has suspended the Petitioner without reciting the necessary statute as a source of his power under which it was made. In this context the observation made in AIR 1958 SC 1964 Supra were reiterated.

56. The last case relied upon is Ghazanfar Ali Khan etc. Vs. State of U.P. and Others, . In this case it was argued that there was no delegation of powers under clause (8) of Control Order of 1966 in as much as no notification has been made u/s 5 of the Essential Commodities Act, 1955. The Division Bench of this Court had noticed that under clause II of the Control Order, 1966 the power could be delegated. The language of this clause 11 was identical to Section 5 of the Essential Commodities Act. On this basis it was held that delegation of power was valid. There is an observation of the Division Bench which reads as under :

if an authority is competent to do certain actions, mere recitation of a wrong provision would not invalidate the exercise of that power.

57. It was argued by Sri Tapan Ghosh, learned Counsel for the Petitioner that the above cases pertain to service matters and the principles cannot be applied to the errors in statutory provision. It was urged that the Government which has an expertise in legislative activities is not expected to commit such mistakes that it will mention a wrong source of power for making an order which has a statutory force.

58. The above cases no doubt pertain to service matters but a broad principle has been laid down in them. It is, that, where an authority has a power to pass certain order then it will not become invalid as the authority quoted some wrong provision as the source of his power. This applies to statutory provision also. It would be evident from the case discussed in the following paragraph.

59. In Hukumchand Mills Ltd. Vs. The State of Madhya Bharat and Another, , certain amendments of Tax Rules were challenged on the ground that such amendments could not be made under rule 17 of the Tax Rules as was purported to be done. The Supreme Court observed that the Notification, by which the amendments were made, purported to have been published under rule 18 of the Tax Rules read with rule 17. The argument on behalf of the Appellant was that rule 17 of the Tax Rules must be treated on a par with provisions in a statute which provide for framing of rules, and these rules are subordinate legislation made for carrying out the purposes of the statute, and the power to frame such rules does not include the power to modify the parent law under which the rules have to be framed.

60. The Supreme Court did not think it necessary to consider the above argument, for it was of opinion that the amendment could be justified on the basis of Act 1 of 1948 which was passed on December 13, 1948 by the Rajpramukh. The Supreme Court observed that if the amendment could be validly made u/s 5 of Act 1 of 1948, then mere mistake in the opening part of the Notification in reciting wrong source of power does not affect the validity of the amendments made. The Supreme Court observed :

It is urged that the Government knew that it could only make regulations u/s 5 and it had made regulations u/s 5 of Act 1 of 1948 in certain cases. Even if that be so there can in our opinion be no doubt about the validity of the amendments made if the Government had power to make them, even though there was a mistake in the opening part of the notification publishing the amendments. All that section 5 of Act 1 of 1948 requires is the publication of the regulation made thereunder and its being made by Government; and that has been complied with in this case. There is no other formality required for making a regulation and we are therefore of opinion that even though there was a mistake in the opening part of the notification of December 28, 1949, the amendment made in the Tax Rules can be upheld u/s 5 of Act 1 of 1948 as a regulation. We therefore reject the contention under this head.

61. The case of *Hukumchand Mills* (supra) squarely applies to this case. The mention of the Delegation Order of 1966 in the first amendment of 1978 in the State Cement Order appears to be only a clerical mistake. It does not invalidate the amendments. It is also noteworthy that the words "and all other powers enabling him in this behalf" are not frivolous or ornamental legislative finery. It is like a saving clause to cover such contingencies where despite all care and caution some mistake occurs on account of some omission or errors. The above clause occurring in the amendment will be deemed to refer to the Delegation Order of 1974. On this basis also the first amendment of 1978 cannot be deemed to be invalid.

62. The question of repugnancy of a statute for statutory provision has to be considered within the ambit of article 254 of the Constitution of India, which reads as under :

254. Inconsistency between laws made by the Parliament and laws made by the Legislatures of States. -- (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the president and has received his assent, prevail in that State :

Provided that nothing in this clause shall prevent parliament from enacting at any time any law with respect to the same matter including a law adding to,

amending, varying or repealing the law so made by the Legislature of State.

63. It has been argued by Sarva Sri Tapan Ghosh and Ambwani that Central and State Cement Orders operate in the same field of cement and as the Central Order was proceeding to take "non levy" cement, out of any control in its sale and distribution by the Government, the State Government was continuing its control over the matter. Hence, it was argued, the State Cement Order is repugnant to the Central Cement Order, as it militates against the policies of the Central Government, as far as it pertained to "non levy cement". Our attention was drawn to the recent notification of the Central Government and State Government, by which the Central Government abolished the distinction between "Levy" and "Non Levy" cement and ultimately by notification Nos. 0624 (6) dated 7-8-1990 rescinded the powers delegated to the State Government under the Act. Consequently the State of Uttar Pradesh had sent directions to all the District Magistrate that by rescinding of the delegation State Cement Order stood revoked. It was urged that considering the whole matter in the above conspectus the provisions of the State Cement Order stood impliedly repealed as far as it pertained to "Non Levy Cement". In the above context it was also argued by Sri Tapan Ghosh that the "Non Levy Cement" by implication ceased to be an "essential" Commodity" after the notification of 1982 and therefore, even the "Display Order" was not applicable to the matter arising in case of "non levy cement". Sri Ambwani is, however, of the view that the "Display Order" is still applicable even after the notification of 1990 of Central Government rescinding the delegation order. His contention proceeds even on this premise that before 18-6-1960 had and after 7-8-1990 State Government, has no delegated power to keep the cement under any control in exercise of the powers under the Act."

64. Sri Ambwani agreed with Sri Tapan Ghosh that after the amendment of 28th February, 1982 in the Central Cement Order the provision of the State Cement Order as far as it pertains to "non levy cement" stood impliedly repealed. He also agreed that in view of the repugnancy with the Central Cement Order the State Cement Order relating to "non levy Cement" became inoperative. Sri Ambwani however, argued that Display Order had been promulgated with a view to secure the maintenance and increase of supplies essential to the life of the community and for securing equitable distribution and it had been issued in exercise of power u/s 3 of the Essential Commodities Act read with Notification No. GSR 316-A/20th January, 1972 issued by the Government of India No. S.O. 681-E dated 13th November, 1974 and no. S.O. 682-E dated 13th November, 1974 of Government of India in the Ministry of Industries and Civil Supplies (Department of Civil Supplies and Cooperation), the Display order will continue to remain in force despite the amendment made on 28 th February, 1982 and rescinding of the delegation by 7th August, 1990. We are not concerned, with the state of affairs after 28th February, 1982 because such a question has not been referred to this Bench.

65. The learned Advocate General has urged that even after the amendment of

28th February, 1982 bifurcating cement in the Central Cement order into two categories of "levy" and "non levy" cement the "Act" has not been affected by this amendment. The amendment of 28th February, 1982 affected only the industries. The Central Cement Order had been issued in exercise of power of the State Government u/s 18(g) and 25 of the Industries Act. This amendment of 28th February, 1982 only affected the control of cement at the stage of manufacturing by the cement industries. The central cement order only gives certain facilities to the industries dealing with cement, in excess of 66% of their installed capacity, in any manner they liked, but the distribution of the cement to the consumers by the retailer was not at all affected. There was no consequential amendment in the "Act" therefore, the "Act" and the State Cement Order and Display order framed under the Act continued to apply. The learned Advocate General argued that the Central Cement Order and the State Cement Order proceeded in two different fields, former operated at the level of production whereas the later at the level of distribution to the consumers. Consequently the State Cement Order can be said to be neither repugnant to the Central Cement Order as amended by notification of 28th February, 1982 nor impliedly repealed by the Central Cement amendment order of 1982.

66. learned Counsel for both the sides have cited a catena of cases in support of their contentions. First of all we proceed to consider whether the State Cement Order and Display order became repugnant to the Central Cement Order as amended in 1982.

67. In *M/s. Chandra Prakash Agarwal and Co. v. State of U.P.*, 1990 ALJ 459 : 1990 AWC 699, a Full Bench of this Court proceeded to consider as to when the Act of State becomes repugnant to the Central Statute within ambit of Article 254 of the Constitution which has been quoted" above. In paragraph 24 the Full Bench has observed as under :

...a sound construction of Article 254(1) which would indicate that the repugnancy arises only when the enactments made by the parliament and those made by the State Legislature occupy the same field with respect to one of the matters enumerated in the Concurrent List and there is direct conflict between the two. It is only when these two conditions precedent are fulfilled only in that event it could be said that the State law will, to the extent of repugnancy become void....

68. In *Deep Chand Vs. The State of Uttar Pradesh and Others*, , the Supreme Court, considered the case of *Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others*, and *Zaverbhai Amaidas Vs. The State of Bombay*, , and laid down the principle of repugnancy between two legislations in the following words :

The principle embodied in section 107(2) and Article 254(2) is that when there is legislation covering the same ground both by the centre and by the Province, both of them being competent to enact the same, the law of the Centre should

prevail over that of the State.

Repugnancy between two statutes may thus be ascertained on the basis of the following three principles :

- (1) Whether there is direct conflict between the two provisions;
- (2) Whether Parliament intended to lay down an exhaustive code in respect of the subject matter replacing the Act of the State Legislature; add
- (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

69. It is not disputed that Central Government and the State Government were proceeding in respect of item no. 33 which occurs in the Concurrent List of the 7th Schedule to the Constitution. In the case of Chandra Prakash Agarwal (supra), the question arose whether the U.P. Krishi Mandi Adhiniyam as far as it pertained to the levy of fee on the sale of tobacco was repugnant to the provisions of the Tobacco Board Act enacted by the Central Government. After examining the various provisions of the two Acts, the Full Bench came to the conclusion that the Tobacco Board Act and U.P. Krishi Mandi Adhiniyam were operating on different fields. The Tobacco Board Act was controlling the Tobacco Industries whereas the U.P. Krishi Mandi Adhiniyam was operating in collecting fees when the raw tobacco is brought in the market and the Act provided for collecting fee in lieu of the services rendered quite on the principle of quid pro quo.

70. Applying the principles enunciated in the above Deep Chandra's and Full Bench cases to the matter in hand the learned Advocate General drew our attention to the preambles of "Industries Act" and the "Act" which read respectively as under :

An Act to provide for the development and regulation of certain industries.

An Act to provide, in the interests of the general public, for the control of the production, supply and distribution of, and trade and commerce in, certain commodities.

Learned Advocate General had laid specific stress on section 6 of the "Act" and section 31 of the Industries Act. It was urged that according to section 31 of the Industries Act, the Industries Act was to operate in addition to any other enactment. It was also urged that according to section 6 of the Essential Commodities Act the provisions of Essential Commodities Act were to prevail over any other enactment. It was contended that if the State Cement order is examined in the light of the aforesaid preambles and sections it would be apparent that as it was framed under powers delegated under the "Act" the State Cement Order will prevail even though the Central Cement Order have been amended and the Central Government has lifted its control in respect of "non-levy cement".

71. The aforesaid sections i.e. 31 of the Industries Act and Section 6 of the "Act" read as under :

31. Application of other laws not barred :

The provisions of this Act shall be in addition to and not, save as otherwise expressly provided in this Act, in derogation of any other Central Act for the time being in force, relating to any of the Scheduled industries.

6. Effect of orders inconsistent with other enactments. Any order made u/s 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.

72. It is true that bare reading of the two above quoted preambles and sections indicate prima facie that as no consequential amendment has been made in the schedule to the Essential Commodities Act then provision of State Cement Order continue. But on a close and comparative examination of the "Industries Act", the "Act" and the Central and State Cement Orders it becomes obvious that the object of the two Acts and orders are same. They are working in the same field. Their main object is to secure equitable distribution and availability at fair prices of cement. Thus these two orders were working in the same field with a common object. Hence when the Central Government had withdrawn its control over non-levy cement then the State Government was not at all justified in continuing the control over non-levy cement under the grab of "its" exercise of powers under the "Act". The learned Counsel for the Petitioner Sri Tapan Ghosh had demonstrated that section 18-G of the "Industries Act", 1951 and section 3 of the "Act" are almost identical in nature. They are the main sections providing for control over supply etc. of certain articles. It would be better to quote the relevant portion of two sections side by side. The order of sub-section of Section 3 of the "Act" have been changed by me and the relevant provision of the "Act" placed against the relevant provision of the "Industries Act" to demonstrate the similarity.

The other sub-sections not relevant, in the Act have been omitted.

Industries Act

Section 18-G

18-G. Power to control supply, distribution, price, etc. of certain articles. --

(1) The Central Government, so far as it appears to it to be necessary or expedient for securing the equitability at fair prices of any article or class of articles relatable to any scheduled industry may, notwithstanding anything contained in any other provision of this Act, by notified order, provide for regulating the supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by subsection (1), a notified order made thereunder may provide --

- (a) for controlling prices at which any such article or class thereof may be brought or sold;
- (b) for regulating by licences, permits or otherwise the distribution, transport, disposal, acquisition, possession, use or consumption of any such article or class thereof;
- (c) for prohibiting the withholding from sale of any such article or class thereof ordinarily kept for sale;
- (d) for requiring any person manufacturing, producing or holding in stock any such article or class thereof to sell the whole or part of the articles so manufactured or produced during a specified period or to sell the whole or a part of the articles so held in stock to such person or class of persons and in such circumstances as may be specified in the order;
- (e) for regulating or prohibiting any class of commercial or financial transactions relating to such article or class thereof which in the

E. C. Act

Section 3(1)

3. Powers to control, production, supply, distribution etc. of essential commodities. --

(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices or for securing any essential commodity for the defence of India or the efficient conduct of military operations, it may, by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by subsection (1), an order made thereunder may provide --

(a)....

(b)....

(c) for controlling the price at which any essential commodity may be bought or sold;

(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity;

(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale opinion of the authority making the order are, or if unregulated are likely to be detrimental to public interest;

(f)....

(g) for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters; and

(h) for any incidental or supplementary matters, including, in particular, the grant or issue of licences, permits or other documents and the charging of fees therefor.

(f) for requiring any person holding in stock, or engaged in the production, or in the business or buying or selling, of any essential commodity, --

(a) to sell the whole or a specified part of the quantity held in stock or produced or received by him, or

(b) in, the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him, to the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the order.

(g) for regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs or cotton textiles which, in the opinion of the authority making the order, are, or if unregulated, are likely to be detrimental to the public interest; (h) for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matters;

(i)....

(ii) for the grant or issue of licences, permits or other documents, the charging of fees therefore, the deposit of such sum, if, any, as may be specified in the order as security for the due performance of the conditions of any such licence, permit or other document, the forfeiture of the sum so deposited or any part thereof for contravention of any such conditions, and the adjudication of such forfeiture by such authority as may be specified in the order;

(iii)

73. A comparative chart of the objects of the two cement orders would illustrate that they too were working in the same field;

Central Cement Order

Whereas it appears to the Central Government for the purpose of securing the equitable distribution and availability at fair price of cement, the supply and distribution of and trade and commerce in cement should be regulated.

U.P. State Cement Order

Whereas State Government is of opinion that it is necessary and expedient so to do for maintaining supplies and for securing the equitable distribution and availability of the cement at fair prices.

74. The two comparative chart to amply demonstrate that two orders and the Acts were operating in the same field. The object of the two orders was to ensure equitable distribution of Cement at fair price. The two Acts were controlling production and distribution. Both the Acts contained provisions like controlling the prices, issue of licence, ensuring that no withholding of stocks was done either by manufacturers or by the sellers etc. It is worth noticing that the object of "Act" was to control production also. Hence the "Act" operated at the level of the production also in the factory. In view of these similarities the contention of the learned Advocate General that the two Acts i. e. Industries Act and the "Act" were operating in different fields, is not correct.

75. In *M/s. Ram Chandra Mawa Lal v. State of U.P.* 1984 ALJ 235 : 1984 EFR 242 cited by learned Advocate General the Hon^{ble} Supreme Court was considering two fertiliser orders; one issued by Centre under the "Act" and the other issued by the State of Uttar Pradesh under the Defence of India Rules (1971). The facts were, that by notification dated 11-10-1973 the Central Government, had fixed maximum price of fertilisers. The Central Government by subsequent notification dated 1-6-1974 had raised the maximum sale price. The State Government issued the U.P. Fertiliser prices (Supplementary) Order, 1974 on 11-6-1974 in exercise of the powers under Defence of India Rules prohibiting the dealers from charging the revised price in excess of the maximum price prevailing immediately prior to the upward revision of the price as authorised by Central Government on 1-6-1974 in respect of stocks purchased prior to 1-6-1974. The necessity of the State Government notification arose in the circumstance that after 1 -- 6-1974 the dealers would have obtained profit at Rs. 990/-per ton in respect of stocks purchased prior to above date, where as they would have otherwise obtained a profit of Rs. 45/- per ton only. The notification of State Government was challenged inter alia on the ground that the State notification was inconsistent with the Central notification. The majority view of Hon^{ble} Judges of Supreme Court did not agree with the above contention. The Supreme Court observed:-

The Central notification, as discussed earlier, is altogether silent on the ramification regarding sales from out of existing stocks acquired by the dealers at lower rates. The impugned State notification on the other hand, deals exclusively with this aspect. The State notification speaks on a refinement of the subject about which the Central notification is blissfully unaware and on which it is altogether silent. The two do not overlap. There is therefore no real inconsistency. The principle may be stated thus. The Centre and the State both cannot speak on the same channel and create disharmony. If both speak, the voice of the Centre will drown the voice of the State. The State has to remain "silent" or it will be "silenced" But the State has the right to "speak" and can "speak" (with unquestionable authority) where the Centre is "silent" without introducing disharmony. If the Centre sits only on a portion of the Chair, the State can sit on the rest of the portion with arms thrown on the shoulders of each other. While the State cannot sit on the lap or on the shoulders of the

Centre, both can certainly walk hand-in-hand, lending support to each other, in a friendly manner, towards the same destination. If the Centre has built a wall, and has left a gap from which intruders can infiltrate, the State can fill the gap in the wall, and thus make its own contribution to the Common Cause. What is more, each in the or any principle must be presumed to be conscious of the need for accord and need for accommodating each other in the interest of NATIONAL HARMONY".

76. Using the phrase in the above quoted paragraph from 1984 ALJ 235 Supra, the Central Government had provided a space to the State Government to sit alongwith it in its "chair of control over cement" by delegating its power to the State under the "Act". The Centre was withdrawing the chair of control over non-levy cement" by bifurcation then the State Government can not say that it will continue to sit in the said whole chair of control over the cement. When the Centre was withdrawing its control over the non-levy cement then the State Government has consequently to make suitable amendment in its State Cement Order. The Central Government had expressed its desire to the State Government by sending a wireless requesting it to make suitable amendment in the State Cement Order. This wireless has been quoted in extenso in paragraph 19-A of this judgment, But strangely enough the State Government was insistent that it will continue to act under the State Cement Order and the Display Order,. The State Government has even bifurcated the licenses into "non-levy" and "levy" cement. This is exactly the situation when State Order becomes repugnant to the Central Order which was operating in same field. It is not open to the State Government to State that section 6 of the Act saves its power to continue the State Cement Order and Display order issued u/s section 3 of the Act. In respect of matters enunciated in concurrent list, the State Government has to see that its enactment do not over-ride the Central enactment. It is not disputed that the two Cement Orders have force of a statue. Section 6 of the Act will not come to save the State Cement Order if by virtue of Article 254 of the Constitution its provision as far as they pertain to non -levy cement become repugnant to the Central Cement Order.

77. It was argued by learned Advocate General that under rule 6 of State Cement Order, the Government could fix price of cement. This rule reads as under :

6. Retail price. -- (1) No dealer holding licence in Form "B" shall sell cement at a price exceeding the price fixed by the Licensing Authority of the district in consultation with the cement company having due regard to --

(i) f. o. r. price ;

(ii) handling charges (includling charges in respect of packing or container and transporting charges);

(iii) godown charges ;

(iv) commission of an agent, distribution, wholesaler or dealer ;

(v) local taxes ;

Provided that it shall not be necessary for the licensee to get the retail price fixed for every consignment. The retail price once fixed by the Licensing Authority shall remain operative until there is any change in any of the aforesaid constituents thereof.

(2) No dealer holding licence in Form "D" shall charge a profit of more than ten paise per kilogram on the cost price.

78. It was urged that under this rule the local authorities could fix the price. The proviso in the aforesaid rule says that it shall not be necessary for the licence to get the retail price fixed for every consignment. This was to operate in more hardship and oppression than any social benefit to the consumers. learned Counsel for the Petitioners rightly urged that if the cement manufacturers decided that in view of continuing restrictions in the State of Uttar Pradesh under the State Cement Order they would not sell their product to any dealer in the State of Uttar Pradesh, then in such a circumstance, the State Government had no power to compel the manufacturers to sell non levy Cement to the dealers in Uttar Pradesh. A close reading of the State Cement Order indicates that there was no provision for compelling the manufacturers to sell cement to a particular dealer. Rule 1 contains short title. Rules 2 is a definition clause. Rules 3 and 4 impose restrictions on retail, loose, or wholesale of cement. Rules 4 -A, 4-B, 4-C, 4-D, 4-E, and 4-F relate to issue of license. Rule 5 imposes restrictions on movement of cement. Rule 6 has been quoted above. Rule 7 relates to counter signatures of Railway receipts or transport receipts by the Licensing Authority. Rule 8 empowers the licensing authority to direct a person holding stock of cement to sell it to specific persons or class of persons. Rule 9 imposes ban on transfer of cement by consumers. Rule 10 imposes condition that dealers shall exhibit price and stock. Rule 11 provides for regulation of supply and distribution of cement by any manufacturer. However, the proviso to sub-rule (ii) states clearly that nothing in this clause shall apply to movement of cement by producers, manufacturers under the orders of the Government of India or the cement controller. Clause 12 provides for maintenance of books for inspection. Clause 13 empowers the licensing authorities of entry, storage and seizure. The last clause 14 says that the Uttar Pradesh Cement Control Order, 1966 was rescinded. Thus the proviso to sub-clause (11) of clause 11 clearly indicates that the State Government had no authority to restrict movement of cement by producers if under the orders of Government of India or the cement controller they were authorised to do so. If this proviso is examined in the light of the amendment order of the Centre dated 28th February, 1982, it becomes obvious that the manufacturers were given a free hand to deal with non-levy cement in any manner they liked. In the light of their own provisions as contained in above proviso the State Government could not ask the producers to sell their non-levy cement to the dealers in Uttar Pradesh. In that event the continuance of the

State Cement Order would have resulted in more oppression to the dealers as well as the consumers than any reciprocal social benefit.

79. It is also worth noticing that as late as 25th October, 1982, Sri Naresh Chandra Saxena, Commissioner and Secretary, Food Department of State of U.P. in his letter addressed to all the Commissioners etc. which is Annexure "E" to the writ petition, had noticed that from 1st of March, 1982 the prices of non-levy cement will not be fixed by the Government. In these view of the matter it is obvious that State Government itself was conscious that it has no power to fix prices of non-levy cement. Therefore, there is no force in the contention of the learned Advocate General that section 6 of the Act the State saves the power of State to continue the State Cement Order and Display Order and under rule 6 of State Cement Order the Licensing authority could fix the price.

80. There is no force in the contention of the Advocate General that "Cement" continues to be an essential commodity, hence the State Cement Order could continue. The "Act" contained very long list in its schedule. Several articles like Bread etc. are essential commodities, but the Government have chosen not to control them. No such control order affecting them have been brought to our notice. Hence mere mention of an article as essential commodity does not authorise the state to continue its control order when the other laws framed under the Statute of parliament lifts such control. It must show the necessity of continuance of such control. We have not been shown any such necessity. In the matters occurring in concurrent list the State has to act in harmony with the Central Government When despite requests of the Central Government it was not going to amend its laws then the Court will step in and see where the State law militates against Central law.

81. I do not agree with Mr. Ambwani that Display Order will continue to apply in respect of non -- levy Cement. The. provisions of display of stock and price are contained in the condition no. 6 of license as contained in Form given at the end of State Cement Order as well as clause 4 of Display Order. They are overlapping provisions. Since the "State Cement Order" with reference to the non-levy cement, becomes repugnant, the obviously corresponding provision of the Display order regarding display of stocks etc. becomes repugnant to Central Government Order.

82. The learned Advocate General has cited K. Ramanathan Vs. State of Tamil Nadu and Another, the Hon"ble Supreme Court defined the word "regulating" in the context of Section 3(2)(d) of the Act. It was held that this word includes prohibition. However, in the context of the matter in hand the State Government under its delegated power could neither regulate or prohibit the sale of "non-levy cement" when the Centre had opted neither to regulate the sale nor to prohibit the producers to sell their "non-levy cement" in their own way. The State can not exceed the delegated power, by saying that it has powers under the Act, as the Centre was acting in removing the restrictions under the Industries Act. The Court will make a harmonious construction of the laws to serve the best interest

of the society.

83. The Respondent learned Counsel also cited M/s Kanwal Agencies Saharanpur v. State 1990 (2) EFR 406 in which a Division Bench of this Court held that "non-levy cement" continue to be an essential commodity and violation of two order was punishable. In this case the question of repugnancy of the State Order under article 254 of the Constitution or the State Cement Orders becoming violative of Article 19(a) of the Constitution was neither raised nor considered. Hence it does not help the Respondent.

84. Delhi Administration Vs. Munshi Ram Ram Niwas and Others, , was cited by learned Advocate General. In this case the validity of Delhi Agricultural produce Marketing (Regulation) Act 87 of 1976 was considered in the conspectus of the field of operation of the Act. It was found by Delhi High Court that two Acts operate in their own field in the matter of licensing. Thus this case is not applicable to the present matter.

85. Chint Ram and Another Vs. State of Punjab, cited by learned Advocate General was also based on different facts. In this case the question raised was whether a person could be prosecuted for violation of section 16(1)(a)(i) of Prevention of Food Adulteration Act, when the licensee under Food Products Order had manufactured products in conformity with the specifications in the said order. This case does not held the Respondents.

86. We have seen above that the State Cement Order and Central Cement order were proceeding in the same field. Hence the State Cement Order was obliged to tow the line of the Central Government and act accordingly. In this way when the State Government had no power to fix price of non-levy cement the imposition of condition to obtain a licence of non-levy cement according to the State Cement Order and to display price and stock on notice board according to terms of licence were only ritualistic formalities. The restriction imposed by the State Government under the State Cement Order became repugnant to Central Cement Order under article 254 of the Constitution as far as they pertained to the "non-levy cement"

87. Regarding the contention that after 28-2 -- 1982 State Cement Order became violative of article 19(1)(g) of the Constitution. We may have a look at the article relevant portion of which reads as under:--

(19) (i) All citizens shall have the right--

(a)

(b)

(c)

(d)

(e)

(f) Omitted by Constitution (44th Amendment Act, 1978.

(g) to practice any profession, or to carry on any occupation, trade or business.

(2)

(3)

(4)

(5)

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law, imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub--clause, and, in particular, nothing in the said subclause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating. to--

(i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade, or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry, the service whether to the exclusion, complete or partial, of citizens or otherwise.

88. Clause 6 says that the restrictions imposed should be reasonable. The Constitution does not define the expression "reasonable restriction" The Hon"ble Supreme Court of India has interpreted the expression "reasonable restriction" in its various judgments delivered from time to time In Chintaman Rao Vs. The State of Madhya Pradesh, . The Supreme Court observed that the decision of the Legislature of what constitutes a reasonable restriction is neither final nor conclusive. It is subject to supervision by the Court. The Supreme Court observed that the Court has to take into consideration the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evils sought to be remedied thereby, disproportion of the imposition and the prevailing conditions at that time. The Supreme Court also observed that the limitation imposed upon a person in the enjoyment of his fundamental rights must not be arbitrary or of excessive nature beyond what is required in the interest of the public.

89. If the present matter is examined in the light of the aforesaid pronouncement it becomes obvious that the State Cement Order and Display Order providing for obtaining a licence displaying the price, stock and also providing for punishment on which of the conditions of the licence and non-displaying of price and stock on a notice board in accordance with rules of Display Order were neither necessary nor in the interest of the general public as far as it pertains to non-levy cement. This provision would result in more harassment to the cement dealers than any fulfilment of interest of the public. The fear of the prosecution for violation of the conditions of the licence would be

hung over the head of cement traders like "Sword of Democles" without any fulfilment of the purpose mentioned in the two State Orders. Hence the State Cement Order and the Display Order as far as they pertain to non-levy cement became violative of Article 19(1)(g) of the Constitution of India after 28-2-1982.

90. It is not necessary to examine the argument whether the State Cement Order was impliedly repealed, as far as it pertained to "Non Levy Cement" after 28-2-1982. Since it has been held that the State Cement Order, with reference to Non Levy Cement was repugnant to Central Cement Order and was also violative of Article 19(1)(g) of the Constitution, then obviously the State Cement Order with reference to "Non Levy Cement" became impliedly repealed.

91. In view of what has been said above, I answer question No. 1 in negative and hold that as the State Cement Order is repugnant to the Central Cement Order and also violative of Article 19(i)(g) of the Constitution as far as it pertains to non-levy cement no licence is required by a dealer of said cement under the provisions of State Cement Order.

92. The U.P. Essential Commodities (Display of Prices and Stocks and Control of Supply and Distribution) Order, 1977 is also not applicable to the non-levy cement. It is repugnant to the Central Cement Order as far as it pertains to non-levy cement. Therefore, no person can be prosecuted for contravening the terms of licence. Question No. 2 is answered in the negative.

93. Question No. 3 is also answered in negative. Since the Display Control Order will not apply to the non-levy cement, no person can be prosecuted for non-displaying the stock of cement and prices on the notice-board.

94. Let the above answers be placed before the Division Bench which has referred the matter to the Full Bench.

V.N. Mebrotra, J.

95. Being of the view that the decision in the case of Om Prakash Agarwal Vs. State of U.P. and Others, and followed by several other Division Benches of this Court, requires reconsideration, a Division Bench of this Court has referred the following questions to the Full Bench :

1. Is a license required under the provisions of State Cement Order for a person who wishes to deal in non-levy cement ?
2. If he contravenes the terms of the licence, can such a person be prosecuted for contravening the provisions contained in the State Cement Order and the Display Order ?
3. Assuming that answers to the two aforesaid questions are in the negative, can any person dealing with non-levy cement be prosecuted under the Display Control Order for flouting the provisions contained therein?

Before embarking on a consideration of these questions, it will be proper to

consider the relevant facts and provisions of law, as may be applicable to the present case.

96. Petitioner no. 1 M/s. Hari Om Om Prahash is a cement stockist carrying on retail sale of non-levy cement at Budaun. Petitioners nos. 2 and 3 are the partners of the said firm. It is alleged that on 23-4-1990, some officials of the supply department inspected the premises of the petitioners' firm and various contraventions of the terms of the licence for carrying on retail business in non-levy cement were found. It was alleged that the Petitioners were carrying on business not at the premises mentioned in the licence but at another place. They had also not displayed the stock-list as well as the price-list. A first information report was filed alleging that the above acts and omissions amounted to the contravention of the provisions contained in the U.P. Cement Control Order, 1973 (hereinafter referred to as the State Cement Control Order) as well as the U.P. Essential Commodities (Display of Prices and Stock and Control of Supply and Distribution) Order, 1977 (hereinafter referred to as the Display Order).

97. The Petitioners filed the writ petition asserting that the provisions of the State Cement Control Order and the Display Order were not applicable to the non-levy cement and so the first information report, as against the Petitioners is liable to be quashed. The Petitioners placed reliance on the Division Bench case of Om Prakash Agarwal (*supra*) which was followed by several other division benches of this Court.

98. We shall now consider the various provisions of law and orders, relevant to the present case.

99. The first Act to be considered in this regard is Industries (Development and Regulation), Act, 1951 (hereinafter referred to as the "Industries Act"). This Act was enacted to provide for development and regulation of certain industries. u/s 2 of this Act, it was declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule" Item No. 35 of the First Schedule relates to:

Cement and Gypsum Products :

- (1) Portland cement.
- (2) Asbestos cement.
- (3)
- (4)

100. The provisions of this Act are applicable to the industries specified in the first schedule and the Cement Industry is one of the industries which has been included in that schedule. The Act provides for the establishment of the Central Advisory Council and Development Councils. It further provides for registration of scheduled industries and also for the licensing of those industries. It also provides for direct management or control of industrial undertakings by Central

Government in certain cases. Chapter III-B was subsequently added to this Act and u/s 18-G of this chapter, it is provided that the Central Government, so far as it appears to it to be necessary or expedient for securing the equitable distribution and availability at fair prices of any article or class of articles relatable to any scheduled industry, may, notwithstanding anything contained in any other provision of this Act, by notified order, provide for regulating the supply and distribution thereof and trade and commerce therein.

101. Sub section (2) of section 18-G, provides that a notified order issued under sub section (1) may provide for controlling the prices of the articles and also for regulating by licences, permits etc. the distribution, transport, disposal etc. of such articles and for various other things for carrying out the directions contained in sub section (1) of this section.

102. u/s 25 of this Act, the Central Government may delegate its powers exercisable under the Act to the State Government or other authorities mentioned in the section. Further, u/s 26 of the Act, the Central Government could issue directions to any State Government as to the carrying into execution in the State of any of the provisions of this Act or of any order or direction made thereunder.

103. The Central Government issued the Cement Control Order, 1967 (hereinafter referred to as the Central Cement Control Order) in exercise of powers conferred by section 18-G and 25 of the Industries Act. Under sub clause (a) of Clause 2 of his Order, cement was, defined. Clause 3 prohibited the producer of the cement from removing the same from the precincts of its factory or from any other part of its premises to any place outside the precincts of such factory or premises, except with the previous permission in writing of the Central Government. Under clause 4, the Central Government could direct the producers to sell or transport the cement. Under clause 5, it could issue directions to the producers as regards the disposal of stock. Clause 6, provided for maintenance and production of accounts etc. by the producers. Clause 7 provided for the retention prices. Under Clause 8, the prices for various qualities of the cement were provided, under Clause 9, the payments to cement regulation account was to be maintained by the producers. Clause 10 provided for the fixation of wholesale and retail price; Clause 11 provided for the maintenance of the Cement Regulation Account. Under Clause 13, all powers exercisable by the Central Government under this Order, except under clauses 8, 11 (2) and 12 could be exercisable by the Controller also. Under sub clause (ii) of Clause 13, the State Government could also exercise powers to the extent provided under proviso to clause 4 of this Order. Under that proviso, the Central Government could authorise the State Government to decide, subject to such conditions as may be specified and within the total quantities of cement allocated to the State Government by the Central Government from each of the cement producer, the details of the allottees and the quantities to be supplied to each of them by each of the cement producer.

104. The Central Cement Control Order was amended by the notification dated 28-2-1982 under which the cement was categorised as "levy cement" and "non-levy cement". The "levy cement" was that part of production of cement with regard to the installed capacity of cement plant as may be defined by the Central Government from time to time not being more than 66.6% of the installed capacity of the cement plant. Any cement produced in excess of the production mentioned above, was to be termed as "non-levy cement". By the same amendment, Clause 1-A was also added which provided that the provisions of the said Order except clauses 3-A, 6 and 11 (2) (iv) thereof shall apply only in relation to levy cement. As mentioned earlier, clause 6 relates to the maintenance and production of account books by the producer of cement while clause (2) relates to the maintenance of the Cement Regulation Account. The other provisions of this Control Order were thus made inapplicable in respect of the "non-levy cement" w.e.f. 28-2-1982. Lateron. on 1st March, 1989, the Central Cement Control Order was again amended and the distinction between "levy cement" and "non-levy cement". was removed. The entire cement after this amendment could be said to be non-levy cement. Clauses 6 and 11 of the Central Cement Control Order remained applicable to the cement producers while other clauses were made inapplicable.

104. The Central Government enacted the Essential Commodities, Act, 1955 in the interests of the general public for the control of the production, supply and distribution of, and trade and commerce, in certain commodities. Clause (a) of section 2 defines "essential commodity". Sub clause (xi) of this clause further provides that "any other class of commodity, which the Central Government may by notified order, declare to be an essential commodity for the purpose of this Act, being a commodity with respect to which Parliament has power to make laws by virtue of Entry 33 in List III of the Seventh Schedule to the Constitution, could also be termed as essential commodity. By notification dated 28-1-1963, the Central Government declared cement as essential commodity. Since then cement is included in the list of the essential commodities to which this Act applies. Section 3 of the Act provides for the control production, supply, distribution etc., of essential commodities. The Central Government has been authorised to issue necessary orders for carrying out this purpose. Section 5 of this Act provides for delegation of powers by the Central Government to the State Government or other authorities or officers subordinate so . the State Government. Section 6 of the Act provides that an order made u/s 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act. Thus an order made u/s 3 of the Act was to prevail over any provisions of any other enactment or any instrument having effect by virtue of any other enactment. The Central Government delegated its powers u/s 3 of the Essential Commodities Act by the Order dated 18-6-1966 on the State Government for issuing necessary orders under that section. The State Government issued Uttar Pradesh Cement Order, 1966, but subsequently it

issued Uttar Pradesh Cement Control Order, 1973 and rescinded Cement Order of 1966. The Cement Control Order, 1973 was amended by notification dated 13-5-1978. Later on this Control Order was further amended by order dated 8th August, 1978 and then again by order dated 30-12-1978. Before these amending orders were issued by the State Government, the Central Government by notification dated 30th November, 1974 rescinded the delegation order dated 18th June, 1966 and issued fresh delegation order under the powers conferred by section 5 Of the Essential Commodities Act. Later on, the Central Government by notification dated 7th August, 1990, rescinded delegation of powers under clause (d) of sub section (2) of section 3 of the Essential Commodities Act, in so far as it "relates to the regulation of retail cement distribution by licences or permits". However, this modification of delegation order dated 30th November, 1974 was not to affect the previous operation of the said Order or anything duly done or suffered thereunder or any right, privilege, obligation or liability acquired, accrued or incurred under the said Order or any penalty of punishment incurred in respect of any offence committed against the said order; OF any investigation, legal proceedings etc. already initiated.

105. The State Government issued "Uttar Pradesh Essential Commodities (Display of Prices and Stocks and Control of Supply and Distribution) Order 1977" under the authority delegated by the Central Government by notification dated 30th November, 1974, issued u/s 5 of the Essential Commodities Act. This Display Order provides for exhibition of price list and stock by retailers. It also provides for the fixation of price which could be charged by a wholesaler or a retailer. It also provides that the wholesaler or retailer could not withhold from sale any scheduled commodity. Clause 7 of this Order provides for the issuance of correct receipt or invoice etc. to the purchaser; Clause 8 provides for the maintenance of account books, etc, Clause 9 provides for the regulation of supply and distribution of any essential commodity and Clause 10 provides for powers of entry, search and seizure etc. This Display Order was to be applicable to the scheduled commodities, i.e. the commodities which have been specified in the schedule of the Order and at item no. 28 of the schedule, cement has been mentioned.

106. In the case of Om Prakash Agarwal, referred to above, the Petitioner was a retail dealer in non-levy cement carrying on business at Agra. In the licence granted to him under the U.P. Cement Control Order, 1973 he was to carry on business at a particular premises. On inspection by the authorities concerned, it was found that the Petitioner was carrying on business at different premises. He had also allegedly committed several irregularities and had also committed breach of terms and condition mentioned in the licence issued to him under the Cement Control Order. He has also contravened the provisions of the Display Control Order. Proceedings under sections 3/7 of the Essential Commodities Act were initiated against him. He had surrendered before the Court concerned. Before he could secure his release on bail, the District Magistrate passed a detention order. The Petitioner asserted that the provisions of U.P. Cement

Control Order as well as Display Order were not applicable to the non-levy cement and for this reason he did not commit breach of provisions of section 3 of the Essential Commodities Act nor he could be detained for committing the alleged offence.

107. The Division Bench considered the various provisions of the Cement Control Order, 1973 as well as the Essential Commodities Act, and held that though the provisions of U.P. Cement Control Order, 1973 were not inconsistent with any order made by the Central Government u/s 5 of the Essential Commodities Act, but these were inconsistent with the provisions of the Cement Control Order, 1967 as amended by the 1982 notification which was made by the Central Government in the exercise of its powers u/s 18-G and Section 25 of the Industries (Development and Regulation) Act, 1951. It was observed that "the U.P. Cement Control Order, 1973 does not seem to be hit by clause (a) (iii) of the Delegation Order. Still we cannot close our eyes to the fact that where only levy cement is subject to control under the Cement Control Order, 1967 with effect from 28-2-1982 and non-levy cement is free from any control, U.P. Cement Control Order, 1973 has placed non-levy cement under control. In other words, it has the effect of destroying the provisions of the Central Cement Control Order vis-a-vis non-levy cement and to that extent it is repugnant to the cement Control Order, 1967 as amended by the 1982 Notification. Both the Cement Control Order, 1967 and the U.P. Cement Control Order, 1973 are orders issued in exercise of the powers conferred by a statute. Therefore, they for all practical purposes have the same effect as if enacted in that statute and inconsistency between them will attract the application of Article 254 of the Constitution of India. Such repugnancy is, therefore, hit by Article 254 of the Constitution of India and, even if not hit by this Article, it cannot be permitted to hold the field if the State of U.P. does not see the wisdom of making suitable amendments in the U.P. Cement Control Order, 1973 as the State of Bihar has done with respect to their Bihar Cement Control Order, 1972. In other words, the U.P. Cement Control Order, 1973 would remain inoperative to the extent it is sought to be applied with non-levy cement. That is the law as it stands now after 28-2-1982 does not permit control of non-levy cement in a manner which is not consistent with the Cement Control Order, 1967 issued by the Central Government. It cannot be disputed that this does not mean that a retail dealer in levy cement (which of course is also cement as defined in the U.P. Cement Control Order 1973) should be given a free hand in indulging in activities enabling him to make undue gain. It is not within our competence to suggest here the ways and means for achieving this object."

108. A consideration of the above decision of the Division Bench will show that according to the Bench, the provisions of U.P. Cement Control Order, 1973 were not inconsistent with any order made by the Central Government u/s 5 of the Essential Commodities Act but it was inconsistent with the provisions of Cement Control Order, 1967, as amended by 1982 Notification. The Division Bench, however, did not consider in effect of the provisions of section 6 of the Essential

Commodities Act while considering the inconsistency between the two Control orders. The Division Bench also did not consider the provisions of the Display Control Order, 1977 and it did not decide as to whether any breach of the provisions of that order has been committed and, if so, whether the Petitioner of that case could be punished for the same.

109. Sri Tapan Ghosh, learned Counsel for the Petitioners, has argued that the U.P. Cement Control Order stood rescinded expressly or, in any case, by necessary implication, with effect from 28-2-1982 in respect of non levy cement and so no licence was necessary for the sale of non-levy cement, nor any breach of the provisions of U.P. Cement Control . Order could be punishable. It has further been argued that for the same reason, the Display Order could not be made applicable to the non levy cement nor any breach of that order could entail prosecution or punishment. The learned Counsel has also argued that the provision of licence was introduced by the U.P. Cement Control (First Amendment) Order, 1978 but this amendment order was invalid as it purports to have been made by the State Government under the Delegation Order dated 18-6-1966 by the Central Government, much before the date on which this order was made on 13-3-1978, the Delegation Order dated 18-6-1966 had already been rescinded by the Central Government vide its order dated 30th November, 1974. Thus, the argument is, the U.P. Cement Control (First Amendment) Order, 1978 was invalid and so the provision, as regards the licence under the U.P. Cement Control Order, was inapplicable.

110. Sri, Sunil Ambwahi, who has also argued the petition on behalf of the Petitioners, has on the other hand contended that though the provision for licence in the U.P. Cement Control Order may not be invalid, still certain clauses in the licence issued under the Order, as well as certain clauses of the Display Order, could not be enforced in respect of the non levy cement and should be held that these provisions were either expressly or impliedly repealed in respect of such cement.

111. Sri Umesh Chandra, Advocate General, who has argued the petition on behalf of the Respondents, has, however, contended that the provision of U.P. Cement Control Order as well as the Display order were applicable to the non levy cement and it could not be said that these provisions were either expressly or impliedly repealed in respect of the same. He has further argued that the U.P. Cement Control (First Amendment) Order, 1978 was a valid order and its validity could not be challenged merely because a wrong delegation order was mentioned in it.

112. Before proceeding to consider these arguments, we may like to make it clear that we do not propose to consider the situation as obtaining after partial rescission of the Delegation Order dated 20th November, 1974 by the Central Government vide its order dated 7th August, 1990. We shall be considering the position as regards the non levy cement for the period prior to 7th August, 1990 only.

113. We will first consider as to whether the U.P. Cement Control (First Amendment) Order, 1978 was invalidly passed by the State Government, as on its validity, the requirement to obtain the licence depends. The parliament enacted the Essential Commodities Act, 1955 to provide, in the interests of the general public, for the control of the production, supply and distribution of, and trade and commerce, in certain commodities. Section 3(1) of the Act empowers the Central Government to pass orders to provide for regulating or prohibiting the production, supply and distribution of any essential commodity and trade and commerce therein, if it was of the opinion that it was necessary and expedient so to do for maintaining or increasing supply of the same or for securing their equitable distribution and availability at fair prices. The essential commodity was defined in section 2 of the Act and cement was one of the commodities termed as essential commodity. An order could be passed by the Central Government under sub-section (1) for the purposes mentioned in that sub section. The Central Government could, however, u/s 5 of the Act, delegate its powers to make orders of issue notification u/s 3 of the Act to the State Government or to an officer or authority subordinate to the State Government.

114. The Central Government passed the first delegation order on 18th June, 1966 directing that the powers conferred on it by sub-section (1) of section 3 of the said Act to make orders to provide for the matters specified in clauses (d), (e), (f), (g), (h), (i), (ii) and (J) of sub-section (2) in relation to "all commodities other than food stuffs and fertilisers be exercisable also by the State Government. Some limitations on the powers of the State Government in respect of exercise of the delegated authority were also provided in the same order. The limitation, relevant to our purposes, is that no order shall be issued in pursuance of the powers hereby delegated if it is inconsistent with any order issued by the Central Government under the said Act.

115. Under the delegated authority, the State Government issued U.P. Cement Control Order, 1973. Subsequently by order dated 30th November, 1974, the Central Government rescinded the delegation order dated 18th June, 1966 and issued a fresh delegation order. This delegation order is more or less in the same terms which were contained in the earlier delegation order. The State Government subsequently on 13th March, 1978, issued "The Uttar Pradesh Cement Control (First Amendment) Order, 1978" substantially amending the U.P. Cement Control Order, 1973. This amendment order purports to have been issued "in exercise of the powers u/s 3 of the Essential Commodities Act, 1955 (Act No. X of 1955) read with Government of India, Ministry of Commerce Order No. S.O. 1844. dated June 18, 1966 and all other powers enabling him in this behalf...." Thus, this order was issued in exercise of the powers u/s 3 of the Essential Commodities Act read with delegation order dated 18th June, 1966 as well as all other powers enabling the State Government in this behalf to pass such order. Sri Tapan Ghosh has argued that as the delegation order dated 18th June, 1966 had been rescinded much earlier the State Government could not have passed the amendment order dated 13th March, 1978 and this order was

invalid as the State Government had. at that time. no authority to take recourse to the delegation order dated 18th June, 1966! The contention by the learned Advocate General, however, is that under the delegation order dated 30th June, 1974, the State Government had authority to pass the order dated 13th March, 1978 and merely because a wrong order has been cited in it, this amendment does not become invalid. It has also been argued that not only the delegation order dated 18th June, 1966 has been mentioned in this amendment order, the State Government has further mentioned "all other powers enabling him in this behalf. Thus, even though the State Government could not have passed the order under the delegation order dated 18th June, 1966, it could have passed the order under the delegation order dated 30th November, 1974.

116. On a consideration of the arguments by the learned Counsel, we are unable to accept the arguments made by the learned Counsel for the Petitioners. As mentioned earlier, the First Amendment Order purports to have been issued not only under the delegation order dated 18th June, 1966 but also refers to "all other powers enabling the State Government in this behalf. It cannot be denied that on the date on which this order was passed, the State Government could issue such an order under the authority delegated to it by the Central Government by its order dated 30th November, 1974. Merely because a wrong order has been cited by the State Government, it does not affect its jurisdiction to pass such an order nor it cannot be said that the amendment order passed was invalid for this reason. Reference may be made to the ruling in the case of *Isha Beevi on behalf of the Minor Umaiben Beevi and Others Vs. The Tax Recovery Officer and Addl. P.A. to Collector, Quilon and Others*, , and also to the case of *The Vice-chancellor, Jammu University and Another Vs. Dushiant Kumar Rampal*, . In these cases, the authority concerned had mentioned wrong provision while passing the orders and it was held that if the authority had the powers to pass the impugned order, the same does not become invalid merely because a wrong provision of law was cited in that order. In the case of *Ghazanfar Ali Khan etc. Vs. State of U.P. and Others*, , it was held by a Division Bench of this Court that if an authority is competent to do certain act, mere recitation of wrong provision would not invalidate that act. Considering the above facts, it cannot be held that the U.P. Cement Control (First Amendment) Order, 1978 was not valid or was inapplicable.

117. Now coming to the question as to whether the U.P. Cement Control Order was, either expressly or impliedly, repealed due to the Central Government notification dated 28th February, 1982 amending the Central Cement Control Order. By this notification, the Central Government divided the cement into two categories. That part of production of cement which did not exceed 66.6% of the installed capacity was to be known as "levy cement" while the remaining production was known as "non levy cement". The provisions of Central Cement Control Order excepting clause 6; 11 (2) and (iv) were not to be applicable to the non levy cement, while the entire central Cement Control Order remained applicable to the levy cement. Clause 6 of this Order relates to the maintenance

and production of books of accounts etc. Clause 11 relates to the cement regulation account. Except for these two clauses, the other clauses regarding - the transport and fixation of price in respect of non levy cement were made inapplicable. The argument by the learned Counsel for the Petitioners is that by passing the order dated 28-2-1982, the Central Government intended that there should be no control on price or sale of the non levy cement and, therefore, the State Cement Control Order and Display Order, which contained the provisions regarding the control over price and sale etc. became inapplicable in respect of non levy cement. It is also contended that the provisions of the State Control Order were in direct conflict with the Central Control Order in respect of the non levy cement and both the provisions could not be applied together due to this conflict, hence the Central Cement Order should prevail over the orders passed by the delegated authority, i.e., by the State Government.

118. The argument by the learned Advocate General, however, is that though the purpose of Central Control Order and the State Control Order may be the same i.e. to provide the cement to the general public at a reasonable rate, their field of operation was quite different. It has also been argued that the provisions of the U.P. Control Order or the Display Order were not in conflict with the provisions of Central Control Order; hence the question or repugnancy between the two orders does not arise. It has further been argued that even if there was a conflict between the two orders, the U.P. Control Order, 1973 and the Display Order 1977 were to prevail in view of the provisions of Section 6 of the Essential Commodities Act.

119. The first question to be considered is as to whether there was any conflict between the Central Cement Control Order and the U.P. Cement Control Order so far as the non levy cement was concerned. "Cement" has been defined in Section 2(a) of the Central Control Order which is being quoted below :

"Cement" means any variety of cement manufactured in India, and includes portland pozzalana cement, blast-furnace slag cement water-proof (hydrophobic) cement, rapid hardening cement, low heat cement, masonry cement and (high strength ordinary portland cement) but does not include oil well cement and white and coloured cement other than grey portland cement).

120. As mentioned earlier, production to the extent of 66.6 per cent of the installed capacity of the cement plant is termed as "levy cement" while the remaining production is termed as "non levy cement". However, the levy cement as well as non levy cement continues to be included in the definition of "cement". The non levy cement does not cease to be cement but it is actually a part of the total production of cement by a cement plant. By notification dated 24-11-1962, the Central Government has declared the cement to be an essential commodity for the purposes of the Essential Commodities Act, 1955. Under entry 33 in List III of the Constitution the Parliament has power to make laws relating to trade and commerce, production, supply and distribution of cement, if it is to be expedient in the public interest. This has been done by the Parliament by

enacting Industries (Development and Regulation) Act, 1951. Cement is specified in the first schedule of the Act as required u/s 2 of that Act. Therefore, both the requirements of section 2(a) of the Essential Commodities Act have been fulfilled and the cement is an essential commodity as defined under this Act.

121. Sri Tapan Ghosh, learned Counsel for the Petitioners, has, however, argued that as the Central Government has removed the control on price and sale of non levy cement, the same ceased to be an essential commodity within the provisions of the Essential Commodities Act. We are, however, unable to agree with this argument. As mentioned earlier, thereon levy cement is also a commodity which is known as "cement". Merely because the provisions of the Central Control Order have been made inapplicable to the non levy cement, it does not cease to be "cement". The provisions of the Essential Commodities Act continue to be applicable to the non levy cement also as no such exception has been made in that Act in respect of non levy cement. As mentioned earlier, the Central Government could have passed orders for regulating or prohibiting the supply and distribution of the essential commodities. The Central Government could also delegate its authority to pass such order to the State Government or some officer or authority subordinate to the State Government.

122. The Essential Commodities Act thus empowers the Central Government to delegate its authority to pass orders u/s 3 of the Act to the State Government and the State Government, by virtue of that delegated authority, passed the State Control Order, 1973. This order by the State Government, having made in accordance with the powers conferred by the Statute, i. e. the Essential Commodities Act, 1955, has the statutory force and validity as if the same was included in the parent Act itself. Reference may be made to the decision in the case of Kailash Nath and Another Vs. State of U.P. and Others, .

123. Before considering the other aspects of the matter, it should be seen as to whether there is in reality any conflict between the Central Control Order and the State Control Order. The Control Order, 1967 was issued in exercise of powers conferred by Section 18-G and 25 of the Industrial (Development & Regulation) Act, 1951. A reading of this order will show that the provisions of the same were applicable to the producers of the cement. Clause 3 prohibited the removal of the cement by the producer without the previous permission of the Central Government. Clause 4 empowered the Central Government to order the producer to sell cement or to transport it to such destination by such modes, as may be directed. Under clause 5, the producer could be directed to dispose of his stock. Under Clause 6, the producer was to maintain and produce the account-books; clause 7 provided for retention price available to producer; clause 8 provided for the price on which the producer could sell the cement; clause 9 related to the payments to cement regulation account by the producer; clause 11 related to the maintenance of the Cement Regulation Account; under clause 12, the Central Government could vary the prices mentioned in the schedule to the order; clause 13 provided for the delegation of powers exercisable by the Central Government

to the State Government and clause 14 related to the procedure regarding claim by producers. Thus all these provisions were applicable ,at the stage of production of cement. Under clause 10 only the maximum price at which the cement could be sold by a dealer, could be fixed by the State Government. In that case, also the State Government was bound to take into consideration the price fixed under clause 8 while fixing the price applicable to the dealer. This Cement Control Order thus does not relate to the actual sale to consumer in the State or the question as to whether the seller has to obtain any licence or to maintain books of accounts etc. The State Cement Control Order, however, provides for these things. As mentioned earlier, object of the State Government Order was also to maintain the supply and securing equitable distribution of cement at fair price, but the of operation of this Control Order was different from the field of operation of Central Control Order. As mentioned earlier, the Central Control Order was applicable at the stage of production only, exercising for the provision for fixation of price by the State Government. That price too was to be fixed after taking into consideration the price fixed under clause 8 of that order. However, the State Control Order operates in the field of the Sale to the consumer in the State. This order does not, in any way purport to regulate the production of cement by producer or transport of the same by producer. The provisions of the Central Control Order were inapplicable to the non levy cement, excepting clauses 6 and 11. These clauses are not relevant for the purpose of the present case. Thus the position is that the provisions of Central Control Order became inapplicable to the non levy cement w.e.f. 28-2-1982. Thus for all purposes, the restrictions at the production level in respect of non levy cement ceased and the producer could fix his own price and could also sell and transport the non levy cement without any restriction by the Central Government. So it could be said that there was no Central Control Order in respect of non-levy cement. In these circumstances, could it be said "that there was. any apparent inconsistency between the Central Control Order and the State Control Order and in case there was any such inconsistency, the same was irreconcilable or intolerable one.

124. While considering the law relating to the question of inconsistency between the Central and State notifications, their Lordship of Supreme Court made the following observatious in the case of M/s. Ram Chandra Mewa Lal v. State of U.P. 1984 ALJ 235 at p. 254 under paragraph 48 :

The priniciple may be stated thus. The Centre and the State both cannot speak on the same channel and create disharmony. If both speak, the voice of the Centre will drown the voice of the State. The State has to remain "silent" or it will be "silenced". But the State has the right to "speak" and can "speak" (with unquestionable authority) where the Centre is "silent" without introducing disharmony. If the Centre sits only on a portion of the Chair, the State can sit on the rest of the portion with arms thrown on the shoulders of each other. While the State cannot sit on the lap or on the shoulders of the Centre, both can certainly walk hand-in-hand, lending support to each other, in a friendly manner,

towards the same destination. If the Centre has built a wall, and has left a gap from which intruders can infiltrate, the State can fill the gap in the wall, and thus make its own contribution to the common Cause. What is more, each in theory and principle must be presumed to be conscious of the need for accord and need for accomodating each other in the interest of "NATIONAL HARMONY".

125. The question of inconsistency or irreconcilability could be raised only when the orders by the Central Govt. and the order by the State Government could not be enforced or followed at the same time i. e. in case one order is followed, it will amount to the breach of the other order. In the present case, no such occasion arises. The provisions of the Central Control Order have been made inapplicable to the non levy cement so it does not now, in any way, regulate the production or disposal or fixation of price of such cement at the level of producer. The State Control Order, however, regulates the sale of cement to the consumers in the State. It cannot be said in the circumstances that there was any apparent inconsistency between the Central Order, and the State Order muchless any irreconcilable inconsistency. The provisions of both the control orders could be followed without committing breach of any of them.

126. The learned Counsel for the Petitioners has contended that the inconsistency between the Central Control Order and the State Control Order would be apparent from the fact that though the Central Government removed the control on the sale and price of non levy cement, the State Government still wants to control the same. The learned couusel has referred to the communication by the Controller to the Central Government ro the State Government mentioning the fact that the State Government mentioning the fact that the State Government has not amended its control order as regards the non levy cement and requested it to do so in the light of the Central Government Order dated 28-2-1982. From this communication, the learned Counsel wants us to draw the inference that the Central Government had implied by repealed its delegation order dated 30-11-74. We are, however, unable to agree with this connection. "Controller" has been defined in sub clause (b) of clause 2 of the Central Control Order as the the Cement Corporation of India Limited". Under clause 13 of the Control Order, all powers exercisable by the Central Government under this order except under clauses 8, 11 (2) and 12 were exercisable by the Controller also. However, the Cement Controller has not been conferred with any power to rescind or modify the authority delegated to the State Government u/s 5 of the Essential Commodities Act. Even if the Cement Controller had sought to rescind or modify the authority delegated to the Status Government by the Central Government u/s 5 of that Act,: the orders would have been invalid. However, in the present, case, the Cement Controller does not purport to do any such thing. The Cement Controller has merely requested the State Government to take note of the central notification dated 28-2-1982 and to take proper action in relation to the State Control Order. It is not disputed that the State Government did not amend its Control Order but temporarily suspended the enforcement of clauses 5, 6, 7, 8 and 9 of the Control Order vide its order dated

22-6-1989. The Central Government ultimately partly rescinded the delegation order dated 30-11-1974 so far as that related to the regulation of retail cement distribution by licences or permits.

127. Obviously, the Central Government was conscious of the fact that it had not rescinded or modified its delegation order dated 30th November, 1974 before the notification dated 7th August, 1990 was issued. It cannot, in the circumstances, be said that even before the notification was issued by the Central Government, it should be held that the delegation order stood rescinded or modified.

128. Considering the above discussion, it cannot be said that the State Cement Control Order stood rescinded either expressly or by necessary implication. It cannot also be said that there was any inconsistency between the Central Cement Control Order and the State Cement Control Order," muchless irreconcilable inconsistency. As mentioned earlier, non levy cement continues to be an "essential commodity" within the provisions of the Essential Commodities Act, 1955 In the case of *M/s. Kanvval Agencies, Saharanpur v. State of U.P.* 1990 (2) EFR 406, a Division Bench of this Court held that non levy cement remains to be essential commodity and the violation of the State Control Order, 1973 as well as the Display Order, 1977, was punishable under sections 3 and 7 of that Act.

129. Even if, for the sake of argument, it is accepted that there was inconsistency between the Central Control Order and the State Control Order as regards the non levy cement, then it has to be seen as to which of the two provisions will prevail. The Central Control Order, 1967 was passed under the powers conferred by section 18-G and section 25 of the Industries (Development and Regulation) Act, 1951 while the State Cement Control Order and, for that matter, the Display Order, were issued by the State Government under the powers delegated by the Central Government u/s 5 of the Essential Commodities Act. Section 6 of the Essential Commodities Act provides that an order made u/s 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act, thus in case an order is made u/s 3 of the Essential Commodities Act, it is to prevail over any other enactment other than the Essential Commodities Act, if the provision of the order is inconsistent with the other enactment. As compared to this, there is no non obstante clause in the Industries Act. On the contrary, section 31 of that Act provides that the provisions of this Act shall be in addition to and not, save as otherwise expressly provided in this Act, in derogation of any other Central Act for the time being in force, relating to any of the scheduled industries. So the provisions of the Industries Act cannot override the provisions of the Essential Commodities Act, which is also a Central Act, in case there is any inconsistency between the two Acts.

130. The Central Government by notification dated 30th November, 1974 delegated its power to pass orders u/s 3(1) of the Essential Commodities Act to make orders to provide for the matters specified in clauses (d), (e), (f), (g), (h),

(i) (ii), and (j) of sub section (2) thereof. It was, however, provided that the State Government shall not issue any order in pursuance of these delegated powers if it is inconsistent with any Order issued by the Central Government under the said Act, So in case there was any order issued by the Central Government under the Essential Commodities Act, then in case of inconsistency, that order was to prevail over the order passed by the State Government under the delegated powers. In the present case, however, there was no order by the Central Government under the Essential Commodities Act which could be said to be inconsistent with the State Control Order. In the case of *Harishankar Bagla v. The State of Madhya Pradesh* AIR 1954 465. the Supreme Court considered the provisions of the Essential Supplies (Temporary Powers) Act, 1946. The provisions of sections 3 and 6 of that Act were similar to the provisions of these sections under the Essential Commodities Act and that Act also provided for the delegation of powers by the Central Government to the State Government. The question arose as to whether, in case of inconsistency the State Control Order was to prevail over another Central Act. It was observed that "by enacting section 6, the Parliament has itself declared that an order made under section. 3 shall have effect notwithstanding any inconsistency in this order with any enactment other than this Act. This is not a declaration made by the delegate but the legislature itself has declared its will that way in section 6. The abrogation or the implied repeal is by force of the legislative declaration contained in section 6 and is not by force of the order made by the delegate u/s 3. The power of the delegate is only to make an order u/s 3. Once the delegate has made that order its power is exhausted. Section 6 then steps in wherein the Parliament has declared that as soon as such an order comes into being that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act. Parliament being supreme, it certainly could make a law abrogating or repealing by implication provisions of any pre-existing law and no exception could be taken" on the ground of excessive delegation to the act of the Parliament itself. There is no delegation involved in the provisions of section 6 at all and that section could not be held to be unconstitutional on that ground"

131. In the case of *Chint Ram and Another Vs. State of Punjab*, , a Division Bench of Punjab and Haryana High Court, while considering the order passed under the provisions of the Essential Commodities Act vis-a-vis the Food Adulteration Act. held that the order passed under the provisions of the Essential Commodities Act will prevail in view of the provision of section 6 of that Act. A similar view has been taken by the Delhi High Court in the case of *Delhi Administration Vs. Munshi Ram Ram Niwas and Others*, . Thus in case there was any irreconcilable inconsistency between the State Control Order and the Display Order on one hand and the Central Control Order on the other, the provisions of the above mentioned State Control Order and Display Order will prevail over the Central Order in view of the specific provisions of section 6 of the Essential Commodities Act.

132. The learned Counsel for the Petitioners has also argued that as the State

Control Order was inconsistent with the provisions of the Central Control Order, the Central Control Order, which has been passed under the Industries (Development and Regulation) Act, 1951, shall prevail in view of the provisions of Article 254(1) of the Constitution of India and the State Control Order shall stand repealed to the extent of inconsistency. Article 254(1) of the constitution reads as follows :

254 (1). If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament incompetent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause.(2), the law made by Parliament, whether passed before or after the ,law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

Under these provisions, in case the Parliament as well as the Legislature of a State enact laws in respect to one of the matters enumerated in the concurrent List and the provisions of these laws are inconsistent, then the law made by the Parliament is to prevail over the law made by the State Legislature to the extent of the repugnancy. This provision is obviously -applicable to the law made by the Parliament and the law made by the State Legislature in respect of a matter enumerated in the Concurrent List. It cannot be made applicable to an order passed by a State Government exercising powers delegated to it by the Central Government. An order passed by the State Government under the powers delegated to it by the Central Government becomes a part of the Central Act itself and even if such an order was inconsistent with another Central Act, it cannot be said that the State Legislature had passed any law inconsistent with the law passed by the Central Government. So even if the provisions of U.P. Control Order and the Display Order had been inconsistent with the provisions of the Central Control Order, 1967, the same could not stand repealed under the provisions of Article 254(1) of the Constitution of India.

133. The learned Counsel for the Petitioners has further argued that in view of the fact that though the Central Government has withdrawn the control as regards the price and distribution of non levy cement, the State Government has sought to continue that control under the State Control Order and the Display Order and these orders are placing unreasonable restrictions . over the right of the Petitioners to sell non levy cement and so the State Control Order and the Display Order will be hit by the provisions of Article 19(1)(g) of the Constitution of India. Under Article 19(1)(g), a citizen of India has a fundamental right to practice any profession, or to carry on any occupation, trade or business. However, under clause (6) of this Article, State can make any law imposing reasonable restriction on this right in the interest of the general public. In the present case, the Essential Commodities Act was passed by the Central Legislature in the interest of the general public. Its purpose was to make

available the essential commodity to the general public at reasonable rates. For that purpose, orders could be passed by the Central Government, or by the State Government under the delegated powers, to provide for the licence etc. Even though the Central Government has withdrawn restrictions as regards the price and distribution in respect of non levy cement, which were earlier imposed, under the Central Control Order, still the non levy cement continues to be an essential commodity under the Essential Commodities Act and it has not been excluded from the purview of that Act. The State could make law imposing reasonable restrictions in the interest of general public in respect of non levy cement also. Neither the State Control Order, 1973 nor the Display Order, 1977 prohibits a dealer from carrying on business in non levy cement. These orders merely regulate the sale of entire cement, including the non levy cement, so that it could be available to the general public at fair price. The State Control Order, 1973 provides for a licence to be obtained by the dealer in cement. It has to also make certain other provisions at the stage of sale by the dealer to the consumer. The Display Order is applicable to a number of commodities mentioned in the schedule to this order. This order is apparently for the protection of the rights of the consumer. It provides for exhibition of price list and stocks by the dealer. It also provides that correct receipt or invoice should be issued by the dealer to the purchaser. It further provides for the maintenance and production of account, books, stock register etc. by the dealer. As all the provisions of both the orders are merely to regulate the sale- of cement, including non levy cement, the restrictions placed by these orders cannot, in any case, be said to be unreasonable so as to attract the provisions of Article 19(1)(g) of the Constitution of India.

134. The Supreme Court considered the vires of U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 in the case of Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, . The above mentioned Act placed certain restrictions upon the cane -- growers in regard to sale of their sugarcane to the occupiers of factories in areas where the membership of the Cane Growers' Co-operative Society was not less than 75 per cent of the total cane-growers within the area. It was held by their Lordships that the restriction in question was a reasonable restriction in the public interest designed for safeguarding the interests of the large majority of growers of sugarcane in the area and works for the greatest good of the greatest number. It was observed that due to these reasons this Act comes within the protection of Article 19(6) of the Constitution of India.

135. In the case of Ghazanfar Ali Khan etc. Vs. State of U.P. and Others, , a Division Bench of this Court considered the validity of the Sugar Cane (Control) Order, 1966. By that order, the State Government had prohibited the manufacture of Gur and Khandsari by power crushers for a limited period. It was held that this order did not place any unreasonable restriction on the fundamental right of the manufacturers. In the case of K. Ramanathan Vs. State of Tamil Nadu and Another, , the Supreme Court considered the validity of the

Tamil Nadu Paddy (Restriction on Movement) Order, 1982, which barred the transport of paddy outside certain districts of Tamil Nadu. It was observed that the impugned order was not in excess of the powers delegated to the State Government u/s 5 of the Essential Commodities Act and that the power to issue, order flows from section 3(1) of the Act and the word "regulation" in section 3(2) (d) included prohibition. It was held that the impugned order was valid. The validity of Sugar Cane (Control) Order, 1966 also came for consideration by the Supreme Court in the case of Laxmi Khandsari and Others Vs. State of U.P. and Others, . In that case also the question was as to whether the order by the State Government stopping power crushers for a limited period was violative of the provisions of Article 19(1)(g) of the Constitution. It was observed that the restriction imposed by the impugned notification were not unreasonable. Such restrictions clearly contain the quality of reasonableness and when tested on the touchstone of the principles laid down by the various authorities, they fully satisfy all the requirements of a reasonable restriction.

136. In the present case, it cannot be said that the provisions of State Control Order or the Display order placed any unreasonable restriction on the right of the Petitioners to carry on business in non levy cement. The provisions of these orders cannot be said to be in violation of Article 19(1)(g) of the Constitution..

137. Sri Sunil Ambwani, counsel for the Petitioners, has argued that certain provisions of the State Control Order as well as the Display Order could not be enforced in respect of non levy cement though he during the course of the arguments, conceded that the State Government could provide for obtaining of licence by the persons who also deal in non levy cement. The learned Counsel has referred to clauses 4 to 9 and 11 of the State Control Order and also clauses 5, 8, 10 and 11 of Licence in Form "B" and clauses 3, 4 and 9 of Licence in Form "D" and has argued that these conditions could not be enforced in respect of non levy cement. We are, however, unable to accept this argument. The State Cement Control Order, as well as the Display Order was validly passed under the powers delegated to the State Government u/s 5 of the Essential Commodities Act in respect of cement. This commodity still continues to be an essential commodity. The Central Government did not rescind or modify its delegation order prior to 7-8-1990. The provisions of both these orders could not become " inapplicable in respect of non levy cement Consequently, it must be held that the case of Om Prakash Agrawal v. State of U.P 1985 ACC 133 : 1985 AWC 196 (DB), does not lay down correct law on the subject. The other cases decided by this Court in which Om Prakash Agarwal's case has been followed, also do not lay down correct law on the questions before us.

138. In view of the above discussion, it must be held that the U.P. Cement Control Order, 1973 and the U.P. JEssential Commodities (Display of Prices and Stocks and Control of Supply and Distribution) Order, 1977 were valid orders issued under the delegated authority by the State Government" and were applicable in respect of non levy cement also. Consequently, the answer to the

questions referred to the Pull Bench are as under :

(1) A licence is required under the provisions of U.P. Cement Control Order, 1973 in respect of a person who wishes to deal in non levy cement;

(2) In case such a person contravenes the terms of the licence, he can be prosecuted for contravening the provisions contained in the above mentioned Cement Control Order and, further, in case such a person contravenes the provisions of U.P. Essential Commodities (Display of Prices and Stocks and Control of Supply and Distribution) Order, 1977, he can be prosecuted for the same also.

139. In view of the answer to questions no. 1 and 2, the question no. 3, does not arise. As mentioned earlier, in case a person, dealing in non levy cement, contravenes the provisions of U.P. Essential Commodities (Display of Prices and Stocks and Control of Supply and Distribution) Order, 1977, he can be prosecuted for the same also.