
(1992) 05 DEL CK 0042

In the Delhi High Court

Case No : Civil Writ Appeal No. 1919 of 1986, 1991 and 20170 of 1987 and 846 of 1992

The Raymond Woollen Mills Ltd. and Another

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 29-05-1992

Acts Referred:

Citation : (1992) 48 DLT 20 : (1992) 23 DRJ 461

Hon'ble Judges : S. Duggal, J;B.N. Kirpal, J

Bench : Division Bench

Advocate : Vinod Bhubade, A.Y. Chitale, P.B. Agarwal, Mohinder, J.S. Rypal, Sandhya Mehta and P.K. Jain, for the Appellant;

Judgement

B.N. Kirpal, J.

(1) A number of manufacturers of cement have filed these writ petitions, inter alia, challenging the validity of clause 9A of the Cement Control Order, 1967 whereby producers of cement were required to pay to the cement regulation account an amount of Rs.9 per metric tonne of non-levy cement produced by them.

(2) As common questions of law have been argued it is not necessary to set out facts of all the writ petitions. For the sake of convenience, and in order to appreciate the contentions raised, we will set out briefly the facts in the petition filed by M/s Raymond Woollen Mills Limited, which has a division which manufactures cement.

(3) The cement industry, except for a brief period in 1966-67 had been under control since 1942. Prior to 28th february, 1982 when the impugned clause 9A of the Cement Control Order, 1967 was promulgated, the entire production of cement in the country was under price and distribution control by means, of orders issued under Sections 18G and 25 of the Industries (Development and Regulation) Act, 1951 (for short the Idr Act) and also in terms of the Cement

Control Order, 1967. It was provided that the Government was empowered to fix retention/ex-works price as also the selling price of cement.

(4) With effect from 28th February, 1982 partial de-control of cement was announced. A composite scheme was formulated whereby there was -to be a uniform retention price or ex-works price of Rs. 335.00 per tonne for Ordinary Portland Cement and Portland Slag Cement and Rs. 320.00 per tonne for Portland Pozzolana Cement and, furthermore, levy cement obligation was limited to 66.6% of the installed capacity. It may here be clarified that the expression "levy cement" pertains to the cement which is subject to the control of price and distribution under the provisions of the Cement Control Order. Under this new policy of 28th February, 1982 the non-levy portion of cement was free from price and distribution control in contrast to the position as applicable for levy cement. One more change which was brought about with effect from 28th February, 1982, and which is impugned in these writ petitions, is the insertion of clause 9A in Cement Control Order. Whereas in relation to the sale of levy cement under clause 9 of the said order the cement manufacturers were required to remit into the Central Regulation Account the difference between the For destination price charged by them and the retention price admissible to them, under clause 9A they were required to contribute to the aforesaid account Rs.9.00 per metric tonne in respect of non-levy cement produced. This levy has now been discontinued since 15th December, 1986. The challenge in these petitions is to the levy and realisation of the said contribution under clause 9A till it was discontinued w.e.f 15th December. 1986.

(5) Before referring to the rival contentions it is necessary to set out the relevant provisions, with which we are concerned in this case. Section 18G of the I.D.R Act is as under: 18G - Power of 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 availability at fair prices and equitable distribution 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 regulation the supply and the distribution thereof and trade and commerce therein. (2) Without prejudice to the generality of the powers conferred by sub- section(1), a notified order made there-under may provide (a) for controlling the prices at which any such article or class there- of may be bought or sold: (b) for regulating by licenses, permits or otherwise the distribution, transport, disposal, acquisition, possession, use or consumption of any such article or class there-of: (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 opinion of the authority making the order are, or if unregulated are likely to be detrimental to public interests: (f) for requiring persons engaged in the distribution and trade and commerce in any such article or class thereof to mark the articles exposed or intended for sale with the sale price or to exhibit at some easily accessible place on the premises the price-lists of articles held for sale and also to similarly exhibit on the first day of every month or at such other time as may be prescribed, a statement of the total quantities of any such articles in stock: (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 licenses, permits, or other documents and charging of fees therefore. (3) Where in pursuance of any order made with reference to clause (d) of subsection (2), any person sells any article there shall be paid to him the price therefore: (a) Where the price can consistently with the controlled price if any, be fixed by agreement, the price so agreed upon: (b) Where no such agreement can be reached, the price calculated with reference to the controlled price, if any, faced under this section: (c) Where neither clause (a) nor clause (b) applies, the price calculated at the market rate prevailing in the locality at the date of sale. 4..... 5.....

 Explanation.....
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(6) The provisions of the Cement Control Order which are relevant are set out hereunder: "8. Every producer shall, himself or by any person on his behalf, sell: (a) water proof(hydrophobic) cement at Rs.564.00 per metric tonne. (b) rapid hardening cement and low heat cement at Rs.555.00 per metric, tonne. (c) High Strength ordinary Portland cement conforming to Is specification No. IS-B 112-1976 at Rs.555.00 per metric tonne. (d) Ordinary Portland Cement at Rs-532.00 per metric tonne. (e) Portland Pozzolana Cement and masonry cement at Rs. 517.00 per metric tonne. free on rail destination railway station plus the excise duty paid thereon: "Provided that in the case of packed cement there shall be added to the price referred to in this clause such charges as may be fixed by the Central Government in respect of packing in jute bags or in any other containers, and different charges may be fixed for the use of new and serviceable second hand jute bags and for the use of such other containers. Provided further that in the case of packing of cement in jute bags the producers shall not use serviceable second hand jute bags in excess of the limit specified by the Central Government from time to time. Provided also that the Central Government may allow rebate discount or commission in the price of cement sold to the Government through the Directorate General of Supplies and Disposal or intended for export out of India. Provided further that nothing in this clause shall apply to cement produced in a mini cement plant. Explanation: I (i) for the

purposes of this order, the expression free on rail destination railway station means the price (including the cost of transport by the cheapest mode except where any other mode of transport has been specified by Central Government under clause (4) at the destination point). (ii) For the purposes of this clause, the expression "excise duty paid thereon", will include any exemption of or rebate in excise duty granted by the Central Government to the cement manufactured in a mini cement plant. Explanation-II For the removal of doubts, it is hereby declared that the expression "Ordinary Portland Cement" referred to in sub-clause (d) includes coloured cement made otherwise than from white cement. 9. Payment to Cement Regulation Account: Every producer shall, in respect of each transaction by way of sale of cement effected by him or in respect of every removal of cement made by him under clause 3, pay within one month of the close of the month in which such sales or removals take place, to the Controller an amount equivalent to the amount, if any, by which the free on rail destination prices of such cement exceeds the aggregate of the following amounts, namely: (i) The ex-factory price of such cement calculated in accordance with the rates specified in the schedule: (ii) Selling and distribution expenses calculated at the rate of Rs.4 per tonne. (iii) The excise duty paid thereon, and (iv) In the face of packed cement, the charges fixed by the Central Government in respect of packing under the first provision to clause 8 and where a producer uses second hand jute bags in excess of the limit, if any, specified under the second provision to that clause such charges as proportionately reduced.

(7) Provided that the expenditure incurred by the producer on freight by the cheapest mode of transport or where any other mode of transport has been specified by the Central Government under clause (4), by such mode of transport in respect of such transactions shall be reimbursed to the producer by the controller from out of the Cement Regulation Account referred to in clause II. 9A. Every producer shall, in respect of the production of non-levy cement, pay to the cement regulation account an amount at the rate of Rupees none per metric tonne of such production within one month of the close of the month in which such production takes place. 10. Wholesale and Retail Prices (1) The maximum price at which cement may be sold by a dealer (whether wholesale or retail) shall sell cement exceeding such maximum price. (2) In fixing the maximum price under sub-clause (1) the State Government shall have due regard to: i) the price fixed under clause 8 ii) handling (including charges in respect of packing or container) and transporting charges. iii) godown charges. iv) stockist's margin of profit. v) local taxes, if any. vi) additional road transport charges, where allowed. Explanation: In this clause, "State Government" in relation to a Union Territory means the Administrator thereof appointed by the President under Article 230 of the constitution. 467 11. Cement Regulation Account: (1) The Controller shall maintain an account to be known as the Cement Regulation Account to which shall be credited the amounts paid by the producer under clauses 9 and 9A and such other sums of money as the Central Government may after the appropriation made by Parliament by law in this behalf, grant from time to time.

(2) The amount credited under sub-clause (1) shall be meant only for the following purposes, namely: i) Paying or equalising the expenditure incurred by the producer on freight in accordance with provisions of this order. ii) equalising concession if any, granted in the matter of price, freight, supplies to Government or Public or for purposes of export under the second proviso to clause 8 or for import. iii) expenses incurred by the Controller in discharging the functions under this order subject to such limits if any, as may be laid down by the Central Government in this behalf. iv) such reimbursement of expenses by the Controller as may be incurred by the producers of cement for the purposes of increasing the production, for securing the equitable distribution and availability at fair prices of cement . 3. The Controller shall cause accounts to be kept of all moneys received and expended by him from out of the Cement Regulation Account and he shall prepare and submit such reports and returns relating to the said accounts as may be required by the Central Government from time to time. 4. The balance, if any, remaining unspent in the Cement Regulation Account shall be disbursed in accordance with such directions as may be given by the Central Government in this behalf. 12. Power to vary the prices and to alter the schedule The Central Government may, having regard to any change in any of the factories relevant for the determination of price of cement, such as increase or decrease in the cost of production or distribution by notification in the official gazette vary the price fixed in this order alter the schedule to this order as appear to it to be necessary. 14. Procedure regarding claims by producers Every producer shall make an application regarding his claim for any reimbursement towards equalising freight or equalising 468 concession in the matter of export price to the controller who may, in setting the claim, require the producer to furnish all details relating thereto, including the cost of freight incurred, excise duty, if any paid etc."

(8) The main contention on behalf of the petitioners is that clause 9A and the levy and recovery there under of Rs.9.00 per metric tonne on non-levy cement produced by them is ultra virus Section 18G of the said Act. It has been contended that the impugned clause amounts to the manufacturers being compulsorily required to pay the said sum of Rs. 9.00 per metric tonne of the non-levy cement produced by them and the said sum, in effect, constitutes the levy and recovery of a tax. Elaborating the contention further it was submitted that no tax can be imposed by any subordinate legislation unless the principal statute specifically authorises such imposition. The case of the petitioners was that the I.D.R.Act does not authorise levy or recovery of any such tax and, Therefore, clause 9A is ultra virus of the said Act.

(9) It was also submitted that the said amount realised could be construed as a levy of duty on the manufacturer of cement but. it was contended, duty on the manufacture can be levied only by legislation in exercise of the powers conferred on the Parliament under Entry 84 of List I of the Seventh Schedule. It was submitted that, in the present case the realisation of the said amount of Rs.9.00 per metric tonne was not in exercise of any legislative enactment but this

amount was being recovered under the provisions of the Cement Control Order and was, Therefore, unconstitutional. No provision of the Constitution could come to the aid of the said recovery of Rs.9.00 per metric tonne because, it was submitted, clause 9A is a piece of subordinate legislation and no Central Act authorises the said "levy". The respondents in their reply-affidavit have explained the provisions of the Cement Control Order and the reasons for the incorporation of clause 9A. It has been stated that prior to 28th February, 1982 the entire production of cement in the country was under price and distribution control by means of orders issued under Sections 18G and 25 of the I.D.R.Act, 1951 and in terms of the Cement Control Order, 1967. It was provided therein that the Government was empowered to fix retention/ex-works price as well as the selling price of cement. In framing the orders two principles kept in view were that while the producers of cement were to be assured a reasonable return on their capital investment, the Government had also to ensure availability of cement at a reasonable price and its equitable distribution throughout the country. In order to achieve this the Cement Control Order, inter alia, provided for one uniform For destination price throughout the country fixed vide clause 8 of the said Order. The counter-affidavit seeks to explain the contribution to the Cement Regulation Account in the following words:

"THIS F.O.R. destination price is a composite price which is required to be paid by consumers of cement and consists of elements such as retention price payable to Cement Manufacturers as fixed under Clause 7 of the Cement Control Order, as element of all India average freight etc. The cement producers, under Clause 9 of the Cement Control Order are required to remit into the Cement Regulation Account the difference between the F.O.R. destination price charged by them, and the retention price admissible to them. The element of average freight included in the price is paid into Cement Regulation Account and in turn, the producers of cement are reimbursed the cost of transportation of cement from the factory to the destinations in accordance with the instructions issued by Govt. under Clause 4 of the Control Order. The net result is that in a case where the cost of transportation of cement from the factory to the specified destination is more than the element of all India average freight built in the F.O.R. price then that extra freight amount is paid from the Cement Regulation Account to the cement producers and where the actual incidence of freight for movement from the factory to the specified destination is less than the element of all India average freight, the difference is required to be paid by the cement producers into the Cement Regulation Account. This is how the freight pool operates and it becomes possible to operate the system of uniform F.O.R. price as visualised in the Control Order. Any other elements of contribution to Cement Regulation Account as per the provisions of Cement Control Order also serve the same purpose."

(10) It has further been stated by the respondents that if there is any increase in the retention price or if the average incidence of all India freight goes up then correspondingly the For destination price should normally be increased. But as such increase may adversely affect the consumers of the cement in the country

the Government of India takes an overall view of the economic conditions in the country and decides whether an increase in the For price of cement would be desirable or is it possible to meet the extra expenditure on account of higher incidence from the amount available in Cement Regulation Account but without increasing the For price. One example which has been given by the respondents in this behalf is that w.e.f. 15th December, 1986 the retention price of cement payable to Cement Manufacturers was increased by Rs.24.50 per tonne and the levy obligation of the cement factories was also reduced from 60% to 50% in case of old units and from 40% to 30% in case of new and sick units with a view to compensate the cement industry for increase in the cost of production of cement. Similarly, the incidence of freight has increased from 1st December, 1986 by about 22% to 23% of the earlier freight, due to increase in the Railway freight. However, no increase was effected in the F.O.R. price of cement and the increases have been absorbed in the earlier F.O.R. destination price by meeting the same from the accumulations in the Cement Regulation Account .Thus the consumers were not burdened by the same. This all has been possible on account of sufficient amount being available in the Cement Regulation Account from out of which it would be possible to meet the extra incidence of retention price and freight without burdening the consumer.

(11) It has also been submitted on behalf of the respondents that apart from the fact that clause 9A is not ultra vires, if the amounts already collected under clause 9A of the Cement Control Order are required to be paid back to the cement manufacturers it would mean a very heavy outflow of Rs.50 to 60 crores and the net result would be that the F.O.R. destination price of levy cement would have to be increased resulting in higher burden on the consumer. Since the amounts remitted by the cement manufacturers have already been collected by them from various consumers, and since there is no mechanism by which the same can .be returned by them to those consumers from whom the same were realised, it was just and appropriate that the amounts so collected were utilised in the interest of general consumer by not increasing price of levy cement. In other words, no order should be passed for refund of the amounts so collected as this would, in effect, amount to unjust enrichment of the petitioners. In support of the contention that realisation of money under clause 9 A amounts to imposition of tax, reliance was placed by the petitioners on a decision of the House of Lords in 1922 (127) Law 822 (Attorney General v. Wills United Dairies). In this case the Ministry of Food had granted licenses to the defendant company to purchase milk produced in certain named counties and stipulated that the licensee should pay to the Food Controller in the prescribed banner the sum of 2d for each gallon purchased under the licenses. Application for payment having been made, the defendant company refused to make the payment, their contention being that the charge of 2d per gallon of milk amounted, in effect, to a tax levied in an un-constitutional manner. The Court of Appeal had held that the imposition of 2d a gallon as a condition for the grant of license was a tax which could only be imposed by the Parliament and as no authority was giver by

the Parliament the realisation of this amount was illegal and unenforceable. The House of Lords, in a further appeal, upheld the decision and came to the conclusion that the charge was a levy of money for the use of the Crown without the sanction of Parliament, and that it was a tax which the Food Controller had no power to impose.

(12) In *Attorney General for New South Wales v. Homebush Flour Mills Limited* 56 C.L.R. 390 an Act provided for expropriation of flour and vested it in the Crown and converted all rights and interests therein into claims for compensation. The amount of compensation was to be calculated by the difference between the fair and reasonable price as fixed by a Committee appointed under the Act and a standard price fixed by the Governor in Council. Unless and until possession was demanded by the Crown the flour was left in the possession of the expropriated owner who held it for the Crown at his own risk. It was the duty of the Minister to sell any flour vested in the Crown under the Act. The expropriated owner of any flour was given the first right to purchase it from the Crown, and its sale or disposition by such owner was deemed an exercise of such right. In the case of flour for human consumption the expropriated owner, or other purchaser from the Crown, was required to pay the "standard price" as fixed by the Governor in Council. The "compensation" was to be set off against the "standard price" and the balance of the purchase money, after deductions for expenses, was to be paid into a special fund for the relief of necessitous farmers. It was held by the High Court of Australia that the difference between the two prices was something which the miller was in practice compelled to pay to the Government and it amounted to a tax. It was further held that this tax was a duty of excise which could not be validly imposed by a State Parliament. In the case of *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited* 1933 A.C. 1681 the provincial legislature of British Columbia, in Canada, passed a Dairy Products Sales Adjustment Act, 1929 authorising the appointment of an Adjustment Committee in any District in which the dairy farmers petitioned for one. Where a Committee was appointed the farmers had to make returns to it, and a farmer selling fluid milk had to pay to the Committee a levy assessed according to the quantity he had sold: the total of these levies, which together made up the difference in value of the milk disposed of in the two forms, was to be apportioned by the Committee among the farmers who had sold milk products. The expenses of the Committee were to be met by a further levy on the farmers. Both levies were recoverable as debts. It was held by the House of Lords that both these levies were taxes, and, as they would tend to affect the price of commodities, they were indirect taxes, and the Act was ultra vires the powers of the Province. Learned counsel for the petitioners also placed reliance on the decision of the Supreme Court in the case of *Venkata Subba Rao v. State of A.P.* AIR 1955 SC 1773. In this case the Government of Madras passed various orders for procurement and distribution of paddy and rice. Persons were appointed as procuring agents and wholesalers and their duty was to procure rice from specified areas at prices specified by the Government, from

time to time, and to deliver it at prices so specified to the Government or to the persons-nominated by it or to other licensed purchasers. The purchasing agents were to get the difference between the purchase price and the sale price. During the year 1947-48 the Government increased the price and this resulted in excess profits to procuring agents. The Government insisted that this excess sum so earned by the procuring agents should be paid to the Government and this sum was directed to be collected as surcharge. It was held by the Supreme Court, while referring to the aforesaid Australian decision in the case of Home-bush Flour Mills Ltd(supra) that recovery of this money amounted to a tax imposed by an executive fiat without any legislative sanction on the capital value of the stocks of foodgrains held on a particular date. While referring to Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., it was contended that, as held in the said case, that "no tax can be imposed by any bye-law or rule or a regulation unless

THE statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it."

(13) Reference was also made to the case of Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others, where the expression "tax and fee" has been discussed. The Supreme Court, inter alia, reiterated its earlier observations in the case of The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., to the effect that:

"THE essence of taxation is compulsion, that is to say. it is imposed under statutory power without the tax payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purpose of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is as it is said, no element of quid pro quo between the tax payer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay."

(14) In our opinion there is no merit in the contention that the amount paid under clause 9A of the said Order amounts to a tax. Clauses 9, 9A and 11 form part of the same scheme. What is contributed under clauses 9 and 9A to the Cement Regulation Account has to be utilised in the manner indicated in clause 11 of the order. In these petitions there is neither any challenge to the validity of clause 9 nor to that of clause 11. In fact, such a challenge made earlier has been unsuccessful. In R.D. Aggarwala and Another Vs. The Union of India and Another,

a Division Bench of this Court had occasion to consider the scope and effect of the various provisions of the Cement Control Order, 1967 and of Clauses 9 and 11 in particular. A contention had been raised, in that case, that the requirements of clause 9 for payment to the Controller of the balance that remains out of the F.O.R. destination price, and the provisions in clause 11(4), enabling the Government to disburse the unspent amount in the Cement Regulation Account in any manner it likes, was a tax qua the producer and/or the consumer. In support of this contention reliance was placed on the aforesaid judgment of the Privy Council in *Crystal Dairy Limited* (supra). It was held by this Court that the whole idea of the Cement Regulation Account was to rationalise the inequalities in the freight, and the freight pooling system provided by the Control Order was intended to secure uniformity in the price for the benefit of the consumers and the deficit, areas having no cement factories. Having upheld the validity of the ex-factory or retention price it was observed (at page 554) that:

"IT would follow that the balance of the F.O.R. destination price that remains after deducting the said retention price and the other items allowed to be deducted by the producers under clause 9 of the Control Order, does not belong to the producer and, Therefore, he cannot be said to be deprived of the same when he pays the same to the controller under clause 9. In that view, the payment of the balance to the controller cannot be described as levy of tax qua the producer nor can it be a tax qua the consumer, as the amount of freight is paid by the consumer as part of F.O.R. destination price."

(15) The decision of the Privy Council in *Crystal Dairy Limited* (supra) was distinguished by observing at page 555 as follows:

"IN the case before the Privy Council, a farmer selling fluid milk had to pay to the Committee a levy assessed according to the quantity he had sold. The levy was distinct and separate from the price of the milk. The farmer sold the milk and got the entire price for the same. It was out of that price which became his money that he had to pay the levy. In the present case, as stated earlier, the producer is entitled under the scheme of the Control Order only to the retention price as his money, and the balance of the F.O.R. destination price received by him from the consumer was never his money according to the scheme. In paying the balance to the Controller, the producer does not pay any money of his own. He merely collects the balance amount and pays the same to the Controller. As such, the payment of the balance by the producer cannot be regarded as levy of a tax qua the producer. So far as the consumer is concerned, the amount is paid by him as part of the F.O.R. destination price for the cement purchased by him. It is not separate and distinct from the F.O.R. destination price which is the price for the cement purchased by him. It is not separate and distinct from the F.O.R. destination price which is the price for the cement so far as the consumer is concerned. The amount so paid by the consumer cannot, Therefore, be regarded as a tax qua the consumer also."

(15) Construing clause 11(4) it was held that the said provision provides for disbursement of unspent amount in accordance with such directions as may be given by the Central Government in that behalf and that the directions have necessarily to be for the purposes mentioned in clauses 11(2) or, at the most, for similar purposes connected with the Cement Control Order. The amounts paid into the Cement Regulation Account did not belong to the Government. There appears to be no essential difference in the object sought to be achieved between clauses 9 and 9A of the Act. Both require contribution of sums to the Cement Regulation Account. Whereas clause 9 has reference to the levy cement, the amount payable under clause 9A is in relation to non-levy cement produced by the producer. The amount or manner of calculation is, however, different. Whereas under clause 9 the amount payable to the Cement Regulation Account has to be calculated according to the formula stipulated therein, clause 9A, however, provides for a fixed amount of Rs. 9.00 per metric tonne of non-levy cement which is produced. u/s 18G of the Idr Act a control order may provide for controlling the price at which any such article or class thereof may be bought or sold. (Section 18G). Even though the non-levy cement can be sold at any price fixed by the producer, there is, however, an overriding charge on the same. It is provided by clause 9A of the Control Order. In a sense, Therefore, even with regard to the non-levy cement, which is produced by the manufacturer, there is a sort of price control. Clause 9A provides that Rs. 9.00 per metric tonne of the cement produced shall be the amount payable into the Cement Regulation Account under Clause 11. Due to shortage of cement which had required the need for the issuance of the Cement Control Order, the entire levy cement was being sold and Rs.9.00 per metric tonne were being added to the selling price. This is the case of the respondents and we see no reason not to accept the same. In effect, Therefore, the sum of Rs. 9.00 was not a contribution by the producer for its own pocket but was an amount ultimately recovered from the consumer. This sum of Rs. 9.00 never formed part of the money which, at any time, belonged to the producer. Just as it was held in R-D. Aggarwala's case (supra) by this Court that the difference referred to in clause 9 of the order, which had to be paid into the Cement Regulation Account, could not be treated as having become the money of the producer of non-levy cement. This amount, as already observed, was an overriding charge on the non-levy cement produced and it all along belonged to the Cement Regulation Account. It formed part of the F.O.R. destination price paid by the consumer but qua the cement producer, this could never be regarded, in law, as being the amount belonging to him. The accumulation in the Cement Regulation Account did not at any stage, form part of the Consolidated Fund of India or became part of any Consolidated Fund of India or became part of any other Revenue of the State, as would have been the case if this amount had been recovered by way of tax or duty imposed.

(16) The Calcutta High Court also in the case of Union of India (UOI) and Others Vs. Hindustan Aluminium Corporation Limited and Another, considered the provision named clause 4B of the Aluminium Control Order, 1970, which was

similar to clause 9 of the Cement Control Order. Payment was required to be made to the Aluminium Regulation Account and while contending that the same was sought to be realised as a tax, reliance was placed on the case of Mathews v. Chicory Marketing Boards. 60 Clr 263 decision of the Privy Council in Crystal Dairy Limited's case (supra), decision of the Supreme Court in Venkata Subba Rao's case (supra) and the decision of the House of Lords in Wilts United Dairies Ltd. (supra). After construing clause 4B the Calcutta High court came to the conclusion that none of these decisions which were cited, was of any assistance and it observed that:

"IN the instant case, money that is required to be paid by Hindalco into the Aluminium Regulation Account, that is to say, the difference between the sale price and the retention price of aluminium, does not belong to HINDALCO. In order that a particular imposition can be characterised as tax, it must be proved that the amount that has to be paid belongs to the person from whom it is recovered. It is only the person entitled to a sum of money compulsorily recovered from him by any statutory authority can assail such recovery or imposition as "tax" if it be without any legislative sanction. But a person who is merely the holder of the money for the time being but not entitled to the same cannot, in our opinion, assail the recovery of the same as tax, even if such recovery is without any legislative sanction, for, in such a case, there would be no element of exaction which is a sine qua @ non to the imposition being a tax. For these reasons, the earlier Privy Council case in the City of Halifax v. Nova Scotia Car Works Limited, 1914 Pc 227 and the decision in Attorney-General v. Wilts United Dairies Limited (1922) 127 Lt 822 which have been relied on by Mr. Ray do not apply- to the facts of the instant case."

(17) The aforesaid observations of the Calcutta High Court would apply also to the provisions of clause 9A of the Cement Control Order. The amount required to be paid never belonged to the cement manufacturers and also did not belong to the Government and, Therefore, could not be regarded as a tax. The judgments in R.D. Aggarwala's case (super) and Hindustan Aluminium Corporation's case (super) have clearly distinguished the various decisions cited by the petitioners counsel before us. We adopt the reasoning in R.D. Aggarwala's and Hindustan Aluminium Corporation's cases(supra) in this behalf.

(18) At the time when partial de-control of cement took place the provisions of clause 9A could well have been incorporated in clause 9 itself. The producer of cement, to whom both clauses 9 and 9A are applicable, is one. There is a requirement for contribution to the Cement Regulation Account and in clause 9 itself two different rates, one for levy cement and the other for non-levy cement, could have been prescribed. What has now been done is that a separate provision viz. clause 9A has been framed. In essence there is no difference with regard to the nature of the money which is to be paid into the Cement Regulation Account The manufacturer who produces both levy and non-levy cement is required to ensure the payment into the Cement Regulation Account though the

calculation of the amount to be contributed has to be at two different rates. By framing clause 9A, instead of incorporating the same provision by amending clause 9, a new or a different kind of levy has not been introduced. As the validity of clause 9 has been upheld, we see no reason as to why clause 9A should be held to be ultra vires. Clause 9A fits into the scheme of price control and distribution of cement and this is permissible u/s 18G of the Idr Act.

(19) Our attention was also invited to a Full Bench decision of the Madhya Pradesh High Court in the case of M.P. Lime Manufacturers' Association, Katni and Others Vs. State of Madhya Pradesh and Another, in an effort to show that levy on land would amount to a tax. In that case Section 12 of the M.P. Upkar Adhiniyam, 1981, inter alia, provided the levy and collection of cess on land held in connection with mineral rights at such rate as may be prescribed. It was held by the M.P. High Court that this levy was a tax. This decision can be of little assistance to the petitioners for the reason that there was Section 12 which existed in the said Act which provided that the proceeds of cess on land, held in connection with the mineral bearing areas. This Section 12 was omitted by an Act of 1989 but with retrospective effect from 1st October, 1982. The result of this was that there was no provision in the Act laying down any manner of utilisation of the proceeds of the cess recovered u/s 11. It is obvious that under this Section what was described as cess, would, in effect, become and will have to be regarded as a tax. In the present case, however, the amount which is contributed under clause 9A is utilised in the manner set out in clause 11 of the order. While referring to the decision of the Supreme Court in the case of Kewal Krishan Puri and Others Vs. State of Punjab and Another, it was sought to be contended that unless it can be shown that there was a need for more money in the Cement Regulation Account, no amount should have been realised under clause 9A of the order. In the case of Kewal Krishan, market fee had been increased from Rs.2.00 to Rs.3.00 and it was held by the Supreme Court that on the face of the facts and figures placed before the Court there was no justification in law in raising the fee from Rs. 2.00 to Rs.3.00. It was further held that if in future the market fee is to be raised then proper budgets and estimates etc. should be prepared. It is only thereafter that decision could be taken whether to increase the fee or not. The ratio of the said decision can be of no assistance to the petitioners. In the present case clause 9A was inserted in 1982. Even though at the time when clause 9A was deleted in 1986 there may have been a large sum of money in the Cement Regulation Account but the provision has to be examined when it was enacted. There is no material or data before us which can persuade us to hold that the decision to recover Rs. 9.00 per metric tonne on non levy cement which is produced was bad in law. Prior to the partial de-control the entire cement was regarded as levy cement and was subject to control. In respect of the cement produced and sold the provisions of clause 9 were applicable. With the partial de-control taking place it is obvious that it must have been anticipated that contribution under clause 9 will fall and, Therefore, it was not un-reasonable to provide for contribution with relation to the production

of non-levy cement, as envisaged by clause 9A. According to the respondents it is because of the availability of sufficient amount of funds that despite the increase in the railway freight, price which the consumers had to pay was not raised. The principle behind the enactment of the Cement Control Order is for equal and fair distribution of cement at reasonable price. If clause 9A helped in achieving this purpose, by making adequate contribution to the Cement Regulation Account, then it cannot be said that the said clause is ultra virus Section 18G of the Idr Act. Section 18G envisages that order could be passed regulating the supply and equitable distribution of articles at fair price. An order, like the present, which provides for uniform F.O.R. price would be regarded as an order which provides for equitable distribution of cement at fair price. This is possible only with the help of Cement Regulation Account so that even though excess freight may have to be paid for conveying cement over larger distances the consumer would not be saddled with added burden and the shortfall will be made good from the said Account. For the maintenance of the said account provisions like clauses 9 and 9A have been formulated. It cannot be said that the said provisions are ultra virus Section 18G of the Act.

(20) It had been contended by Mr. Ganguly, while adopting the arguments of the other counsel, that clause 9 had nothing to do with price fixation and that the said provision was in the nature of a tax. We are unable to agree with this. In order to help the non-escalation of the price when there is increase in the freight, clause 9A was inserted which, Along with clause 9 enabled money to be contributed to the Cement Regulation Account. As already indicated herein above, the retention price and the sale price were fixed keeping into account the funds available in their Cement Regulation Account. There can be no doubt that no tax can be levied without any legislative backing. We need not consider decisions which have been cited at the bar in this regard. The said principle, however, is not attracted here for the simple reason that, as already observed by us, the contribution under clause 9A cannot be regarded as a tax. Furthermore, section 18G of the Idr Act is comprehensive enough to empower the enactment of a provision like clause 9A of the Order. There is no merit in the contention that the sum paid under clause 9A is a "duty" or "cess". The amount paid under that provision is nothing more than a contribution to the Cement Regulation Account and clause 9A has been validly framed u/s 18G of the I.D.R. Act. For the aforesaid reasons we do not any merit in these writ petitions and the same are dismissed. During the pendency of these writ petitions interim orders had been passed in C.Writ No. 1919/86 (Andhra Cement Company Ltd.) staying the payment of Rs. 9.00 per metric tonne under clause 9A w.e.f. 1st September, 1986 to 21st December, 1986. As the writ petitions are being dismissed, the petitioner in that case will make payment of the amount payable under clause 9A Along with interest @ 15% per annum with quarterly rests w.e.f. the date the payment became due till the date of payment. This payment should be made within eight weeks from today.

(21) There will, however, be no order as to costs.