
(1971) 04 MAD CK 0058
In the Madras High Court

Union of India (UOI)

APPELLANT

Vs

India Cements Ltd. and Others

RESPONDENT

Date of Decision : 23-04-1971

Acts Referred:

Industries (Development and Regulation) Act, 1951 — Section 18(G)

Citation : (1972) ILR (Mad) 443 : (1971) 84 LW 583 : (1971) 2 MLJ 502

Hon'ble Judges : K.S. Ramamurti, J;Ismail, J

Bench : Full Bench

Judgement

K.S. Ramamurti, J.—These writ appeals arise out of three writ petitions filed by the petitioners therein, questioning the legality of the Cement Control (Amendment) Order of 1969, (hereinafter referred to as the Amendment Order) which came into force on the 16th of April, 1969, introducing certain changes in the Cement Control Order of 1967, hereinafter referred to as the Order.

2. The writ petitioners asked for the issue of a writ of mandamus and other appropriate directions. Ismail, J., accepted the contentions of the petitioners on all the main points and allowed the writ petitions issuing certain directions. Chettinad Cement Corporation Ltd. is the petitioner in W.P.No. 2243 of 1969; Madras Cement Ltd. is the petitioner in W.P.No. 2244 of 1969 and the India Cements Ltd. is the petitioner in W.P. No. 2245 of 1969.

3. The Union of India represented by the Secretary, Ministry of Industrial Development and Company Affairs, New Delhi, and (2) The Cement Controller, New Delhi, the respondents in the writ petitions aforesaid, have preferred these appeals against the Order of Ismail, J.

4. Certain other cement companies were impleaded as party-respondents in the appeals, some of them supporting the Cement Control (Amendment) Order of 1969 while some of them sail with the writ petitioners questioning the legality of the Order.

5. At the hearing of the writ appeals, arguments were advanced by learned

Counsel for the parties in the writ proceedings as well as by counsel appearing for the parties newly impleaded in the writ appeals.

6. The crucial point relates to the legality and validity of the Cement Control (Amendment) Order of 1969.

7. It is necessary to have a brief survey about the cement industry in India and the circumstances which led up to the writ proceedings. Cement has been a controlled commodity for a long number of years and its production, distribution and price were being regulated by the Cement Control Orders issued by the Government of India from time to time in the exercise of the powers conferred on the Central Government u/s 18(G) of the Industries (Development and Regulator) Act of 1951, hereinafter referred to as the Act.

8. The arrangement that was in force in July, 1956 was that the cement produced by all the producers was acquired by the State Trading Corporation, which distributed the commodity all over India at a uniform price on a f.o.r. basis. The price payable by the State Trading Corporation to the producer for his cement was however, "" the retention price", or ex-works or ex-factory price (as known in the cement industry) which was fixed by the Government.

9. There was, first, a Tariff Commission of the year 1958 and in pursuance of its recommendations, the Government had fixed the f.o.r. and ex-factory price for a period of three years from 1st July, 1958, under the Cement Control Order of 1958. Even though the consumer price of cement was one uniform f.o.r. destination price, there were different retention prices for cement so far as producers were concerned. Whenever fresh units went into production, the Government, after a scrutiny of the cost of production, by the concerned authorities, fixed suitable and appropriate retention prices.

10. On receipt of numerous representations from the representatives of the industry calling for revision of the prices, the Government appointed the second Tariff Commission to conduct the necessary enquiry and submit its report with regard to the fixation of price, the f.o.r. price as well as the retention price and other relevant aspects. The Tariff Commission conducted a comprehensive review of the industry concerning all the aspects, such as production, prices, distribution, development, etc., and submitted its report on 26th August, 1961.

11. A perusal of the report of the Second Tariff Commission shows that it scrutinised the working of each unit on all the relevant issues, the capital employed, its productive capacity, actual production, the cost of production, the reasons for the increase in the cost of production, availability of raw materials and the fluctuation in their prices, depreciation, what would be the reasonable return that could be recommended for each industry with regard to its capital outlay, etc., etc. (In this judgment reference is made only to " ordinary cement" as it is called in the industry--as distinguished from slack quick cement, since these proceedings relate to ordinary cement only. In the course of the enquiry, it was pressed upon the Tariff Commission that the fixation of varying and different

ex-works prices for individual cement producers, was not conducive nor healthy for the industry. Dealing with this aspect, the Tariff Commission observed at page 21 of its report as follows:

It has been contended that the fixation of ex-works prices for individual cement producers has brought about a stagnation in the cement industry. There is no element of competition amongst the producers to reduce their cost of production or to improve their operative efficiency. It has engendered a feeling of complacency amongst producers as all costs are likely to be covered and no effort need be put forth to effect economies, improve efficiency and raise output. The efficient firms who have kept their costs low, are not specially rewarded for their performance. In fact, a tendency has grown to inflate costs so that in the process of getting them covered further margins of profit may become available.

12. The Tariff Commission, on ultimate analysis, grouped the various units under three broad categories on the basis of the return on the capital employed, by the three categories of units: Group-A, the lowest cost group; Group-C, the high cost units; and Group-B units whose cost of production is mid-way between Groups A and C.

13. The important formula, which formed the recommendations of the Tariff Commission was to provide roughly, a return of 14 per cent, on the capital employed by certain units; a return of 12 per cent on the capital employed by certain units; a return of 10 per cent, in the case of certain units and a return of 8 per cent, in the case of retrain other units. (Vide pages 42 and 43 of the Tariff Commission report).

14. The criticism that the system of varying and different retention or ex-factory prices for different units is not conducive to the efficiency, progress and development of the industry, was taken note of by the commission. Even so, in view of the wide disparity in the costs of production in different units, it recommended as many as ten retention prices; and to quote its own words, the recommendation of the Tariff Commission was made with the following objectives:

(a) Units which exist at present must be encouraged to maintain production at the highest possible level consistent with proper maintenance of plant and machinery.

(b) The low cost units should have sufficient inducements to expand while the high cost ones should not be impaired in their capacity for production; and

(c) New capital should continue to be attracted to this industry and even small units should have a chance to get established and develop.

15. The ultimate ex-works price for ordinary cement for the 19 units, as recommended by the Tariff Commission, is found at page 53 of its report.

16. The Government, however, did not agree with this recommendation of the

Tariff Commission, of maintaining ten different ex-factory retention prices for different units. The Government's view was on these terms:

While the Tariff Commission has taken note of the view that the present system of retention prices for individual units has not provided the units in the industry sufficient incentive to improve efficiency and increase output, it has not recommended a more or less common price for the majority of units of the industry, because of the apparent wide disparity in the costs of production in the different units. Government are of the considered view that the existing system of differential prices, based on individual costs, is not conducive to efficiency and greater production and that there should be a uniform price for the industry, so that greater pressure is exercised on units having higher costs to find economies and there is a measure of reward for those units able to achieve economies. Government, however, recognise that in the case of those few units having appreciably higher costs on account of special reasons, an extra price may have to be allowed for a period of time, such as will enable them to continue in production until, by reaching economic levels, they are able to operate within the uniform price.

17. The Government ultimately fixed a uniform ex-works price at Rs. 69-50 per tonne for the industry. At the same time, it grouped the industry into three groups--the first group consisting of units for which the retention ex-factory price was Rs. 69-50 per tonne, while for the second group a sum of Rs. 3 was added fixing the retention price at Rs. 72-50 and for the third group a sum of Rs. 5-50 was added, fixing the retention price at Rs. 75 per tonne. This three-tier system was in force for two years and on 1st June, 1963, the Government increased the retention or ex-factory price by Rs. 2-75; in 1964, by another Rs. 1-25 and in 1965 by Rs. 4.

18. Cement continued to be a controlled commodity till the end of December, 1965, and was decontrolled with effect from 1st January, 1966. At the time of decontrol, the Government allowed a general increase of Rs. 13 per tonne in the ex-factory price of all the producers, taking note of the rise in the cost of production. This amount of Rs. 13 per tonne comprised the following elements:

Rs.

Provision for increase in the
cost of production

...

2-70

Interest in I. D.B.I, loan

...

1-30

Provision for taxation

...

3-15

Bonus

2-00

Provision for expansion

3-85

Rs.

13-00

19. Producers were also required to credit to what was known as the Cement Expansion Reserve Account at the rate of Rs. 4 per tonne consequent upon the aforesaid increase in prices.

20. Instead of the State Trading Corporation, a central organisation was formed by the cement producers in 1966, at the time of the decontrol of cement, for exercising informal control over the equitable distribution and sale of cement at the prices mentioned above, though there was no formal legal price control.

Year

Cement Control Order

Prices

Rs.

Ps.

Rs

Ps

1961

Cement Control Order, 1961....

69

50

69

50

69

50

+

3

= 72

50

69

50

+

5

50

= 75

00

1--6--1963

Cement Control Order, 1961

69

50

+

2

25

= 72

25

72

50

+

2

75

= 75

25

75

00

+

2

75

= 77

75

1--7--1964

Cement Control Order, 1961

72

25

+

1

25

= 73

50

75

25

+

1

25

= 76

50

77

75

+

1

25

= 79

00

1--6-- 1965

Cement Control Order, 1961

73

50

+

4

00

= 77

50

76

50

+

4

00

= 80

50

79

00

+

4

00

= 83

00

1--1--1966

Cement decontrolled (Cement allocation and co-ordinating organisation.)

77

50

+

13

00

= 90

50

80

50
+
13
00
= 93
50
83
00
+
13
00
= 96
00

To this, Rs. 25-48 will have to be added to arrive at the f.o.r. destination price to the consumer, which includes the freight transport charges, etc.

21. In 1967 the Government received complaints about the shortage of cement in certain States and the demand for cement also considerably increased. The Government on investigation was satisfied that there were certain defects in the working of the informal control arrangement and that sufficient check and control could not be exercised by the Central organisation and that the private organisation set up by the cement industry must be substituted by a Government controlled agency to secure equitable distribution of cement in the country at a fair price. The result was that the Government, exercising its powers u/s 18-G and Section 25 of the Industries (Development and Regulation) Act of 1961, passed the Cement Control Order of 1967 on 23rd December, 1967, which came into force from 1st January, 1968. Clause 7 has fixed the ex-factory prices. In this Order too, the Government adopted the same grouping of the different units into three categories, i.e., the three-tier system and fixed the ex-factory prices for the concerned units as specified in the schedule appended to the order.

The increase in the price of cement from time to time, sanctioned by the Government, is reflected in the following statement:

22. It is unnecessary to refer in detail to the provisions of the Cement Control Order of 1967, and it is sufficient to set out the substance of the provisions. There is a Controller appointed and functioning under the Order. Clause 3 contains the provisions prohibiting the producer from removing any cement from the precincts of his factory, or any other part of his premises except with the

previous permission in writing of the Central Government. Under Clause 4 the Central Government has power to direct the producer to sell cement to such person or class of persons under Such terms as may be directed by the Government. Clause 5 refers to the power of Government to give directions for securing proper distribution of cement. Clause 6 deals with the directions for the maintenance and production of accounts. Clause 7 provides for the fixing of the ex-factory price of each producer and the same to be specified in the schedule. Clause 8 fixes the consumer's price or the f.o.r. price of ordinary cement at Rs. 125.55 per tonne, excise duty, extra. Clause 10 gives the power to the Government to fix the wholesale and retail price. Under Clause 12 the Central Government may vary or alter the price fixed. Clauses 9 and 11 deal with the Cement Regulation Account., The substance of Clause 9 is that out of the f.o.r. price collected by the producer, the producer can keep for himself--

- (1) The ex-factory price as specified in the schedule in respect of each producer;
- (2) a selling-agency commission calculated at the rate of Rs. 1-25 per tonne; and
- (3) the excise duty paid the reon.

As regards the freight, the producer is to appropriate the actual freight paid by him and pay into the Cement Regulation Account the excess, or in case the producer paid more freight than Rs. 25-48 he will be entitled to be reimbursed from the Cement Regulation Account.

23. The Cement Allocation and Co-ordinating Organisation so far functioning, was substituted by the Cement Controller. The result was that from January, 1968, the several units were governed by a three-tier system. The Chettinad Cement Corporation Ltd., the petitioner in W.P. No. 2244 of 1969, was established sometime in 1962 and it actually went into production in 1968 and it was included in the Schedule under the Notification No. 8468 dated 8th April, 1968 as item No. 26 with a price of Rs. 96 fixed as ex-factory price. The following statement gives the details of the producers, the ex-factory price fixed for each of the units:

Name of Producer

Price per metric tonne

Rs.

P.

Ex-works Price:

1.

M/s. Dalmia Cement (Bharat) Ltd.,

Dalmianagar

90

50

M/s. Andhra Cement Co.,Ltd.,

Vijayawada

90

50

3.

M/s. Orissa Cement Ltd. Rajgangpur .

90

50

4.

M/s. K. C. P. Ltd., Macherla

90

50

upto an annual pro-

duction of 1,15,000

tonnes.

96

00

for every tonne beyond

1,15,000 tonnes.

5.

M/s. Rohtas Industries Ltd., Dalmianagar

90

50

6.

M/s. Mysore Iron and Steel Works Ltd; ,

Bhadravati

90

50

7.

M/s. Associated Cement Companies Ltd.

96

00

New Porbandar Works

96

00

Jamul Works

96

00

Dwarka Works

90

50

upto anannual pro-

duction of 3,45,000

tonnes.

96

00

for every tonne beyond

2,45,000 tonnes per

annum.

Other Works

90

50

8.

U.P.GovernmentCementFactory,

Churfc

90

50

upto annual produc-

tion of 2,20,000 tonnes.

96

00

for every tonne beyond

2,20,000 tonnes.

9.

M/s.DalmiaDadriCementLtd.,

Dalm a Dadri

90

50

10.

M/s.BagalkotCementCo.,Ltd.,

Bagalkot

90

50

11.

M/s. Ashoka Cement Ltd., Dalmianagar,

80

50

12.

M/s. Jaipur Udyog, Ltd., Samaimadhopur

90

50

13.

M/s. India Cements Ltd.,

Talaiyathu Works

93

50

Sankaridurg Works

96

00

14.

M/s. Birla Jute Manufacturing Co.,
Ltd., Satna

93

50

up to an annual pro-
duction of 225,000
tonnes.

96

00

for every tonne beyond
225,000 tonnes per
Annum.

15.

M/s. Birla Jute Manufacturing Co.,
Ghittargarh

96

00

16.

M/s. Shree Digvijay Cement Co., Ltd.,
Sikka Works

93

50

upto an annual produc-
tion of 260,000 tonnes.

96

00

for every tonne beyond
260,000 tonne sper
Annum provided that

the combined produc-
tion of the Sikka and
Sewzee Works is not
less 410,000 tonnes in
that year.

Sewree Works.

129

75

Exclusive of actual
wharfage charges paid
at Sikka on Clinker.

17.

Kalyanpur Limeand Cement Works,
Ltd., Banjari

93

50

up to an annual produc-
tion of 150,000 tonnes.

96

00

for every tonne beyond
150,000 tonnes per
annum.

18.

Sone Valley Portland Cement Co., Ltd.,
Japan

93

50

19.

M/s. Panyam Cement and Mineral Indus-

tries, Ltd. Cement Nagar

96

00

20.

M/s. Sowrashtra Cement and Chemical

Industries Ltd., Rajapalayam

96

00

21.

M/s. Madras Cements, Ltd., Rajapalayam

96

00

22.

M/s. Mysore Clements, Ltd., Ammasundra

96

00

23.

M/s. Assam Cements Ltd., Amma-

Sunudra

96

00

24.

M/s. Industrial Development Corporation

of Orissa, Ltd., Bargarh

96

00

25.

M/s. Travancore Cements Ltd.,

Kottayam

113

25

26.

Chettinad Cements Corporation Ltd.

96

00

24. The next event of importance, is the proceeding in Jaipur Udhog Ltd. Vs. Union of India (UOI) and Another, in the Rajasthan High Court, in which the three-tier system, adopted in the Cement Control Order of 1967, was questioned. The decision of the Bench of the Rajasthan High Court dated 14th August, 1968, is reported in Jaipur Udhog Ltd. Vs. Union of India (UOI) and Another, It is sufficient to mention at this stage that the Rajasthan High Court took the view that the three-tier system evolved by the Government is valid and did not offend Article 14. In that case the Government put forward their points of view justifying the three-tier system. In the Bench decision aforesaid, there is a review of the historical background of the continued control which the Government had been exercising in the Cement Industry about the production, distribution and the control of price of cement, and how, in the interests of the industry and in the interests of the consumers, the Government had been regulating the ex-factory price as well as the consumer price, from time to time. There is also reference to the recommendations of the Tariff Commission of the year 1961, recommending the retention prices, but the Government accepting only the three-tier system.

25. The Cement Industry was not satisfied with the prices as fixed under the Cement Control Order of 1967, and they were making numerous representations to the Government for a revision of the price structure consequent on the Governmental actions, including escalation of prices on account of fuel and power. The representatives of the Cement Manufacturers' Association interviewed the authorities concerned in the Ministry for Industrial Development and Company affairs. They also interviewed Mr. R. Venkatraman, Member, Planning Commission and Mr. Fakhruddin Ali Ahmed, the Honourable Minister for Industrial Development and Company Affairs, New Delhi. They also sent in several written Memoranda pressing their point of view. The correspondence covers the period from 16th August, 1968 to 14th December 1968. True copies of this correspondence. have been furnished by the Counsel for the writ petitioners and they have been marked as Set No. III. A true copy of the statement by the Honourable Minister for Industrial Development Mr. Fakhruddin Ali Ahmed, in the Lok Sabha on 14th April, 1969, regarding the decision of the Government about the price control in the cement industry, has been filed by the Standing Counsel for the Central Government. In the course of arguments, Counsel appearing for all parties, placed considerable reliance upon the correspondence and the statement of the Honourable Minister for Industrial Development and Company Affairs, in support of their rival contentions. In view of this, and to facilitate easy

reference, we have ordered that the correspondence and the statement of the Minister for Industrial Development shall be marked as Exhibits A, B, C, D, E and F respectively, and they shall form part of the records of these proceedings.

26. In their efforts to secure a further revision of the prices, the cement industry in the correspondence aforesaid had made certain suggestions based upon the uniform decision of all the members of the Cement Manufacturers Association. In particular the cement industry accepted that the control of the price and distribution of cement should continue till such time as the Government is satisfied that there is proper balance between the supply and demand and there is also adequate availability to the consumer. They had also accepted the freight pooling arrangement. What is relevant for the present enquiry is, that they have accepted in full, the principle, that there should be one uniform retention or ex-factory price in the place of the three-tier system; though the claim of the Industry was that in the first instance the uniform retention price should be fixed at Rs. 96 to be followed by a stable fixation of price, taking note of the increase in the cost of production, due to governmental action and other reasons.

27. In this connection, it is necessary to mention that the industry had explained in the correspondence their position, as to why the industry could not accept the suggestion of the Government to the fixing of the uniform retention or ex-factory price at the level of Rs. 93 and why they were insistent of having the uniform price fixed in the sum of Rs. 96. Whatever it is, the fact remains, beyond any dispute, that throughout the correspondence in the Industry put forward, as its unanimous view, that there should be a uniform retention price to be followed by a proper increase in the price based upon a careful examination of the data, as was done by the Tariff Commission. In their telegram, dated 11th December, 1968, the cement industry has emphasized the same aspect that there should be one uniform retention price; but it should not stop with the fixation of the retention price at Rs. 96 per tonne but that it should be followed by a proper fixation of price taking note of the price escalation due to the governmental action and other factors. The Government ultimately passed the Cement Control (Amendment) Order of 1969 on 14th April, 1969, taking effect from 16th April, 1969. Under this Order the Government abolished the three-tier system and introduced one single uniform retention ex-factory price of Rs. 100 per tonne. But, so far as the Travancore Cements Ltd., a substandard unit, was concerned, its retention price was fixed at Rs. 113-25. By a further order, dated 8th May, 1969, there is an amendment to the Cement Control (Amendment) Order of 1969 (to come into effect from 16th April, 1969), by which this price of Rs. 113-25 was increased to Rs. 120-25. With regard to Assam Cements Ltd., Cherrapanj, the price fixed was Rs. 125-50 per ton. In the case of all other units the consumer's f.o.r., price was increased from Rs. 125-53 to Rs. 129-13, thereby increasing the consumer's price by Rs. 3-60.

28. In the meanwhile, writ petitions were filed in the Delhi High Court, questioning the validity of the Cement Control Order of 1967, and a true copy of

the decision of the Delhi High Court, dated 5th December, 1969, dismissing the writ petitions was furnished to us. Vide the offshoot, R.D. Agarwala and Another Vs. Union of India (UOI) and Another, . A perusal of the judgment shows that amongst other grounds, one of the objections raised was against the fixation of the uniform f.o.r., price under Clause 8 of the Order. The argument in the Delhi High Court, was that consumers in surplus area could get cement for much cheaper price but for the fixation of uniform f.o.r., price, and that it also affected the bargaining facility of the consumer and the competitive skill of the producer. But these objections, as well as the other objections raised, were not accepted.

29. While matters stood thus, the present writ proceedings questioning the legality of the Cement Control (Amendment) Order of 1969, fixing the uniform retention or ex-factory price of Rs. 100 were instituted in this Court.

30. The complaint of the writ petitioners, as set forth in the supporting affidavits filed in the writ petitions, is that the order of the Government fixing a uniform retention or ex-factory price is not fair nor proper, besides, offending Articles 14 and 19 of the Constitution. The main complaint is that the cost of production of cement varies considerably from one area to another; and even with reference to the same from one unit to another, that the cost of various raw materials and power, coal, transport charges, which have an impact upon the cost of production, vary from unit to unit and from region to region, that the Government themselves have uniformly recognised the necessity for different ex-factory prices for different producers, that the Cement Control Order of 1967, itself proceeds on the basis that a uniform retention price applicable alike to all producers is neither feasible nor possible and that even in 1969, while defending the writ proceedings before the Rajasthan High Court, the Government adopted the same attitude and took up the same stand justifying the three-tier system and that in that context the fixation of a uniform price, all on a sudden, by the Government without any fresh investigation of the cost of production and the ex-factory price, is illegal. In other words, the substance of the complaint is that when the Government themselves had declared and have been following the principle that the cement industry is such that different units require to be treated differently, the introduction of a uniform price founded upon a different principle, namely, all the units should be treated alike, offended Article 14.

31. The other complaint is that by fixing the retention price at a uniform level of Rs. 100 certain units would be deriving a considerably higher level of prices resulting in undue discrimination in their favour as against the other units (the writ petitioner) i.e., the low cost units would be getting an increase of Rs. 9.50 while the high cost units will be getting only an increase of Rs. 4 and this itself brings about arbitrariness and inequality, offending Article 14. The further contention is that if the Government decided to give an increase of Rs. 9.50 it should be calculated With reference to the low cost units and that that price should have been fixed at Rs. 100, Rs. 103 and Rs. 105.50. The fixation of a special retention price for the Travancore Cements, Ltd. was attacked as

invidious and irrational, besides being opposed to the very policy of the Government to have one uniform retention price as manifested in the impugned order.

32. Even at the threshold it is necessary to mention that the affidavits filed in support of the writ petitions are totally bereft of particulars and no attempt has been made to make out therein how the three petitioners have been prejudicially affected by the fixation of this uniform retention price. The complaint is only a complaint of an illegality in the abstract that the Government's Order violated Article 14. The writ petitioners have not set forth in their affidavits how this uniform price affects them financially--whether it would reduce the percentage of profits, and if so, to what extent, or whether it would result in a loss i.e., its financial repercussions; and the details of prejudice that would be caused to the petitioners. As this has an important bearing, it is necessary to extract the following portions in their affidavits.

It is submitted that by passing the impugned order, Government have introduced an unfair and arbitrary inequality among various producers. This would cause considerable loss to the petitioner and would amount to an unjust and arbitrary discrimination violative of the Constitutional guarantee under Article 14. If the increase of Rs. 9.50 was given at this slab and a uniform retention price fixed at Rs. 105.50 it might not hurt producers like the petitioner and indeed save them harmless against losses.

33. In another portion, while referring to Article 19(1)(g) there is only this cryptic statement:

Indeed an unreasonable price fixation would amount to an unreasonable restriction of the constitutional guarantee under Article 19(1)(g).

34. Here again, no particulars or details whatever have been given, how and in what manner the price fixation is an unreasonable restriction. Some catchy words and set legal phrases have been used without explaining how, if there had been "any restriction", it was an "unreasonable restriction". This total omission or absence of any reference to particulars and the details as to the real impact of this uniform price upon the economies and finances of the several producers is not something due to inadvertence or oversight or only casual, but is something deliberate, as we shall presently show when we refer to the arguments.

35. The Government have stated in their counter-affidavit that the settled view of the Government for a considerable time was that there should be one uniform price, and that was the reason why the Government did not accept the recommendations of the Tariff Commission recommending as many as ten different retention prices and that if the Government adopted a three-tier system, it was only as a temporary measure and the introduction of the uniform price in 1969 was only by way of implementation of the policy decision already taken by the Government, With reference to the fixation of the uniform price of Rs. 100, this is what the Government stated:

The question of introduction of a uniform price for the entire industry had been under consideration from time to time since 1961. The opportunity of the request of the industry for an upward revision of their retention price due to increase in cost of production as a result of Governmental actions since, 1st January, 1966, was availed of to consider whether it was not opportune to introduce finally a uniform price for the entire industry as a whole. In view of the observations of the Tariff Commission in 1961, that economies were possible with better management control and that the industry should make every effort to reduce its cost of production in future and the time elapsed since 1961 it was felt that the additional price granted to the industry in 1961, need not any longer be continued. The weighted average increase in the cost of production as a result of Government actions since 1st January, 1966, was determined in consultation with the Chief Cost Accounts Officer as Rs. 7 per tonne. The uniform price thus works out to Rs. 90-50 per tonne. But the weighted average retention price on the basis of three different retention prices amounts to Rs. 93 per tonne. Hence the uniform price for the industry is fixed at Rs. 100, i.e., the weighted average of the three retention prices on the basis of actual production (plus) Rs. 7 per tonne, as a result of increase in cost of production due to Government actions since 1st January, 1966. The fixation of a uniform retention price does not therefore involve any inequality or arbitrariness. It is denied that the Cement Control (Amendment) Order, 1969, has introduced any unfair and arbitrary inequality among the various producers and it would cause considerable loss to the petitioner or would amount to an unjust and arbitrary discrimination violative of Article 14 or 19(1)(g) of the Constitution of India.

36. In paragraph 13 of the counter, the Government had further stated that this decision was in pursuance of the declared policy of the Government of progressive decontrol and that the industry itself was in favour of this uniform retention price. In paragraph 14 of the counter the Government defended the fixation of separate retention price for Travancore Cements, Ltd., on the ground that it is a sub-standard unit with a capacity of only 50,000 tonnes while the standard capacity of a unit is 200,000 tonnes per annum. The Government had also stated that this Industry had certain other difficulties locally, such as raw materials and that it is an uneconomic unit deserving special considerations. At the hearing of the appeals, some comment was made that for the Assam Cements, the retention price of cement was fixed at Rs. 123.50 by the Amendment Order dated 25th November, 1969 while for Chettinad Cements which commenced production in 1968, the retention price has been fixed at Rs. 96. The learned Advocate-General explained that the tonnage for standard unit is 200,000 tonnes per annum and that even though the actual production of Chettinad Cements is less than 200,000 tonnes, since its productive capacity is 200,000 tonnes it is not a sub-standard unit and that was the reason why the retention price was fixed at Rs. 96 seeing that the industry was in its infancy.

37. No reply affidavit was filed by any of the writ petitioners, even though in paragraph 13 of the counter-affidavit the Government had stated categorically

that the industry itself was in favour of a single uniform price and that that was a crucial aspect which was taken into account by the Government in fixing the uniform price. Even at this stage we like to mention that the learned Advocate-General stressed this point in the forefront of his arguments. He urged that in the correspondence with the Central Government, the Cement Manufacturers Association representing all the units had in unambiguous terms accepted the introduction of a uniform price on principle and that having regard to this stand it would not be open to the writ petitioners to complain against the fixation of a uniform price. The complaint of the learned Advocate-General is that the learned Judge has disposed of the matter in a summary manner on the erroneous reasoning, that the mere fact that the Government had not stated the exact uniform price which the industry was in favour of, was sufficient to reject this contention which is of vital importance.

38. The main relief which the writ petitioners asked in the original writ petitions is the issue of a writ of mandamus directing the Government to revise the retention prices maintaining the three-tier system and granting a uniform increase of Rs. 9.50 per tonne. In the course of the hearing of the writ petitions the matter appears to have been discussed before the learned Judge who entertained serious doubts whether the petitioners would be entitled to relief on the above terms and realising that a prayer for such a relief is misconceived and unsustainable, the writ petitioners were allowed to amend the writ petitions adding the prayer that the writ of mandamus may be issued directing the Government to dispose of the demand of the cement industry for an increase in prices in accordance with law and without violating the fundamental rights of the writ petitioners. In his order the learned Judge has made it perfectly clear that the writ petitioners would not be entitled to a relief of a writ of mandamus directing the Government to revise the retention prices of cement, maintaining a three-tier division and granting a uniform increase of at least Rs. 9.60 per tonne and that it is a matter entirely for the Government to decide whether they would maintain and continue the three-tier system or introduce a two-tier system or they would provide a uniform system and that the only relief which the Court can grant is to declare the Cement Control (Amendment) Order of 1969 as unconstitutional. It is from this Order that the writ appeals have been preferred.

39. It will be convenient at this stage to set forth the substance of the reasoning and the findings of the learned Judge.

(a) The fixation of a uniform retention price is unconstitutional as it has a consequence of creating a greater advantage and benefit to those producers whose retention price under the Cement Control Order of 1967 was fixed at Rs. 90.50 and giving a smaller and lesser benefit or advantage to the producers whose retention price was fixed at Rs. 93.50 or Rs. 96.00. The difference of Rs. 4 and Rs. 6.50 as compared to Rs. 9.00 bring about discrimination.

(b) Article 14 of the Constitution would be violated not merely by treating persons similarly situated in a different manner but also by treating persons

dissimilarly situated in the same manner. In other words, a statutory provision would offend Article 14 both by finding differences when there are none and by making no difference when there is one. In support of this view, the learned Judge relied upon the decisions of the Supreme Court reported in Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, , State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others, , and The Buckingham and Carnatic Company Ltd. and Others Vs. The State of Madras and Others, .

(c) when the Government have been following the three-tier system, they cannot introduce a uniform retention price unless the Government came to the conclusion that the three-tier system need not be followed either because the higher cost of production ceased to exist or the manufactures themselves have not taken any steps to bring down the cost of production or by their own default and deficiency the cost of production continued to be high. In other words, if the Government decided to abandon the three-tier system and introduce a uniform price, it should be only, if the special reasons mentioned by the Government, vide preamble portion of the Order of the Government, pages (ii) and (iii) Tariff Commission Report, have ceased to exist.

(d) The argument of the Government that the introduction of the three-tier system was only a temporary measure and that the fixing of a uniform price was in pursuance of the declared policy of the Government of progressive decontrol and the industry itself was in favour of the retention price, lacked substance. The ultimate decontrol has nothing whatever to do with the fixation of a uniform price and it is not a relevant consideration at all for fixing the uniform price. As the Government have not stated in the counter-affidavit the particular uniform price asked by the industry, to which producers expressed their consent no weight could be attached to the contention of the Government that the Industry itself was in favour of the uniform price.

40. Before dealing with the arguments addressed before us, it will be convenient at this stage to refer to the array of parties and the stand taken by the several cement producers or the units. India Cements, Madras and Chettinad Cements who are numbers 13,21 and 26 respectively in the Schedule to the Cement Control Order, 1967, are the writ petitioners.

Their retention prices are:

Rs.

P.

13. India Cements, Ltd.

Talaiyuthu Works

...

93

50

Sankaridrug Work

...

96

00

21. Madras Cements, Ltd.,

Rajapalayam

...

96

00

26. Chettinad Cements

...

96

00

41. No. 19 Panyam Cement and Chemical Industries, Ltd. Ranavav (sic) whose retention price is Rs. 96-00 was impleaded on a petition filed by it as a supplemental respondent in the appeal. All the aforesaid units attack the validity and legality of the Amendment Order of 1969. The Dalmia Cements (Bharat) Ltd., Dalmiapuram, and the Associated Cement Companies Ltd., Numbers 1 and 7 respectively and whose retention prices are as follows:

Rs.

P.

1. Dalmia Cements (Bharat) Ltd.,

Dalmiapuram

?

90

50

7. Associated Cement Companies, Ltd.,

New Porbonder Works

?

96

00

Jamal Works

?

96

00

Dwarka Works

96

50 upto an annual production 2,45,00 tonnes.

96

00 for every tonne beyond 2,45,00 per annum.

Other works

?

96

00

were impleaded as supplemental respondents and they sail with the Government in supporting the Amendment Order of 1969 (questioning the correctness of the Order of Ismail. J.)

42. Mr. M. K. Nambiyar and Mr. V. P. Raman addressed arguments questioning the legality of the Amendment Order while the learned Advocate-General for the Central Government and Mr. V. K. Thiruvengkatachari for Messrs. Dalmia Cements and Mr. Vidyasankar of Messrs. King and Patridge on behalf of Associated Cement groups addressed arguments supporting the Cement Control (Amendment) Order of 1969. In the course of the hearing, it was represented by Mr. V. K. Thiruvengkatachari and Mr. Vidyasankar that the units which they represent constitute a substantial majority of the Cement units--over 70 per cent of the cement industry--this was not disputed by Counsel on the other side. We are adverting to this to indicate that the points stressed by these units, Dalmia Cements, Associated Cements, etc. will have considerable bearing while adjudicating upon the legality and the validity of the amendment Order. The application of Dalmia Cements to be impleaded as a party in the writ petitions was dismissed by Ismail, J. on the ground that its presence is not necessary, especially when the Government had not raised a plea of nonjoinder. As soon as the Government preferred the concerned writ appeals, Dalmia Cements had filed an application for impleading as party respondent. Till the Government preferred the appeals there is no question of the Dalmia Cements preferring an appeal against the order dismissing its applications to be impleaded as a party to the proceeding. The application filed in this appeal, by that unit, to be impleaded as

a party respondent is sufficient and the fact that it did not prefer a separate appeal against the order of Ismail, J., cannot affect its right to be heard in the appeal. When all these applications filed by Dalmia Cements, Associated Cement Companies, Panyam Cement Company came up before us, we impleaded them, mentioning that the respondents (writ petitioners) were at liberty to raise all their objections with regard to the maintainability of the petitions for impleading them as party respondents and on the merits of the matters in dispute. Even though that liberty was reserved for the writ petitioners, at the hearing of the writ appeals, the writ petitioners (respondents in the writ appeals) did not seriously argue or press any objection that the aforesaid units ought not to be impleaded as supplemental respondents. They, however, urged that the newly impleaded respondents should not be permitted to place any fresh material and that they could only advance legal arguments. Even if Dalmia Cements (assuming for the sake of argument (had no right to be impleaded as party respondent in the appeal because it did not prefer an appeal against the order of Ismail, J., dismissing its application, no such bar applies to the Associated Cement Units and we cannot conceive of any reasonable objection to their being impleaded and or being heard where those units are most vitally interested in the ultimate decision of this Court. Rules 5 and 6 of the Rules framed by the Court for regulating the proceedings under Article 226 are sufficient to entitle these units to be impleaded as supplemental respondents.

43. In the course of the arguments of learned Advocate-General on the merits, Mr. V.K. Thiruvenkatachariar, intervened to urge the objection that the writ petitions ought to have been dismissed for non-joinder of all the units mentioned in the schedule. He urged that in this case the units have been specially grouped under several categories, retention prices of the individual units have been fixed, there is a common pool arrangement with a provision for adjustment with regard to the actual expenses incurred towards freight and that when the attack in the writ petitions is an attack of discrimination in favour of certain units and when there is also a prayer that the Cement Control Regulation Account should not be operated by the Cement Controller (even to the extent of reimbursement of excess freight charges) the other units are clearly necessary parties and the writ petitions should have been dismissed on the ground of non-joinder. Mr. V. P. Raman on the other hand urged that the other units are not necessary parties and the objection as to non-joinder ought to have been raised only by the Central Government, a party on record and a third party seeking to come on record cannot raise the objection of non-joinder. Learned Counsel urged that when the Government Order, concerns a class or group of persons (even though there is also a prayer that the Cement Control Regulation Account should not be operated by the Cement Controller) and offends Article 14 of the Constitution, it is not necessary for the aggrieved party to implead all the parties and that it is sufficient if the Government and the authority concerned are impleaded in the writ petitions. We have not heard arguments in full on both sides on this aspect and prima facie we were not impressed with the arguments of Mr. Raman.

44. The decision of the Supreme Court reported in *Jalan Trading Co. (Private Ltd.) Vs. Mill Mazdoor Union*, , dealing with the fixation of Bonus under the Payment of Bonus Act (1965) has dealt with this aspect--Vide paragraph 19 at page 703 in which it was pointed out that the employees and employers against whom the complaint of discrimination was made under Article 14 of the Constitution were not impleaded and the Supreme Court for that reason declined to express any opinion on the plea of unconstitutionality of the provisions in the Act without these persons being impleaded as parties. The question is a fortiori in the instant case. The Cement Control Order is not an order merely fixing price as in the Foodgrains Control Order or similar Orders, but in the Cement Control Order there are several interconnected provisions in which all the units are clubbed together and are vitally interested. The order contains provisions concerning all the units as to how the cement produced by the respective units should be marketed and in what manner they should make adjustments and appropriations out of the consumers' f.o.r. price realised by the individual units. The Cement Regulation Account is an account which has to be operated for the benefit of all the units, and speaking for ourselves, we find it impossible to conceive a proceeding in which a writ of mandamus could be asked that the consolidated fund, which grows and is built only out of the contribution made by all the units should not be operated upon without the other units being heard. It is not one or two units, but a considerable portion--70 per cent, of the units who have contributed to the building up of this Fund. Some of the units would be entitled to reimbursement from the Cement Regulation Account for the excess freight. When there is a demand for supply, those units are bound to supply the cement, but at the same time, they will be disabled from obtaining reimbursement if there should be an injunction as prayed for. To pass such an order touching the consolidated fund without hearing all the units who have contributed to the fund, would result in a deadlock and utter confusion. To recognise a jurisdiction of the Court to issue a writ of mandamus prohibiting the operation of the Cement Regulation Fund in the absence of and without hearing the other units, would be violently opposed to all principles of natural justice. It is not a question of the Government raising a plea of non-joinder, but is more a fundamental question of the Court being called upon to issue directions which would turn out to be futile and meaningless when the parties most vitally affected are not before the Court. With great respect to Ismail, J. we are of the prima facie view that once it was brought to the notice of the Court that the Court is called upon the issue a writ which would affect the rights which have accrued in favour of the other units in the cement industry, the writ petitions should have been simply dismissed in limine.

45. We reiterate, the Cement Control Order has got certain special features in which the units have become interrelated and it is impossible to dissect the order in such a manner as to afford relief to the writ petitioners and at the same time leave the rights of other units unaffected. To pronounce upon the legality and the merits of the Amendment Order, refusing to hear the other units who are vitally

affected by the proceedings, will cut at the root of the fundamental principles of jurisprudence. The position perhaps may be different if all the persons to whom a particular Order of the Government concerns, make common cause and sail together with complete oneness and at the same time there is no conflict of interest as amongst themselves. It is not necessary to pursue the matter, because Counsel on all the sides agreed to this course that such units as may desire may be impleaded as party respondents subject to the reservation that they should not be permitted to place fresh material, but at the same time they will have opportunity to advance all legal arguments whether or not they were put forward in the hearing of the writ petitions. In other words, this reservation is confined only to a bar against introducing fresh matters of fact.

46. We shall next steer clear certain aspects to pinpoint the precise ground on which the writ petitioners can attack the legality and the validity of the amendment order, the burden of proof and how it should be discharged. From the averments in the affidavits filed in support of the writ petitions and from the arguments as reflected in the order of Ismail, J., it is clear that sufficient attention had not been focussed upon the significance that the Cement Control Order, 1967, and the Amendment Order, 1969, were issued by the Central Government in the exercise of the powers conferred upon the Central Government by Section 18-G read with Section 25 of the Act. The Order can be questioned on any one or more of the following grounds:

(1) The Central Government while issuing any order u/s 18-G is acting as a delegated authority. The section itself contains an express limitation that is controlling and fixing the price, the price should be a fair price in the sense of giving to the producer (looking at the matter from his point of view) his cost and a reasonable margin of profit, the Central Government had acted in excess of its delegated authority inasmuch as this condition has not been satisfied. The complaint can be that the price fixed is inadequate and low or the margin of profit is considerably reduced and it is not a reasonable margin of profit. This complaint can be in respect of the entire body of units, i.e. the Cement Industry as a whole, or the complaint can be in respect of individual unit or units.

(2) The price fixed offends Article 14 of the Constitution, because one group of units would be obliged to work at a loss while the other groups of units would be making a profit; or one group of units would be getting profits very much more than the other unit or units resulting undue discrimination in favour of the former group of units, offending Article 14 of the Constitution.

(3) The Order offends Article 19(1)(f) and (g) on the ground that the restrictions implicit in the Control Order of 1967 and the Amendment Order of 1969 are not reasonable restrictions within the meaning of Article 19(1)(f), (g) read with Clauses (5) and (6).

47. As the writ petitioners are limited Companies none of them can invoke Article 19 of the Constitution. The British India Steam Navigation Co. Ltd. Vs. Jasjit

Singh, Addl. Collector of Customs, Calcutta and Others, , Tata Engineering and Locomotive Co. Ltd. Vs. State of Bihar and Others, , and the Rajas-than case in Cement Industry, Jaipur, Udhyog v. Union of India AIR 1969 Raj. 294, Learned Counsel for the petitioners conceded that in view of the state of law, the writ petitioners cannot invoke Article 19.

48. Seeing that the interveners who constitute 70 per cent, of the industry are supporting the Amendment Order, the complaint of the writ petitioners will have to be confined to their respective units and they cannot speak for the industry as a whole.

49. The only two aspects which call for consideration are whether Section 18(G) has been violated either because the price fixed is inadequate and low and has caused loss to them or there is no reasonable margin of profit, and whether the price fixed offends Article 14 of the Constitution, because one group of units will be obliged the work at a loss, while the other groups would be making a profit, or alternatively one group of units would be making a profit, very much more than the other group. While examining the complaint that the price fixed is not in conformity with the guide-lines implicit u/s 18(G) of the Act, the question immediately arises whether it is open to the petitioners to make such a complaint when they do not have a right to invoke Article 19 of the Constitution.

50. Various measures adopted either by legislation or by Governmental Orders introducing a permit or licensing system and exercising control over prices, production, distribution and stocking of goods and commodities, would all be governed by Article 19(1)(f) and (g) read with Clauses 5 and 6. In all the cases whenever the question was raised that a particular legislation or a Governmental Order unduly interfered with the freedom of trade or profession or that there has been an excessive delegation in favour of the Government, the tenability of the objection raised, was adjudged with reference to the question whether the restrictions imposed in the statute or Governmental Order, were reasonable restrictions within the meaning of Clauses (5) and (6) of Article 19 of the Constitution. A perusal of these decisions shows that substantially the same tests were applied whether the objection is one based upon violation of Article 19 or a case of Governmental Order suffering from the vice of excessive delegation. For instance, the validity of the provisions of the Sugar Control Order issued by the Government u/s 3 of the Essential Commodities Act of 1955 was considered in the light of the restrictions arising under Article 19(1)(f) and (g), read with Clauses (5) and (6). We may also refer to the decision dealing with Iron and Steel (Control of Production and Distribution) Order, again issued u/s 3 of the Essential Commodities Act. The Supreme Court has discussed the problem in the light of Article 19(1)(f) and (g) Union of India (UOI) and Others and State of Delhi (Now Delhi Administration) and Others Vs. BhanaMal GulzariMal Ltd. and Others, . See also Bhagwati Saran and Another Vs. The State of Uttar Pradesh, . It is sufficient to refer to the latest bench decision of this Court reported in The State of Madras and Others Vs. Sri Vanamamalai Mutt, Nanguneri, represented

by his Holiness Sri Vanamamalai Ramanuja Jeer and Others, , dealing with Madras Paddy and Rice Control Order passed u/s 3 of the Essential Commodities Act of 1955, in which the legality and validity of the Governmental Order issued u/s 3 of the Essential Commodities Act was considered by applying the same tests that would apply where the objection is violative of Article 19(1)(f) and (g) read with Clauses (5) and (6) Vide observations of the Honourable Mr. Justice Natesan at pages 340 to 343.

51. In view of this approach, the question arises whether the writ petitioners can attack the legality and validity of the Order passed u/s 18(G) of the Act, when they do not have right to invoke Article 19 of the Constitution. Or in other words, whether the writ petitioners can sustain the Writ Petitions de hors Article 19.

52. In this connection we may refer to a recent Bench decision of the Bombay High Court in *The Wholesome Grain and Seed Merchants Association, Nagpur and Others Vs. The State of Maharashtra and Another*, , in which the provisions of the Maharashtra Foodgrains Dealers Licensing Order of 1963 issued u/s 3 of the Essential Commodities Act, 1955, were attacked as illegal, that there has been an excessive and arbitrary delegation of powers, that the provision for the fixation of margin of profits is unreasonable and vague, etc., etc. The Bench on a detailed examination of the relevant portions of the afore-said Foodgrains Dealers Licensing Order, held that it was in conformity with Section 3 of the Essential Commodities Act and the restrictions and conditions imposed thereunder were not illegal or unreasonable. The Bench found that the State Government could not be said to have acted beyond the powers in fixing the margin of profit and the wholesale and retail price. After having found against the petitioners as stated above, the Bench went on to observe that it would not be open to the petitioners to complain that the restrictions contained in the Foodgrains Dealers Licensing Order were unreasonable and violative of Article 19, since the right of challenge under Article 19 has been suspended by reason of the Emergency and the Notification of the President. It was observed:

Now, unreasonableness of restriction on the right to carry on trade could only be challenged as an invasion on the right of the petitioners under Article 19 of the Constitution. If rights flowing from Article 19 of the Constitution are not enforceable during the operation of the Proclamation under Article 358 of the Constitution, then we fail to see how the petitioners could be heard to complain that any of the provisions of the Foodgrains Dealers Licensing Order or the conditions of the licence should be struck down because they are unreasonable. In view of the Proclamation of Emergency under Article 358 of the Constitution, any challenge based on Article 19 is untenable. The question has been examined in detail by their Lordships of the Supreme Court in *Makhan Singh Vs. State of Punjab* (and connected appeals), . In paragraph 8 of the judgment their Lordships observed as follows:

It would be noticed that as soon as a Proclamation of Emergency has been issued under Article 352 and so long as it lasts, Article 19 is suspended and the

power of the Legislature as well as the executive is to that extent made wider. The suspension of Article 19 during the pendency of the Proclamation of emergency removes the fetters created on the legislative and executive powers by Article 19 and if the Legislatures make laws or the executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the Proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Article 19, because as soon as the emergency is lifted, Article 19 which was suspended during the emergency is automatically revived and begins to operate. Article 368, however makes it clear that things done or omitted to be done during the emergency, cannot be challenged even after the emergency is over". Thus even though the petitioners have not referred expressly to their rights under Article 19 of the Constitution being violated the complaint, in fact amounts to this that the restrictions placed on the right to carry on trade under the Foodgrains Dealers Licensing Order are unreasonable provisions and therefore they should be struck down. Though we have rejected the contention on merits, it must also be held that it is not open to the petitioners to raise the contention on the allegation of unreasonableness of the provisions and interference with their right to carry on trade. The same view has been taken in two other High Courts viz,, *Swadeshi Cotton Mills Co. Ltd. Vs. Sales Tax Officer and Another*, .

53. With great respect to the learned Judges, their statement of law in that form is not quite accurate. Further the Bench decision of the Punjab High Court in *Channan Ram v. State of Punjab*¹, referred to by them, does not fully support that reasoning. The Punjab High Court which dealt with the validity of the Punjab Khandsari and Gur Dealers Licensing Order, 1963, issued u/s 3 of the Essential Commodities Act, 1955, held that in view of the Emergency and the suspension of Article 19 it would not be open to the petitioner to complain of violation of Article 19 as such. Even so, the Bench held that it would be open to the petitioner to attack the validity of the order on the ground that the order was not in conformity with the limitations which are expressed and also implicit in Section 3 of the Essential Commodities Act--the Parent Act--on the basis of which the Central Government issued the order in question. In other words, the Bench held that when the Government issued an order for the purpose of providing and regulating the production, supply and distribution of an essential commodity at a fair price, certain conditions had to be observed as flowing from the language of Section 3 of the Essential Commodities Act. The right to question a violation of the provisions of Section 3 aforesaid, is a right de fiers a right to question the violation of Article 19 even though the tests to be applied may be the same. The attention of the Bombay High Court and some other Courts and the Supreme Court which have placed the matter beyond doubt to the effect that the fact that Article 19 as such could not be invoked on the ground of the Presidential Order

issued during the period of Emergency, does not take away the right of the subject to question the legality and validity of orders passed by the Government either under the Essential Commodities Act or the legality of orders issued under any other law for the time being in force.

54. In *K. Anandan Nambiar and Another Vs. Chief Secretary, Government of Madras and Others*, , the Supreme Court held that even though the right to question the detention of a detainee under Articles 14, 21 and 22 of the Constitution of India had been taken away, it would still be open to the detainee who was detained under an order passed under Rule 30 of the Defence of India Rules, to show that the order had been passed by the Delegate outside the authority conferred on him by the appropriate Government u/s 40 of the Defence of India Act or that it had been exercised inconsistently with the conditions prescribed in the order. The relevant discussion is contained in paragraphs (6) and (7) of the judgment. What is significant to note is that the earlier decision of the Supreme Court in *Makhan Singh Vs. State of Punjab* (and connected appeals), has been referred to by the Supreme Court, in the later decision as an authority for the position that it is open to the detainee to raise the objection that the detention is contrary to the provisions of the Defence of India Rules, despite the non-availability of the right to invoke Article 19. The same view was taken in *Jaichand Lall Sethia Vs. State of West Bengal and Others*, , (vide discussion at page 485, paragraph 5). The Supreme Court stated the law in these terms:

It was pointed out that during the pendency, of the Presidential Order, the validity of the Ordinance or any rule or order made thereunder cannot be questioned on the ground that it contravenes Articles 14, 21 and 22. But, this limitation cannot preclude a citizen from challenging the validity of the Ordinance or any rule or order made thereunder on any other ground. If the appellant seeks to challenge the validity of the Ordinance, rule or order made thereunder on any ground other than the contravention of Articles 14, 21 and 22 the Presidential Order cannot come into operation. It is not also open to the appellant to challenge the Order on the ground of contravention of Article 19, because as soon as a Proclamation of emergency is issued by the President under Article 358 the provisions of Article 19 are automatically suspended. But the appellant can challenge the validity of the Order on a ground other than those covered by Article 358 of the Presidential Order issued under Article 369(i). Such a challenge is outside the purview of the Presidential Order, for instance, a citizen will not be deprived of the right to move an appropriate Court for a writ of habeas corpus on the ground that his detention has been ordered mala fide.

55. It is sufficient to refer to the latest decision of the Supreme Court in *The District Collector of Hyderabad and Others Vs. Ibrahim and Co., etc.*, , in which the same view is reiterated. In that case, the Government acting under the provisions of the Andhra Pradesh Sugar Dealers Licensing Order of 1963 and Sugar Control Order of 1963 read with Section 3 of the Essential Commodities Act, issued an order that the Sugar quota allotted to the twin cities of Hyderabad

and Secunderabad should be given in its entirety to the Greater Hyderabad Consumers Central Co-operative Stores, Ltd., thereby preventing the petitioners in the writ petitions from carrying on their business in sugar. This Order was no doubt issued during the period of Emergency when Article 19 was in suspension. The Petitioner questioned this Order, giving the entire quota to the Co-operative stores, as contrary to Section 3 of the Essential Commodities Act and the Andhra Pradesh Sugar Dealers Licensing Order, 1963. The argument was that since Article 19 was suspended, it is not open to the petitioner to challenge the order of the Government. The Supreme Court did not accept this argument. This is what the Court observed:

In the present case, the State did not enact any legislation impairing the fundamental right of the respondents to carry on business which is guaranteed by Article 19(1)(g); they proceeded to make an executive order. But the executive order immune from attack is only that order which the State was competent, but for the provision contained in Article 19, to make. Executive action of the State Government which is otherwise invalid is not immune from attack merely because a proclamation of emergency is in operation when it is taken. Since the order of the State Government was plainly contrary to the statutory provisions contained in the Andhra Pradesh Sugar Dealers Licensing Order and the Sugar Control Order, it was not protected under Article 358 of the Constitution.

56. It is true that in several decisions arising under Orders and Notifications issued by the Government (as a delegated authority) with the avowed object of regulating the production and equitable supply of commodities at fair prices, the concerned orders were either upheld or declared illegal by freely importing the principles of Article 19 of the Constitution, bearing on the questions, whether or not the particular restriction was reasonable. It is, however, necessary to bear in mind the precise context and the limited purpose for which the principles underlying Article 19 were applied in those case. In some cases Article 19 itself was applied while in some others, the principles underlying Article 19 were applied while interpreting the particular language employed in the enactment, delegating the powers to the Government. For instance, u/s 3 of the Essential Commodities Act, the Central Government can issue necessary directions and orders providing for regulating or prohibiting the production, supply and distribution thereof and also for maintaining or increasing supplies of an essential commodity or for securing its equitable distribution and availability at fair prices. Under the guise of this power, the Central Government cannot issue orders offending Article 19, though in the section itself there is no such express limitation. In *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, , the Supreme Court observed that the fact that the words "in accordance with the provisions of the Articles of the Constitution" are not used in the section is of no consequence and it has to be presumed that the Government cannot issue any order violative of the Constitution. At page 433, the Supreme Court observed as follows:

It is fair and proper to presume that in passing this Act the Parliament could not possibly have intended the words used by it, viz., " may by order, provide for regulating or prohibiting the production, supply and distribution thereof, and trade and commerce in" to include a power to make such provisions even though they may be in contravention of the Constitution. The fact that the words " in accordance with the provisions of the articles of the Constitution" are not used in the section is of no consequence. Such words have to be read by necessary implication in every provision and every law made by the Parliament on any day after the Constitution came into force. It is clear therefore that when Section 3 confers power to provide for regulation or prohibition of the production, supply and distribution of any essential commodity it gives such power to make any regulation or prohibition in so far as such regulation and prohibition does not violate any fundamental rights granted by the Constitution of India.

57. This principle, that the provisions of post-Constitution enactments are all subject to the provisions in the Constitution, and particularly Article 19, is well-settled and has been reiterated in several decisions of the Supreme Court. From this, can it be argued that whenever the Government issues an order or notification u/s 18-G of the Act, it is not only bound to conform to Article 19 in the sense that the Government is bound by the restrictions embodied in Article 19, but at the same time entitled to this freedom or the wide power in the matter of issuing orders or notifications concerning limited companies as distinguished from an individual? In other words, can it be contended by the Government that because an individual is entitled to complain that a particular order issued by the Government u/s 18-G is ultra vires as violative of Article 19 (a) and (f) read with Clauses (5) and (6), the Government can also contend that it can pass any order concerning limited companies in the view that the Government has full freedom to impose restrictions since the limited company cannot invoke Article 19 of the Constitution? The acceptance of such an argument recognising such wide powers would result in distorting the object underlying Section 18-G, besides being a complete misreading of that provision. Section 18-G is general in terms; the Act and all its provisions are intended to apply alike to an individual and a limited company. In every aspect, the operation of Section 18-G a general provision, makes no distinction between a person and a limited company. Whatever limitations flow from the use of the expression--"securing an equitable distribution, availability at fair prices, regulate the supply and distribution thereof" apply alike to orders concerning an individual and a limited company. Once the true meaning or the import of the words " fair price" in Section 18-G is arrived at, the same meaning should be applied to an individual or a limited company without any distinction. Merely because the reasonableness of the restriction imposed in any particular order of the Government has to be judged with reference to the principles underlying Article 19, the Article itself cannot be bodily incorporated into Section 18-G. Such incorporation would result in startling results. The right to expect the fixation of a fair price, i.e., in terms of Section 18-G and the right to safeguards with regard to the nature of the

restrictions that can be imposed, could be claimed by an individual or by a limited company. When the limited company complains that the restrictions are unreasonable or that the price fixed does not provide for the cost price plus a reasonable margin of profit, the complaint is not a violation of Article 19 but the complaint is that the order issued is in excess of the powers conferred upon the Government u/s 18-G, i.e., in deprivation of the safeguards guaranteed and secured u/s 18-G. To put it differently, the complaint literally is an infringement of the rights secured u/s 18-G and not an infringement of Article 19 though in judging the question whether Section 18-G has been infringed principles or tests which apply to a complaint of violation of Article 19 may be germane and relevant. We are not inclined to take the view that by merely importing the words "" subject to the provisions of the Constitution " as a necessary implication into Section 18-G, the Government is free to issue any order it likes so far as limited companies are concerned on the ground that they cannot invoke Article 19.

58. There is one other crucial aspect of the matter. When the Parliament enacts a legislation on a subject within its jurisdiction, there is nothing to prevent Parliament making all the provisions of the Act applicable to any individual or limited companies; such a legislation would be perfectly valid. Indeed, if such a legislation discriminates in the application of its provision between an individual and a limited company, the provisions will be struck down as violative of Article 14 of the Constitution unless the legislation itself manifests the particular special reasons which warrant such a differentiation. It is not right to read into the Act any such differentiation between an individual and a limited company, thereby making it offend Article 14 of the Constitution. Unless the language employed in the Act makes it impossible, the provisions of the Act should be interpreted as to be in conformity with Article 14. Further, every presumption should be made, in the absence of any express provision to the contrary, that the Act is in conformity with Article 14 of the Constitution. Thus, viewed from any point of view, the petitioners would be entitled to complain, if the Government had acted in excess of or contrary to the provisions of Section 18-G.

59. Let us first take up the question as to how far the fixation of a uniform price of Rs. 100 is in contravention of and not in accordance with Section 18-G of the Act, in the sense that the price of Rs. 100 fixed does not secure to the writ petitioners the cost price plus a reasonable margin of profit. If the writ petitioners succeed in this point, there is no need for them to invoke Article 14 of the Constitution. If, however, they fail on their objections based upon Section 18-G, the further question arises (which we shall consider later) as to whether there is any discrimination between the units of the writ petitioners and the other units offending Article 14 of the Constitution.

60. The scheme of the Act is that the Government takes upon itself a large measure of control over the business activities of industries specified in the First Schedule, where the Government thinks it is expedient in the public interest to do so. The Act contains provisions for registration of existing undertakings,

provisions for licensing the establishment and construction of development councils for advising the Government, power of the Government to order investigation into the activities of industries for certain specified reasons, as mentioned in Section 15, the power of the Government to assume management and control of an industrial undertaking under the circumstances mentioned in Section 15, etc. etc.

61. Section 18-G is the section in which certain powers are conferred upon the Central Government in regard to the supply, distribution price, etc. etc. of certain articles. The portion relevant for the discussion may be extracted.

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 equitable distribution and availability at fair prices of any articles 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 Sub-section (1) a notified order made there under may provide:

(a) for controlling the prices at which any such article or class thereof may be bought 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 articles 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 transaction 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 interest:

3. Where in pursuance of any order made with reference to Clause (d) of Sub-section (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, fixed under this section;

(c) Where neither Clause (a) or (b) applies, the prices calculated at the market value prevailing in the locality at the date of the sale.

62. Section 25 of the Act confers the power on the Central Government to delegate the powers conferred upon it, upon any officer or authority as mentioned in the section.

63. Section 30 deals with the powers of the Central Government to make rules for carrying out the purposes of the Act.

64. It may be relevant to mention that this Act was enacted to provide for the regulation and development of industries, while the Essential Commodities Act of 1955 was enacted 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 specified in the Act, as essential commodities; as well as the commodities which may be notified by the Government from time to time.

65. Section 3 of the Essential Commodities Act 1955, contains provisions similar to Section 18-G of the Act of 1951, under which the Central Government has been empowered to issue orders under similar circumstances and for similar purposes as specified in Section 18-G of the Act of 1951. The language employed in the Act of 1951 and in the Act of 1955 are almost similar and it is needless to observe that the decisions rendered under the one Act may be of relevance and useful when a similar problem arises under the other Act. Indeed, except the latest decision of the Rajasthan High Court reported in Jaipur Udhog, Ltd. v. Union of India AIR 1969 Raj. 281, all the decisions particularly of the Supreme Court, are rendered under the Essential Commodities Act of 1955.

66. The arguments of learned Counsel attacking the Amendment Order may be summed up as follows:

(a) The power of the Government to fix a price u/s 18-G of the Act is delimited by the express provision in the Act and is also impliedly controlled by basic well-settled principles of economics that no man can be compelled to carry on his business at a loss by being obliged to sell his goods at less than his cost of production. The Government have accepted the position that on account of disparity in the cost of production of the several units, all of them cannot be treated alike by fixing a uniform price, that units have to be grouped together and a higher price should be given for the high cost units.

(b) Government ultimately grouped the units under a three-tier system with an increase of a slab of Rs. 3 for the second group of units and Rs. 5.50 for the third group of units. The grouping is as follows:

Rs. 69.50

Rs. 72.50

Rs. 75.00

Dalmia Cement

India Cements

Panyam

Andhra Cements

Digvijay

Saurashtra

Orissa Cements

Satna

Madras

Rohtas

Kalyanpur

Mysore Iron

Sone Valley

A.C.C.

K.C.P. Ltd.

Dalmia Dadri

Bagalkot

U.P. Factory

Jaipur Udyog

Ashoka

This is a clear recognition and an acknowledgment by the Government that this three-tier system should continue till the high cost units (units of groups 2 and 3) are able to continue in production by reaching economic levels and are able to operate within a uniform price, and that during the interval these two groups of units should be capable of reducing the cost of production progressively in future by better management, control and economies.

(c) From time to time the price fixed was increased maintaining the three-tier system, which meant the increase in price was uniform to all the three groups. Even in January, 1966, there was an increase of price by as much as Rs. 13 and this increase was for all the three groups. This was followed by the Cement Control Order of 1967 which came into effect on 1st January, 1968. Even then, the three-tier system was followed, viz., Rs. 90.50 for group A, Rs. 93.50 for

group B and Rs. 96.00 for group C, which again meant that the Government, as late as January, 1968, had recognised and acknowledged that the hopes expressed by the Government in 1961 had not yet been realised and that the high cost units still required the three-tier system to enable them to carry on the business.

(d) After 1961, up till now, no attempt has been made by the Government to investigate the actual cost of production with due regard to the relevant factors which enter into the competition, like (1) raw materials, (a) power and fuel, (3) labour and establishment, (4) repairs and stores, (5) depreciation, (6) overheads, and (7) packing. Government have neither alleged nor proved that the high-cost units have come to a stage that they could continue in production by reaching economic levels and that they would be able to operate within the uniform price. Again, Government have neither alleged nor established that the high-cost units lacked efficiency in the working of the factories concerned, that they are guilty of not securing better management and control or that they have not made any endeavour to reduce their cost of production progressively in future. In other words, the Government have neither alleged nor established (the positive aspect as declared in paragraphs 4 and 5 of their resolution) of 1961 that the situation in completely altered and their hopes have been realised so as to justify the introduction of a uniform price. Nor have the Government alleged (and) established (the negative aspect) that the indulgence or the extra concession shown to the high-cost units had turned, out to be misplaced and not justified on account of the inefficiency, non-co-operation and want of careful management and effecting economies on the part of the high-costs units concerned, and that the Government could not brook any further delay in introducing their policy of uniform price already declared.

The Government cannot abandon the three-tier system and switch over to a uniform price, unless there is a full costs accounts enquiry and investigation as was done in 1961 and that till then, the three-tier system roust continue.

(e) Every time, when there was a price increase, it was uniform for all three units because of the increase in the cost of production. The Government have accepted in their counter-affidavit that Rs. 7 per ton is admittedly the increase due to governmental action and when the Government actually took note of it and gave relief by way of increase in the price, the barest minimum should have been Rs. 103 for the third group, Rs. 100.50 for the second group and Rs. 97.50 for the first group. In other words, the Government having accepted the position that the Industry required an increase of Rs. 7 as due to governmental action, that increase of Rs. 7 should be available to all the three units; but in the case of group Nos. 2 and 3, that condition is not satisfied.

(f) The fixation of the uniform price and the Amendment Order of 1969 were based merely on the law of averages with no relation to facts and actual realities, without even a scrutiny of the actual cost of production and in particular the cost of the several components referred to earlier, and without the assistance of cost

accountants and experts.

(g) The Amendment Order is violative of Article 14 of the Constitution in-as much as units which have been treated differently (accepted as such by the Government for over a decade) have been treated alike, without any change in the conditions and that too resulting in discrimination in favour of group A units.

67. We may, at this stage mention that the main argument of Mr. V.P. Raman was that the order offends Article 14 as giving special treatment in favour of low-cost units enabling them to earn a larger percentage of profits when compared to the writ petitioners. Though he referred to Section 18-G in the course of his arguments, we gained the impression that his main complaint was one of a violation of Article 14. Mr. Nambiar, however, stressed both the aspects--a violation of Section 18-G of the Act and Article 14 of the Constitution.

68. These contentions were urged before Ismail, J., and accepted by him in these terms:

That is clear in the sentence which I have already extracted, namely:

Government, however, recognise that in the case of those few units having appreciably higher cost on account of special reasons, an extra price may have to be allowed for a period of time such as will enable them to continue in production until by reaching economic levels, they are able to operate within the uniform price.

This makes it absolutely and abundantly clear that the Government of India were not contemplating any period of time in a mathematical sense, as, so many years or so many months, but they were thinking of a period of time sufficient to enable these few units to achieve economy so that they can operate within the uniform price by reaching economic levels. It is not the case of the Government of India, in their counter-affidavit filed in these writ petitions that those few units whose costs of production were appreciably higher, on account of special reasons, have reached such economic levels so that they are in a position to operate within the uniform price. So long as the Government of India have not come to any conclusion that those special reasons which were responsible for higher cost of production have ceased to exist or the manufacturers themselves have not taken any steps to bring down the cost of production and by their own default or deficiency the cost of production continued to be higher, with regard to these units, it is not possible to accept the case of the Government of India for fixation of a uniform price. As I have already pointed out no such case has been put forward by the Government of India in their counter-affidavit, namely, that the special reasons which are responsible for higher cost of production have ceased to exist or notwithstanding the time given to those few units and notwithstanding the opportunities available to them, those units have not taken any steps to bring down their cost of production and their cost of production still continues to be higher because of their own deficiency or inefficiency.

With respect, we are not inclined to agree with this view.

69. We are clearly of the opinion that the arguments of the learned Counsel for the writ petitioners are erroneous. The arguments proceed on a wrong perspective and acceptance of the arguments aforesaid would place the Government in an intolerable situation, as if the Government have bound themselves hand and foot ad infinitum and eternally, to maintain the three-tier system and that they can hereafter exercise their powers u/s 18-G of the Act, to vary the price system, only after satisfying the manufacturers that the contingencies mentioned in the resolution of the Government (positive and/or negative aspect) had occurred. We are not prepared to accept that a situation had arisen in 1961 in which a permanent bar or estoppel had come into operation as against "Government, from altering the price except in the two contingencies mentioned above, even though the paramount interest of the public and the duty of the Government to secure equitable distribution at fair prices, clearly demanded a modification of the price level. We have no hesitation whatever in saying that no such vested rights have been created in favour of the manufacturers to enable them to insist upon the continuance and maintenance of the three-tier system. The Government have not, in fact, bound themselves in any irrevocable manner in favour of the manufacturers. In law, the Government cannot bind themselves to follow any policy ad infinitum, at the same time imposing upon themselves a burden, or an undertaking that if in future they introduce a change, it will be only after satisfying the manufacturers that the objectives visualised in the Government resolution have materialised; if that were so, no Government, worth the name, can effectively function, nor can they implement the policies of the Act which are conceived in the larger interest of the general public, in the matter of control, production, supply and distribution at fair prices of essential commodities for the benefit of the general public. The power of the Government to fix a price and modify or vary the same, from time to time, is clear and the only condition that is to be satisfied in Section 18-G is that the Government should act for the purpose of securing the equitable distribution and availability at fair prices of any article. So long as that condition is satisfied, the Government's action cannot be questioned, whatever may be the policies which the Government might have declared earlier. In other words, the only question is, in fixing a particular price, has the Government acted in contravention of or in excess of the powers conferred upon it under the Act.

70. The fact, that at one stage the Government introduced a particular price system after making a careful scrutiny and investigation with the aid of a Tariff Commission, and the fact that when a further change was made, it was made on a broad-based objective without the aid of experts constituting a Tariff Commission, merely taking a general broad survey of the working of the price system and relying upon the representations of the manufacturers and the consuming public, the subsequent price variation cannot be attacked as a contravention of the powers u/s 18-G. When the Government make a change, they make the change in the interests of the general public for the purpose of

maintaining the economy and for the general welfare of the country, especially in the case of commodities and industries which have been specially picked out and dealt with by the enactments like the Industries (Regulation and Development) Act of 1951 and the Essential Commodities Act of 1955. We are clearly of the view that when the Government acts for the purpose of implementing and carrying out the objects underlying such special legislations, the Government does not suffer under any disability or under any bar from taking action and there is every presumption that circumstances existed and exist justifying the Government to take the particular action. But that does not mean that the Government can take any decision and introduce any change in the price system as they like in an arbitrary or capricious manner. Even so, it is for the manufacturer or the consumer (general public) to plead and establish that a particular fixation of price is not a fair price within the meaning of Section 18-G of Act of 1951 or Section 3 of the Act of 1955. In other words, the mere introduction of a particular price system, though it may be contrary to the declared policy of the Government, does not by itself confer any right upon the manufacturer to question its validity or legality. But it is the actual prejudice or the detriment which either it results in or sure to bring about as a direct consequence, that gives a right of action to the concerned manufacturer to seek redress in Court, of course, after pleading and establishing the necessary facts. For instance, the Government, in a particular year, may declare their policies to be put into action at a future date, say, the abolition of auto-rickshaws or abolition of baby taxis, complete decontrol of certain commodities, total prohibition of imports of certain commodities, etc. Persons who carry on business on these lines, may make huge investments and commitments in the light of this declared policy. Businessmen might sell away Baby taxis and invest in big taxis or may make investments on essential commodities with a view to expand their business or sell in open competition, etc., etc. These business men cannot have a legal complaint against the Government in the event of the Government not following the declared policies, but taking some other steps in the interests of the economy of the country and in the interests of the general public. The concerned businessmen cannot say that on the faith of the declared policy they had invested capital and they have suffered prejudice by a sudden change in the policy of the Government. Again, the Government may declare a policy to be continued for some time, a particular system, licensing of importing of certain materials or a free trade without a control, and on the basis of this declared policy, businessmen concerned might have invested large capital to carry on and continue their business. But suddenly the Government may change their view and declare a new policy, may even be a policy totally at variance with the policy already declared. That would not entitle the businessmen concerned to question the change in the policy on the ground that they had made huge investments relying upon the assurance of the Government that a particular system would be followed. It is settled law that the Government cannot bind itself in respect of its future executive action; in the case of policies declared from time to time in the general interest of the country and the general public, the position is a fortiori.

The Government cannot be called upon to justify its action in the change of its policy, in the abstract, in the sense that there has been a breach of faith on the part of the Government. The grievance must be a legal grievance, in respect of which there should be a right to seek redress in a Court of Law. Similarly in respect of certain essential commodities, the Government may fix a price and also declare that the particular price would not be changed for a particular period--say for 10 or 15 years; it will still be open to the Government to introduce a different price structure much earlier. On that ground alone the action taken by the Government u/s 3 of the Act of 1955 or u/s 18-G of the Act of 1951 cannot be canvassed. The cause of action for the proceeding against the Government is certainly not the introduction of a new price structure, but it is the effect of the order as not securing the supply and the equitable distribution and availability at fair prices of any particular article specified in the Schedule. In other words, the cause of action is not mere change of the price structure without anything more, but the change in the price structure which is in contravention of the provisions of Section 18-G of the Act. The Government is not bound to wait till the units improve their efficiency or show better management and proper control in their business activities or to wait eternally till all the units are able to continue in production by reaching economic levels. When they introduce a change, even assuming that it is contrary to their declared policy, the only condition to be satisfied is that action is not in violation of Section 18-G.

71. It will at once be noticed that the burden is upon the writ petitioners to allege all the essential and necessary facts and establish in such manner as is possible and permissible in a proceeding under Art 226 of the Constitution, to the satisfaction of the Court, that there is a contravention of the provisions of Section 18-G. It will avail the writ petitioners nothing, to harp upon the statements in the policy declaration of the Government in October, 1961 and call upon the Government to plead and establish facts as to why they introduced a change and whether the contingencies specified in the Government resolution have occurred. Again it would avail the writ petitioners nothing to harp upon the principle in the abstract that Article 14 would be offended by "finding differences where there are none and by making no difference when there is one", and calling upon the Government to justify their conduct in abolishing the differences and introducing a uniform rule, irrespective of the question whether or not this wiping out of differences and introducing a uniform rule has caused any legal prejudice to the writ petitioners, of which the Court can take cognisance. The crucial question, therefore, is whether the writ petitioners have proved in what manner and to what extent they have been prejudiced by the Amendment Order, i.e., how the provisions of Section 18-G have been contravened.

72. In considering this aspect (of securing the equitable distribution and availability at fair prices and regulating the supply) it is, in the nature of things, neither possible nor feasible to formulate any uniform principle. The Government has to bear in mind the economy of the country, the interests of the general

public, the question of promotion of export and restriction and/or prohibition of import, in the interests of the manufacturers as well as in the interests of the general public. The Government obviously will have to make an overall study and take a decision. Undue importance or over-emphasis should not be paid to the interests of the manufacturer alone or the interests of the consumer alone. The interests of both and the interests of the Industry as a whole should be borne in mind.

73. There is the further aspect which the Law in this country and other countries has recognised that in respect of certain industries or in respect of certain essential commodities, the fair price will have to be fixed with reference to the manufacturers and/or the consumers in general and that the price cannot be said to be not fair, merely because it is not economically, a good price, to certain individual manufacturers or consumers, when the price fixed is, however, fair in respect of the manufacturers as a group or the consuming public as one entity, depending upon the economy of the country, the special incidents of the particular industry, the way and area in which the industry has spread and developed, whether in a particular portion of the country or throughout the country, the necessity for establishing the prices to prevent inflation, etc., etc. In other words, that the "price fixed is uneconomic for one or few of the groups covered by the price regulation, would not. by itself be sufficient to hold that Section 18-G has been contravened, though it is a matter for the Government, while giving effect to its policy, to pay due regard to the repercussions of the price fixation and to make an effort as far as possible to make it economical, for as wide a section of manufacturers and the consuming public as possible.

74. It will be convenient at this stage to refer to certain decisions in which the vires of certain regulatory measures--fixing of rates and prices--have been considered. It is now well settled that the Government is entitled to enforce a permit or licensing system with a price control; and the modern trend of judicial decisions in this country as well as in other countries shows a pronounced reluctance and disinclination on the part of Courts to interfere with such regulatory measures concerning the economic and business activities, individuals or companies. Courts have repeatedly held that the responsibility for the ultimate introduction of the regulatory measures rests with the policy-makers, i.e., the Legislature, and not with the Judiciary.

75. The first decision to which reference may be made is the decision of the Supreme Court reported in *State of Andhra Pradesh Vs. Kannapalli Chinna Venkata Chalamayya Sastri*, , in which the vires of the Madras Estates Land (Reduction of Rent) Act (XXX of 1947) was upheld, approving the view taken by the Bench S. decision of this Court reported in *Rajah of Bobbili v. State of Madras* (1952) 1 M.L.J. 174. We shall first refer to the Bench decision of this Court consisting of Rajamannar,, C.J., and Venkatarama Ayyar, J. The Madras Estates Land (Reduction of Rent) Act was introduced to provide for the reduction of rents payable by ryots in estates governed by the Madras Estates Land Act, 1908,

approximately to the level of the assessments levied on lands in ryotwari areas in the neighbourhood. Various objections against the vires of the Act were raised and the discussion relevant for our purpose is found at pages 181, 190 and 191, in the judgment of Rajamannar, C.J. This Bench decision emphasises certain aspects which are germane to the present discussion. One argument that was stressed was that the reduction of rent to the level of assessments levied on ryotwari lands would cause considerable loss to the land-holder resulting in total deprivation of the enjoyment of the benefits of the property. The learned Chief Justice, referred with approval, to the decision of the Supreme Court in *John H. Reagan v. The Farmers' Loan and Trust Co.* 154 U.S. 361, in which the "vires of a legislation introduced by the Legislature of the State of Texas fixing rates for transportation by rail road was questioned. The Chief Justice observed as follows:

In *Reagan v. Farmers' Loan Trust Co.*¹, it was held that the fixing and enforcement by a rail road commission of unjust and unreasonable rates for transportation by rail road companies is an unconstitutional denial of the equal protection of the laws. The Legislature of the State of Texas passed an Act to establish a rail road commission with power and authority vested in them to adopt all necessary rates, charges and regulations to govern and regulate rail road freight and passenger tariffs, etc. The rail road commission proceeded to establish certain rates for the transportation of goods over the rail roads in the State. The International and Great Northern Rail Road Company and the debenture trustees--under a trust deed executed by the said rail road company--challenged validity of the tariff fixed by the Commission on the ground that the rates were unreasonable and unjust and worked a destruction of the company's rights of property. Mr. Justice Brewer delivering the opinion of the Court observed:

The Courts are not authorities to revise or change the body of rates imposed by a Legislature or a Commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to enquire whether a body of rates prescribed by a Legislature or a Commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation.

In that case, facts were disclosed regarding the indebtedness of the company, its capital, its operating expenses exclusive of taxes, etc., and it was shown that the actual reduction by virtue of the new tariff in the receipts made it impossible to work the company at a profit. Though an absolute rule could not be laid down in every case that a failure to bring some profit to those who have invested their money in the company is conclusive that the tariff is unjust and unreasonable, yet justice demanded that every one should receive some compensation for the use of his money or property if it be possible without prejudice to the rights of others. The Court therefore issued an injunction restraining the Rail road

Commission from enforcing the rates already established.

76. At page 190 the learned Chief Justice went on to emphasise that mere hypothetical calculations would not serve any purpose when the sources of income of one zamindari are not necessarily the same as those of other Zamindaris, and that the income has to be ascertained with reference to several sources like, home farm lands, minerals, forest produce, and other sources of income which varied largely with each estate. It was further observed that the aggrieved party should allege and prove how he has suffered a prejudice as a result of the regulatory measure and that each case must properly be presented in the pleadings and there must be opportunity for the Government to traverse the allegations in such cases. It was also held that in the absence of a detailed statement of the relevant facts, an application founded on mere general allegations, must be dismissed.

77. Before the Supreme Court State of Andhra Pradesh Vs. Kannapalli Chinna Venkata Chalamayya Sastri, the argument was advanced that the fixation of the percentage of 25 per cent, was more or less arbitrary and that when that formula was applied, it would result in some landholders getting more advantages when compared to other land holders, and that itself was a ground to strike down the Act. The Supreme, Court, rejecting this argument, held that what is necessary to ascertain is whether the Act provides for reduction of rent on a reasonable basis and once that basis is accepted as reasonable, the fact that the ratio between one landholder and another would be different, would not make the regulatory measure an unreasonable one. The Supreme Court observed at page 1691 as follows:

Therefore, except for theoretical possibility where the landholder may be left with nothing on reduction of rents, it cannot be said from the mere fact that in some cases the ratio of net income falls after reduction of rent as compared to the net income before reduction below 25 per centum that the restrictors imposed by the Act are unreasonable. Actually we feel that there cannot possibly to any case where after the reduction there will be nothing left to the landholder. We cannot therefore agree with the High Court that simply because in a particular case the net income after reduction falls below 25 per centum of the net income before the reduction the notification which results in such a position is unreasonable restriction on the right of the landholder to hold his estate. As we have said already, the ratio by which the net income will fall after reduction will depend upon whether the landholder whose rents are being reduced was a rack-renter or a humane person; in the case of a rack-renter the fall may be heavier while in the case of a humane person the fall may be less. But if the basis on which the reduction is made is the same in both cases and is reasonable, we see no reason for holding that a notification which may in a given case result in a fall of the net income which is even below 25 per centum of the previous net income would necessarily be bad as unreasonable restriction on the right of the landholder to hold his estate. It is important in this connection to remember that the rent

allowed to the respondent compares favourably with the highest rent payable by the ryotwari tenants in the locality. Therefore, the basis on which rents are being reduced under the Act being good and reasonable the result of such reduction would not make the notification in a particular case bad except where that theoretical case is reached where there is no income left to the landholder after reduction, which in our opinion is impossible.

78. It is settled law that when the vires of a legislation is questioned, either on the ground that it offends Article 14 and Article 19 or any other limitation, there is always a presumption in favour of the constitutionality of the enactment and the burden is upon him who attacks it to show that there has been a violation of the constitutional principles". In order to sustain the presumption, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation, (vide enunciation of this principle by the Supreme Court in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, at pp. 547 and 548. The burden is on the person attacking the legislative arrangement to plead and establish the necessary facts. This presumption in favour of the validity is equally applicable in favour of orders issued in the exercise of delegated power, i.e., subordinate legislation or orders issued by administrative body or by the Government exercising powers conferred on it under Act. Reference may be made to the decision in *Pacific States Box and Basket Co, v. White* 296 U.S. 176. In that case the Director of Agriculture and the Chief of the Division of Plant Industry issued an order specifying certain standards of measurements or containers for Vegetables and fruits, raspberries, strawberries, etc. A certain manufacturer questioned the vires of the order raising various objections. All the objections raised were overruled and it was held that the order in question was a valid regulation of trade as a part of the Inspection laws.

79. There are two aspects dealt with in that decision which are relevant for our purpose. Brandels, J., delivering the opinion of the Court, observed that in view of the presumption in favour of the validity of the order the burden is upon the party questioning the vires to plead all the details and that the burden is not sustained by making allegations which are merely the general conclusions of law or fact and that facts relied to rebut the presumption of constitutionality must be specifically set forth. He also held that the presumption which equally exist in relation to enactments of Legislatures, apply to delegated legislation. He observed:

It is urged that this rebuttable presumption of the existence of a state of facts sufficient to justify the exertion of the police, power attaches only to acts of Legislature; and that where the regulation is the act of an administrative body, no such presumption exists, so that the burden of proving the justifying facts is upon him who seeks to sustain the validity of the regulation. The contention is without support in authority or reason, and rests upon misconception. Every

exertion of the police power, either by the Legislature or by an administrative body is an exercise of delegated power. Where it is by a statute, the Legislature has acted under power delegated to it through the Constitution. Where the regulation is by an order of an administrative body, that body acts under a delegation from the Legislature. The question of law, may, of course, always be raised whether the Legislature had power to delegate the authority exercised. Compare *Panama Refining Co. v. Ryan* 293 U.S. 388; 55 S. C. 241 : 79 L. Ed. 446 and *A.L.A. Schechter Poultry Corporation v. United States* 295 U.S. 495 : 55 S. C. 837 : 79 L. Ed. 1570 : 97 A.L.R. 947. But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies, compare *Aetna Insurance Co. v. Hyde* 275 U.S. 440: 48 S. C. 174 : 72 L. Ed. 357.

80. In the instant case, the affidavits filed in support of the writ petitions are totally bereft of particulars. They do not satisfy even the barest minimum standards. As we are clearly of the view that these petitions are liable to be dismissed even at the threshold for this reason of total lack of particulars, it is necessary to pin-point what the affidavits contain. Paragraphs 3 to 9 contain just a narrative of the prior history, the introduction of the three-tier system, its continuance till 1969 and the introduction of the uniform price in 1969.

81. The grounds for questioning the vires of the Amendment order and the complaint of the petitioners" are to be found only in paragraph 10. The earlier portion of paragraph 10(a) is just a general discourse enunciation of the law of economics, that fair price must have reference to costs of production, cost of production varies from one area to another and there should be different fixation of different prices and that a uniform price for the country is impracticable, etc., etc. It is just a generalisation and the exposition of the petitioners" view as to what would be the best and the most desirable, or ideal formula for fixation of prices. This portion of the affidavit does not contain any particulars or details of facts concerning the writ petitioners. In the later portion of paragraph 10(a), all that the petitioners allege is that on account of uniform price unconstitutional an arbitrary discrimination had been created as against producers like the petitioners and the Government have introduced an unfair and arbitrary inequality amongst various producers. While winding up paragraph 10(a), the affidavit states:

It is submitted that by passing the impugned order, Government have introduced an unfair and arbitrary inequality among various producers. This would cause considerable loss to the petitioner and would amount to an unjust and arbitrary discrimination violative of the Constitutional guarantee under Article 14.

82. The junta-position and the context in which the sentence " This would cause considerable loss to the petitioner, etc"., occurs shows that the complaint is only against the alleged unfair and arbitrary inequality created by the order of the Government. There is no statement of facts, no particulars alleged, that the writ

petitioners themselves have sustained any loss or prejudice. The complaint is not of any loss or prejudice to the petitioners. But the complaint is that the "other producer would be getting more benefits". The statement that "because of "that", "that" meaning discrimination, loss would be caused to the petitioners " conveys no meaning, as the retention price fixed is a uniform price, the f.o.r. price fixed is again a uniform price, and what can be appropriated by each of the producers is the same amount, the rest going to the pool of the Cement Regulation Account. There is no statement in the affidavits with the details as to how the three companies have been functioning for a reasonable period prior to the coming into force of the Amendment Order, whether they have been working at a loss or a profit, the quantum of profit or loss, as the case may be, whether they have made all efforts to enforce all economics and how it is with the price fixed, it would be impossible for the writ petitioners to carry on business except at a loss and that they cannot possibly make any profit on the basis of the uniform price of Rs. 100. Again, there is no averment that the hopes adverted to in the resolution of the Government in the year 1961 could not be realised, that the writ petitioners are not to be blamed for the same in any manner. To reiterate, we do not find any averment of facts in paragraph 10 (a) of the affidavit how the Amendment Order of 1969 in its application to the writ petitioners would cause any prejudice or have any adverse effect on the financial repercussions of their business activities, independent of the question of any greater benefits which have accrued in favour of other producers.

83. The only other paragraph to be referred to is paragraph 10(b). Nothing is stated in this paragraph with reference to the actual realities concerning the writ petitioners. The whole of the paragraph is devoted to a general discussion. To quote the very words "to illustrate", as to what consequences would ensue if the price level is maintained in the sum of Rs. 105-50 for the third group and the slab worked backwards for the other two groups, in other words, in Paragraph 10 (b) there is only a discussion of a problem in arithmetic in a hypothetical situation. There is not one word in paragraph 10(b), no particulars whatever, as to what would be the impact or the repercussions upon the finances of the writ petitioners if the price of Rs. 100 is enforced. The result is that the only pleading is to be found in paragraph 10 (a) which, as observed already, is only a complaint of discrimination in favour of the other producers, i.e., "their getting more".

84. To sum up, there is no averment of fact--literally nil--as to how the writ petitioners have not been given a fair price within the meaning of Section 18-G of the Act. The barest minimum which the writ petitioners ought to have done is to have appended to their affidavits the balance sheets and the Profit and Loss Accounts of the three companies, say for a period of five years, with a detailed explanation as to how the three companies have been functioning during that period and how they would be prejudicially affected if the uniform price of Rs. 100 is enforced. The Court should have been furnished, in the form of Balance Sheets and or Statement of Accounts, all the business activities of the three

Companies, the financial implications their progress in the business activities furnishing all the relevant information which would enable the Court to find out whether there is a contravention of Section 18-G. In some of the decisions, the Supreme Court has observed that the allegation of such particulars even, resting on the mere ipse dixit of the petitioners would not avail, but they should be supported by proof in the form of statement of Accounts, Audited Balance Sheets, etc. Here, nothing of the kind whatever was done. We have already made a comment that the commission to mention the particulars in the affidavits is not casual or inadvertence but with a purpose.

85. In this context, we may refer to the decision in *Hegeman Farms Corporation v. Baldwin* 293 U.S. 163 : 55 S. C. 1934, in which a wholesale milk dealer questioned the order of the New York Milk Control Board, limiting the price of milk to be charged by the dealers to their customers and the price to be paid by, the dealers to the producers. The petition did not contain any particulars as to whether the complainant ran his business with reasonable efficiency when compared with others in his calling, whether he was earning a fair return on his investment, etc., etc. The bill was dismissed as bereft of particulars and not disclosing a cause of action. Cardozo, J., delivering the opinion of the Court, observed as follows:

They do not tell us whether the appellant ran its business with reasonable efficiency when compared with others in its, calling. They do not even tell us whether it was earning a fair return on its investment before the orders were adopted. The omission is the more, significant because, according to official records the spread, has been increased, instead of being diminished, through the operation of control --Report of the Milk Control Board, March, 1934, pages 17, 18. For all that appears upon this record, a change of the minimum prices would avail the appellant nothing if a corresponding increase or reduction were allowed to its competitors. It might still be driven to the wall without the aid of a differential that would neutralize inequalities of capacity or power. If different minimum would help, the pleading leaves us in the dark as to what those minima should be. There is no statement that a different selling price could be fixed with fairness to consumers, of a different purchasing price with fairness to producers. The appellant's grievance amounts to this that it is operating at a loss, though other dealers more efficient or economical or better known to the public may be operating at a profit.

A bill of complaint so uncertain in aim and so meagre in particulars falls short of the standard of candor and precision set up by our decisions. *Public Service Commission of Montana v. Great Northern Utilities Co.* 289 U.S. 130 : 53 S.C. 546 : 77 L.Ed. 1080, *Aetna Insurance Co. v. Hyde* 275 U.S. 440 : 48 S.C 174 : 72 L.Ed. 357. True the appellant is losing money under the orders now in force. For anything shown in the bill it was losing money before. For anything there shown other dealers at the same prices may now be earning profits; at all events they are content, or they would be led by self-interest to raise the present level.

We are unable to infer from these fragmentary data that there has been anything perverse or arbitrary in the action of the board. To make the selling level higher might be unfair to the consumers, to make the purchasing level lower might bring ruin to producers. The appellant would have us say that minimum prices must be changed whenever a particular dealer can show that the effect of the Schedule in its application to himself is to deprive him of a profit. This is not enough to subject administrative rulings to revision by the Courts. If the designation of a minimum price is within the scope of the police power, expense or losses made necessary thereby, must be borne as an incident, unless the order goes so far beyond the needs of the occasion as to be turned into an act of tyranny. Nothing of the kind is charged. The Fourteenth. Amendment does not protect a business against the hazards of competition. *Public Service Commission of Montana v. Great Northern Utilities Co.*¹. It is from hazards of that order and not from restraints of law capriciously imposed, that the appellant seeks relief. The refuge from its ills is not in constitutional immunities.

If the price is not raised, the reason must be that efficient operators find that they can get along without a change. Either that must be so, or else, as was pointed out in the opinion below, the industry will perish. The bill does not suggest that such catastrophe is imminent. True, of course, it is that the weaker members of the group (the marginal operators or even others above the margin) may find themselves unable to keep pace with the stronger, but it is their comparative inefficiency, not tyrannical compulsion that makes them laggards in the race. Whether a wise statecraft will favour or condemn this exaltation of the strong is a matter of legislative policy with which Courts are not concerned. To pass judgment on it, there is need that the field of vision be expanded to take in all the contestants in the race economic welfare, and not some of them only.

86. It will be relevant, at this stage, to refer to the argument of Mr. V. K. Thiruvengkatachari, learned Counsel for the Interveners-Dalmia Cement (Bharat) Ltd., one of the biggest groups. He referred to the information furnished in the Madras Stock Exchange Official Year Book for 1969-70, pages 559 and 560 concerning Madras Cements Ltd., pages 562 and 563 concerning Madras Cements, Ltd., and pages 567 to 569 pertaining to Panyam Cements and Mineral Industries Ltd. The affidavit of Mr. Aggarwal, General Manager of Dalmia Cement (Bharat) Ltd., has extracted these working analysis of the three units aforesaid:

India Cements Ltd.

The factory is at Sankarnagar, Talaiyuthu Railway Station near Tirunelveli Town, with a capacity of 500,000 tonnes per annum. The Company's second unit, set up at Sankaridrug, Salem District, has a capacity of 4 lakhs tonnes.

In July, 1969...2,800,000 Equity shares of Rs. 5 each were issued to holders as on 12th August, 1969, 33 bonus in the proportion of two bonus shares for every five equity shares held, increasing the subscribed and paid-up capital to Rs. 5,23,35,000.

Analysis of Working

1961

1969

Rs.

Rs.

Capital: Preference

33,35,000

33,25,000

Equity

...

2,24,44,750

3,50,00,000

Reserves

...

68,72,350

3,98,33,827

Cement Production (Tons)

...

4,64,295

9,67,716

Net Profit

...

33,26,882

72,73,177

Dividends per cent per annum

...

12

9

Madras Cements Ltd.

1961

1969

Rs.

Rs.

Capital:Preference

25,22,050

29,99,061

Equity

...

79,81,112

89,65,999

Reserves

...

...

62,87,719

Cement Production (Tons)

...

22,146

1,81,300

Net Profit

...

9,84,52?

14,11,808

Dividend per cent per annum

...

Nil

10

Panyam Cements and Minerals Industries Limited.

The expansion programme has been completed and the kiln is now under trial runs. The capacity of the factory will be 1,100 tonnes a day.

Analysis of Working.

1961

1969

Rs.

Rs.

Capital:Preference

...

13,64,000

49,99,900

Equity

...

39,70,300

1,22,87,225

Reserves

...

12,54,388

59,76,162

Cement Sales (Rupees)

...

65,07,819

1,92,70,486

Net Profit

...

11,78,934

13,88,262

Dividend per cent per annum

...

Nil

12

87. Regarding Panyam Cements, it will also be relevant to extract the following information, printed at page 569 of the Stock Exchange Official Year Book

1969-1970.

In March, 1967, 15,000 Equity shares of Rs. 100 each were subscribed for by Directors and their friends, increasing the Subscribed and Paid-up Capital to Rs. 1,14,86,000.

In July, 1967, 35,000 Equity shares of Rs. 100 each and 25,000 Preference shares of Rs. 100 each were issued to the public reclassifying 25,000 Equity shares as ".D" Preference shares to finance a part of its expansion programme. With this, the issued and subscribed capital now stands at Rs. 1,74,60,600 less calls in arrears.

The Company manufactures Portland Cement only. The factory is at Cement Nagar near Bugganipalli Railway Station, Kurnool District (A.P.). The expansion programme has been completed and the kiln is now under trial runs. The capacity of the factory will be 1,100 tonnes a day.

88. The following information concerning India Cements at page 560 of the Stock Exchange Book may also be extracted:

The Company proposes to expand its rated capacity by an additional 6 lakhs tonnes per annum. The Schedule envisages installation of three plants. The first plant, installed at Shankarnagar, has gone into production in March, 1969.

89. Mr. V. K. Thiruvengkatachari, contended that in the face of this rosy and prosperous picture of the Units, as reflected in the Stock Exchange Year Book, it will be simply futile and impossible for the concerned Units to make out that they are prejudicially affected by the Amendment Order. His argument is that if the analysis of the working of the concerned Units were to be taken for the entire period, it would show a steady progress and flourishing improvement from stage to stage, demonstrably proving that they are carrying on business on sound economic basis that they can no longer claim to be high-cost Units and that the situation visualised in the resolution of the Government had been materialised. His further contention is that the particulars mentioned above easily establish that the units have reached satisfactory economic levels and that they would be able to operate within a uniform price and that they have made every endeavour to reduce the cost of production. In other words, the infancy period is long over and there will be no need for continuing the three-tier system. Mr. V. K. Thiruvengkatachari therefore urged, and in our opinion quite rightly, that that was the reason why paragraph 10 of the affidavit of the writ petitioners was bereft of particulars, and the main complaint that was put forth was only a case of discrimination in favour of the low-cost Units and not a complaint that the writ petitioners have been prejudicially affected.

90. Mr. V.P. Raman, learned Counsel for the writ petitioners, objected to the introduction of these aspects at the appellate stage before us and submitted that the arguments of the interveners should be confined to the point stressed before Ismail, J., and no fresh matters could be introduced. Counsel urged that in the

case before the Rajasthan High Court, the writ petitioner therein relied upon the information and the analysis of the working found in the Stock Exchange Year Book, but the Government objected on the ground that it was not relevant and has no bearing on the point arising for decision.

91. Mr. Neelakantan, Secretary, of India Cements Ltd. has filed a counter-affidavit objecting to the particulars furnished in the affidavit of Mr. Aggarwal, the General Manager of Dalmia Cement (Bharat) Ltd.

92. We are totally unimpressed with Mr. Raman's argument as it fails to take note of the limited purpose for which Mr. V. K. Thiruvengkatachari referred to the analysis furnished in the Stock Exchange Year Book. In the first place, it is legitimate to presume that the authorities of the Government concerned would be perusing this Stock Exchange Official Year Book, year after year, as it furnishes very valuable information in respect of all the industries and essential commodities covered by the Act of 1951 and the Act of 1955. We have already observed that it was the obvious duty of the writ petitioners to have furnished a statement with all the particulars of the analysis of working of the concerned Units for a period of at least five years. The publishers of the Stock Exchange Year Book must have obtained all the information from the concerned Units and published the same with their authority. That apart the argument of V.K. Thiruvengkatachari is not that the aforesaid information should be received as absolutely correct and acted upon by this Court. His limited argument is, if the petitioners had set out the particulars as they are bound to, as to the financial repercussions in the business which the writ petitioners were carrying on, there would have been an opportunity to mention the rival points of view leading to the inference that the writ petitioners have flourished in their business and have reached a level of economic sufficiency. He urges that these informations have been withheld and totally ignored in the affidavits filed by the writ petitioners, for the obvious reason that if the financial implications were to be referred to, they would be against the case of the writ petitioners. We are clearly of the view that the information furnished in the Stock Exchange Year Book will be relevant and it will be simply meaningless and unrealistic to dispose of this proceeding, completely ignoring the information furnished in the Stock Exchange Year Book. It is significant to notice that in the counter-affidavit of the Secretary for India Cements, it is not stated that the information furnished in the Stock Exchange Book is inaccurate or opposed to facts. The only stand taken is that the information furnished is inconclusive and not relevant for determining the ex-factory price. We see no force in this contention. A working analysis with crucial details furnished in the Stock Exchange Year Book will be very useful and relevant to determine whether the concerned Companies are working on sound economic basis and whether they have reached the stage of self-sufficiency. In this context, we are unable to understand how the inter-veners can be prevented from satisfying this Court that the writ petitioners have, with a purpose omitted to set forth these facts in their affidavits. What Dalmia Cement (Bharat) Ltd., is doing by filing the affidavit containing reference to the Stock Exchange Book is to

bring home to this Court their complaint that the writ petitioners have withheld relevant useful information, is not baseless but is a genuine complaint. The Government was defending the three-tier system in the Rajasthan High Court and in that context the Government objected to the reception of information furnished in the Stock Exchange Year Book. The purpose for which the information is now introduced is totally different. Further, the fact that the Government objected to the litigation in the Rajasthan High Court relying upon the book, cannot operate as a bar or estoppel as against the interveners so long as they make out that it is useful information.

93. For all these reasons, we have no hesitation in holding that the petitions are liable to be dismissed in limine on the ground that they do not disclose any cause of action.

94. We shall next consider the process involved when the Government fixes a fair price u/s 18-G. What the Government (does) u/s 18-G is to secure equitable distribution and availability of any article mentioned in the Schedule at fair prices and also provide for regulating the supply and distribution thereof. The price must be fair, it must be to secure the equitable supply, regulation and distribution. It must be fair from the point of view of the consumer and it must be fair from the point of the producer. The price fixed must be such that it should provide a proper base for a competitive enterprise in the larger interest of consuming public and in the overall interest of the economy of the country as a whole. The problem whether a uniform or differential prices should be fixed, depends, upon a consideration of various aspects, sometimes, one offsets against another and ultimately depends upon the nature of the industry and the type of the product. It is interesting to extract the following passage from " price fixation in Indian industries ", a study prepared in collaboration with the Institute of Chartered Accountants of India and published by the Indian Merchants' Chamber, Economic Research and Training Foundation, Bombay:

A large number of issues arise in the Business of price fixation on which no unanimous or even near unanimous decision can be taken. Accountants differ with the economists and the politician may ignore both of them. It would not be an exaggeration to say:

Perhaps in no area of economic inquiry is there so wide a gap " between theoretical and empirical work as in the field which has long been considered the core of economic analysis--the formation of price.

95. One thing, however, is clear, the efficient and economic management is a necessary pre-requisite for carrying on business operations yielding profits. The price fixed should not be so low as to be confiscatory or so high as to be oppressive. See observations in *The Union of India (UOI) and Another Vs. S. Narayana Iyer, ,.* In determining " What is a fair price "? , the scope for elimination of or minimising the range of competition will have to be taken, into account, because if there is monopoly or if competition is reduced, the price has

to be fixed at a particular level, since the consumer is deprived of the benefits of competition. The price should be reasonable and should never be extra extortionate or oppressive. The licensing system should not be used to freeze (fleece?) the consumer served by the industry. These are some of the aspects which will have to be borne in mind in determining the vires of a price fixation u/s 18-G. In a controlled or licensed industry, the industrialist gets a licence and he or his group of industries who have secured the licence, alone can do business in that industry manufacture and sell. The producer cannot have the benefits of a monopoly of a licence or permit system and at the same time complain about the disadvantages flowing from a fixation of a price for the industry as a whole. What the Government does in fixing a price is a "fair price" for the industry as a whole and not a price for the individual producer. The section does not talk of a fair price either for the producer or for the consumer. Fair price in the section is in separately linked up with the idea of securing equitable distribution and regulation of supply; this necessarily carries with it a conception of fair price from the point of view of the consumer; how can it be said that any system would secure the equitable distribution and regulation of supply unless it is fair price to the consumer. The price fixation is for securing the availability of the commodity by avoiding unhealthy competition and its evil effects. A fair price from the point of view of the producer alone cannot achieve equitable distribution and regulation of supply. It will be a misreading of the section and defeating the very purpose of the provisions especially Section 18-G, which was introduced in the year 1953, if outweighing importance is attached to the producer. The points of view of the consumer are as vital and important as those of the producers. If the Legislature or the delegated authority therefore takes the relevant factors into account, nicely balancing the interests of the producer and the consumer, fixes a price and also secures an equitable distribution, it is not for the Court to question the wisdom or the prudence of any particular price system involved; because no system can claim to be so perfect in every respect. The best that could be achieved is a rational intelligent fixation of a price. If that is done, the fact that it affects certain producers or it affects certain consumers, is not by itself sufficient to declare the price fixation as ultra vires and in contravention of Section 18-G. The jurisdiction of the Court can be invoked only if irrelevant and extraneous factors are taken into account and relevant factors are ignored or overlooked. Courts are not authorised to revise and change the price fixed by the Legislature. Courts do not determine whether one price is preferable to another or what, under all circumstances would be fair and reasonable as between the consumer and the producer. Courts do not engage in any administrative work, nor do they do any cost accounting. Vide observations of Justice Brewer. 154 U.S. 361 .

96. In this connection, the decision, in *Nebbia v. People of State of New York* 291 U.S. 502, may be referred to, in which the Milk Control Board's order fixing milk prices was questioned. While upholding the order, it was observed that the State has got ample powers for adopting any economic policies reasonably deemed to

promote public welfare and Courts are not authorised to deal with the wisdom of the legislative policy on the adequacy or practicability of enactments seeking to curb unrestrained and harmful competition, and that the Courts are both incompetent and unauthorised to deal with such problems; and this rule was applied especially where there is no economic mal-adjustment of prices threatening to harm the producer at the one end and the consumer at the other. The learned Judge also observed that the Constitution does not secure any liberty to anyone to conduct his business in such fashion as to inflict injury on the public at large and that price control would be unconstitutional only if it is arbitrary or demonstrably irrelevant to the policy of the Legislature. (Vide observations at pages 537, 538 and 539).

97. We may also refer to the decision in *Olsen v. Nebraska* 313 U.S. 216, in which the vires of a statute limiting the amount of the fee which may be charged by private employment agencies, to ten per cent, of the first month's salary or wages of the persons for whom employment was obtained, was upheld. The argument was that it was for the Government to prove special circumstances to support the validity of such legislation like price-fixation and that the circumstances and conditions have not been proved by the Government as to compel the Legislature to enact the laws and thus avert public injury. This argument was not accepted. It was held that the Court was not concerned with the wisdom, need or appropriateness of the legislation. Differences of opinion on that score ought to be left to be solved by the Legislature and not by the Court and there is no necessity for the Government to demonstrate before the Court that evils persist calling for legislation.

98. We shall at a later stage consider some of the components making up the ex-factory prices of the manufacturer and f.o.r. price payable by the buyer. It is relevant to refer to one important aspect bearing upon the uniform freight collected from the purchasers. It is familiar knowledge that Cement is produced in large surplus quantities in the southern region. The northern area is in deficit and it is supplied from the units in the southern region. The actual freight which the consumers in the southern area may have to pay when they get their supplies from the units in the south will never be more than Rs. 16 per tonne, within a radius of 300 miles from the factories concerned. (For this information, vide page 115 of *The Hindu Survey of Indian Industry*, 1969). Having regard to the location of the units in the southern region, it is clear that no consumer will be obliged to pay more than Rs. 16 per tonne, towards freight. But, in order to secure equitable distribution for the consumers in the northern region and in order to secure the equitable distribution at fair price and to regulate the supply and distribution, the Government have throughout been fixing a uniform freight, no doubt a heavy burden upon the consumers in the southern region. Indeed, it is one of the grave problems which confront the Government in fixing a uniform f.o.r. price.

99. In the instant case, the difference between Rs. 16 and Rs. 25-48 is very

considerable and it will be a matter calling for careful scrutiny if a consumer in the south were to question the rationale underlying this fixation of a uniform f.o.r. price. If the case of consumers in the southern region were to be considered from their points of view alone dissociated from the consumers in the northern region it cannot be said that the grievance of the consumers of the southern region is not ill-founded and that the additional Rs. 10 in the f.o.r. price is a serious burden to make the price not a fair price. The producers in the south may well object that it is not fair and equitable distribution to call upon them to pay an extra sum of Rs. 10 which is obviously a heavy burden. For the individual consumed in the south, maintenance and the working of a central pool system, the supply of cement to the consumers in the northern region, are all matters of no concern. But yet the Government has taken this extra burden of Rs. 10 and fixed the uniform f.o.r. price fixing the uniform freight at Rs. 25-48. The right to complain, of course, within permissible limits against the fixation of price is available to the producer as well as the consumer though cases of consumers complaining will be few. See for instance the decision in *Sri Venkata Seetaramanjaneya Rice and Oil Mills and Others Vs. State of Andhra Pradesh etc.*, in which a consumer questioned the act of the Government exercising its power under the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act XXIX of 1949, when the tariff rates for the supply of electrical energy were increased. It is true that the High Court of Delhi had held that the fixation of uniform f.o.r. price is not unconstitutional. Even if it should be finally held that the uniform f.o.r. price is constitutionally valid, The Government in fixing the price will necessarily take that into account and consider whether any additional burden can be imposed upon the consumers. The Government and the producer, they alone together cannot agree to fix a price, the object being only to secure price suitable to the producer ignoring altogether the fact that in "that process an unreasonable and heavy burden would-be imposed upon the consumer. As observed earlier, the Government cannot maintain a permit or licencing system, something in the pattern of a monopoly and secure all advantages, all one-sided for the producer on the" theory that whenever the Government controls the production and distribution it can do so only at fair prices for the producers. "Fair prices in the context u/s 18-G, is a price for the Industry bearing in mind the economy of the country and the fair price from the point of view of the consumer.

100. We may refer to the relevant decisions in which when the Legislature or the Government, as the delegated authority, introduced a regulatory regulation to attain the principal objective of a welfare State to improve production and equitable distribution. To develop the national economy and progress Courts have upheld the concerned regulation even though it might have worked hardship upon certain individuals so long as the resolution was good for the class as a whole and effectuated the object and purpose underlying the scheme. The test applied is, the general effect of the, regulation as a whole, as distinguished from the individual prejudice or loss.

101. In *Bijay Cotton Mills Ltd. Vs. The State of Ajmer*, , the vires of certain provisions of the Minimum Wages Act of 1948, were questioned under Article 19 of the Constitution. The argument was that the provisions of the Act would affect harshly and even oppressively, a particular class of employers, who, for purely economic reasons, would be unable to pay the minimum wages fixed by the authorities without any bad intention to exploit the labourers.

102. This argument was rejected in these terms:

We could not really appreciate the argument of Mr. Seervai that the provisions of the Act are bound to affect harshly and even oppressively a particular class of employers who for purely economic reasons are unable to pay the minimum wages fixed by the authorities but have absolutely no dishonest intention of exploiting their labourers. If it is in the interest of the general public that the labourers should be secured adequate living wages, the intentions of the employers whether good or bad are really irrelevant. Individual employers might find it difficult to carry on the business on the basis of the minimum wages fixed under the Act but this must be due entirely to the economic conditions of these particular employers. That cannot be a reason for striking down the law itself as unreasonable.

103. In the decision in *Diwan Sugar and General Mills (Private) Ltd. and Others Vs. The Union of India*, , the Sugar (Control) Order issued by the Government under the Essential Commodities Act of 1955, which was questioned related to the factories in the three States of Punjab, Uttar Pradesh and North Bihar. One of the contentions was that the price fixed would work hardship and would result in a loss. This argument was not accepted. The Supreme Court took the view that the prices which were prevalent in the free market were taken into account for fixing a fair margin of profit to producer though in the case of an individual factory due to factors for which the producer himself might be responsible, the cost of production might have been a little more. From this decision, it is clear that if the regulatory measure of a price control is a fair price for the entire group or class dealt with, an individual member cannot complain that it would work loss or hardship to him.

104. Reference may next be made to the decision of the Supreme Court in *Union of India (UOI) and Others and State of Delhi (Now Delhi Administration) and Others Vs. BhanaMal GulzariMal Ltd. and Others*, , in which the vires of the Iron and Steel (Control of Production and Distribution) Order of 1941, was questioned, it was contended that the price of Rs. 333 per ton of steel fixed for the writ petitioners was not a fair price and would cause loss. This argument was rejected for two independent reasons-- (both relevant for the instant case). The writ petitioners therein had not placed sufficient materials in support of this complaint and therefore no relief could be given. The other ground on which relief was refused is that in considering the question of fixation of fair price it would not be enough to show that a particular group of registered stockholders suffered loss. What should be proved in such a case is the general effect of an

impugned notification on all classes of dealers taken as a whole. The Supreme Court observed as follows at page 482:

Besides, in considering the validity of the notification, it would not be enough to show that a particular registered stockholder suffered loss in respect of particular transactions. What will have to be proved in such a case is the general effect of the impugned notification on all the classes of dealers taken as a whole. If it is shown that in a large majority of cases, if not all, the impugned notification would adversely affect the fundamental right of the dealers guaranteed under Article 19(1)(f) and (g) that may constitute a serious infirmity in the validity of the notification. In the present proceedings no case has been made out on this ground and so we cannot embark upon an enquiry of that type in appeal.

105. It is important to bear in mind that this decision was rendered in connection with the vires of the order of a delegated authority exercising powers u/s 3 and 4 of the Essential Supplies (Temporary Powers) Act of 1946, dealing with the fixation of a fair and/or a minimum price. After this clear pronouncement, it is clear that the vires of the regulation has to be determined with reference to its general effect upon the entire class of persons or group of companies dealt with by the control order.

106. We may next refer to another decision of the Supreme Court reported in *U. Unichoyi and Others Vs. The State of Kerala*, in which the same principle was enunciated when the vires of the provisions of the Minimum Wages Act, was questioned, the Supreme Court laying down the very same principles as in the case of *Bijay Cotton Mills Ltd. Vs. The State of Ajmer*, the decision already referred to. The principle which clearly emerges from the above discussion is that individual loss and individual hardship or the inability of individual units to meet the burden is not of relevance and it is the effect of the legislation or the control order upon the class as a whole, which has a vital bearing upon the vires of the provision.

107. In a Bench decision of the Patna High Court in *Naurang Rai Chirangi Lal Vs. The State of Bihar and Another*, the vires of the Bihar Milled Rice Price Control Order of 1958, issued u/s 3 of the Essential Commodities Act of 1955, was questioned. The argument on behalf of the dealer was that the maximum control price has been fixed in the sum of Rs. 16 per maund while he actually purchased at prices varying between Rs. 17-12-0 and Rs. 28, and the price fixed was therefore contrary to Section 3 of the Act of 1955. This argument was rejected on two grounds. Firstly, the petitioner had not given particulars nor had he established that he suffered, loss as a result of the control order. Secondly, it was held that the power to control sell and distribute and the power to fix a price obviously included the power to fix a uniform price and that the mere fact that in consequence of the fixation of a uniform price, some loss may fall upon an individual trader, would not amount to contravening Section 3 of the Act. It was also observed that the interests of the petitioner may suffer to some extent, but the provision of the control order fixing the price were enacted in the interests of

the general public and those provisions cannot be struck down as ultra vires merely because the petitioner may suffer some loss. The Bench referred to and followed the principle of the decision of the Supreme Court in *Bijay Cotton Mills Ltd. Vs. The State of Ajmer*, referred to earlier. It was also pointed out that in deciding the reasonableness of the provision, the Court must consider the nature and extent of the restriction, the manner in which the restrictions were imposed, the underlying purpose of the restrictions, as well as the extent and urgency of the evil sought to be remedied and that the point has to be decided on a consideration of balancing conflicting interests, of reconciling individual rights and the social welfare of the public in general, and that the Constitution does not secure to any one the liberty to conduct his business in such a fashion as to inflict injury upon the public at large¹. It is hardly necessary to emphasise that both the Acts of 1951 and 1955, have been enacted in the interests of the general public to improve the social economy and welfare of the country and that the predominant object is brought out and manifested by the use of the expression "secure the equitable distribution and regulating supply".

108. In this connection we may also refer to the decision of the Supreme Court in *Maharashtra State Electricity Board v. Kalyan Municipality* (1969) 1 S.C.J. 38 : AIR 1968 S.C. 99, which dealt with the vires of the fixation of tariff by the Board. The argument that a uniform tariff would work hardship and ought not to have been levied was not accepted. It was observed that when a uniform tariff is fixed, there cannot be any complaint of undue preference of one firm over other groups. (Vide observations at pages 991 and 992). This rule that no complaint of a preference can be made in the case of a provision of an Act, fixing a uniform rate will equally apply to a similar provision in the control order issued by the Government in exercise of the powers of delegation.

109. A principle to the same effect was laid down by the Supreme Court in *Narendra Kumar and Others Vs. The Union of India (UOI) and Others*, in which some of the provisions of non-ferrous Metal Control Order of 1958, were questioned. In order to secure raw material (non-ferrous) at reasonable rates, the Government issued an order that no person shall sell or purchase any non-ferrous material at a price exceeding 31/2 per cent, of its landed cost. The complaint was that this price was wholly uneconomical for the middlemen and therefore not a fair price within the meaning of Section 3 of the Essential Commodities Act of 1955. The Supreme Court rejected this argument in the view that fixation of price was essential to keep prices within reasonable limits and that social control required to keep the middleman's activities to the minimum and that even though this price fixation may mean some trouble and inconvenience, without sufficient return, the price fixation cannot be struck down. From this decision it clearly emerges that if the control order otherwise is a valid beneficial legislation "redounding to the benefit of the general public" it cannot be struck down for the reason, that for a section of the business community (middlemen) it would be uneconomical and unprofitable to carry on business at the rate fixed.

110. We shall now analyse the price structure from 1961 to show that the complaint of the writ petitioners is a complaint in the abstract based upon a doctrinaire approach resting upon mere arithmetical calculation and totally divorced from the realities of the situation.

111. In 1961, the Government declared in no unmistakable terms that their policy is fixation of a uniform price. The Government deviated from the recommendations of the Tariff Commission on two essential aspects, firstly "the Government being of the considered view that ten different retention prices based upon individual costs of individual units is not conducive to efficiency and greater production and that there should be a uniform price for the industry as a whole." Secondly, the Government did not accept the recommendations of the Tariff Commission about the ex-factory prices. The Government considerably deviated from the recommendations of the Tariff Commission. The Commission recommended four grades of returns for the four groups of units on the capital employed by them (vide) 43 of its report):

(a) the return on capital employed should be allowed at 14 per cent, in the case of the following units in the lowest cost group, namely, Dalmia, Bharat, A.C.C., Andhra Cements, Dalmia Dadri and Orissa;

(b) the return on capital employed should be allowed at 12 per cent, in the case of the following units, namely, K.C.P., Rohtas, Bagalkot, Jaipur, Udyog, India Cements, Mysore Iron and Steel Works, Ashoka, Kalyanpur, Sone Valley and Digvijay;

(c) the return on capital employed should be allowed at 10 per cent, in the case of Satna, Panyam and Travancore Cements; and

(d) the return on capital employed should be 3 per cent, in the case of U.P. Government Cement Factory.

112. The Commission accepted the principle that high costs units or new units which enjoyed extra tax concessions, should not expect returns on the same scale as low-cost established units. The following is the recommendation and grouping of the units by the Tariff Commission (vide page 52 of its report):

Rupee per tonne

Rs.

P.

1.

Dalmia Bharat

?

67

50

2.

Andhra, Orissa and Rohtas

?

73

00

3.

A.G.C., K.C.P. and Mysore Iron

?

73

50

4.

Dalmia Dadri, Bagalket, U.P. Government Factory and Jaipur

Udyog

?

75

00

5.

Ashoka

?

75

50

6.

India Cements

?

76

50

7.

Satna

?

77

50

8.

Kalyanpur, Sonc Valley and Digvijay

?

79

00

9.

Panyam

?

79

50

10.

Travancore

?

103

00

113. The Government, however, did a price very much lower, (except Dalmia not accept this price structure but fixed cement as detailed below:

Name of Unit

Percentage of return on the capital invested recommended by the Tariff Commission,

Retention price recommended by the Tariff Commission

Retention price fixed by the Government.

Group-- A.

Per cent.

Rs. P.

Rs. P.

Dalmia Cement

?

14

67 50

69 50

Andhra Cements

?

14

73 00

69 50

Orissa Clements

?

14

73 00

69 50

Rohtas

?

12

73 00

69 50

Mysore Iron

?

12

73 50

69 50

A.C.C.

?

14

73 50

69 50

K.C.P. Ltd.

?

12

73 50

69 50

Dalmia Dadri

?

14

75 00

69 50

Bagalkot

?

12

75 00

69 50

U.P. Factory

?

8

75 00

69 50

Jaipur Udyog

?

12

75 00

69 50

Ashcka

?

12

75 50

69 50

Group -- B.

India Cements

?

12

76 50

72 50

Digvijay

?

12

79 00

72 50

Satna

?

10

77 50

72 50

Kalyanpur

?

12

79 00

72 50

Sone Valley

?

12

79 00

72 50

Group -- C.

Panyam

?

10

79 50

75 00

Saurashtra

?

10

75 00

75 00

Madras

?

10

75 00

75 00

114. A perusal of the above statement shows that the retention prices recommended by the Commission are very much on the high side and do not correctly reflect the real situation. For a large number of units the Government has fixed a retention price of Rs. 69-50 while the Commission recommended a range between Rs. 67-50 and Rs. 75-50. For the second group the Government fixed Rs. 72-50 as the retention price while the recommendation of the Commission ranged between Rs. 76-50 and Rs. 79-00 and for the third group the Government fixed Rs. 75-00 as the retention price while the range recommended by the Commission is between Rs. 75-00 and Rs. 79-50. The Government fixed the price level, lower by Rs. 10 than that recommended by the Tariff Commission. If what is recommended by the Commission is the correct basis how can we say the price fixed by the Government is reasonable or economical? But, the fact remains, that the price formula adopted by the Government was accepted by the industry for a period of two years when the price was next increased by Rs. 2-75 in June 1963. If the price fixed by the Government were extortionate or too low, a large number of units would have closed down their business as they obviously could not work at such great loss. The very fact the Industry functioned for two years, to start with, on the basis of the retention price fixed by the Government shows that that price was a fair and reasonable price taking the industry as a whole. No better proof is necessary to demonstrate that mere arithmetic, multiplication and division, will not afford a safe guide in the solution of a practical problem, the fixation of a reasonable price.

115. In the course of arguments, Mr. M. K. Nambiar and Mr. V.P. Raman, repeatedly stressed, that the uniform price fixed by the Government was not on the cost of production based upon a cost accounting, but it was merely a law of averages having no relation to realities. Learned Counsel urged that the law of averages is hardly appropriate for the fixation of a fair price in an industry like the cement, where admittedly there is wide disparity in the cost of production. We see no substance in this criticism. The grouping by the Government into three

units and the increase in the retention price for all the units from time to time itself involves, to a considerable extent, the application of the law of averages. When, at the first time, the Government fixed Rs. 69-50 for the A Group, it was to a great extent on the basis of the rule of averages resting upon the calculation of the total tonnage of production, the sale proceeds realised, fixing the retention price at Rs. 69-50. This formula adopted by the Government was accepted by the industry which proves that the rule is not unreasonable or extraordinary or perverse. If the formula was not acceptable to the industry as a whole, there would have been an immediate protest (insisting upon ten different retention prices) that the disparity in the cost of production was such that there cannot be a three-tier system, but there should be ten retention prices. We are clear in our mind that even to start with in 1961, one of the important elements which contributed in the grouping of the units and the introduction of the three-tier system is the rule of averages. This again was not in the abstract but based upon the realities of the situation. When there was an increase of Rs. 2-75 on 1st June, 1963, Rs. 1-25 on 1st July, 1964, and Rs. 4-00 on 1st June, 1965, there was no scrutiny, no materials were placed before the Government and there is neither pleading nor proof that there was any periodical scrutiny or cost accounting investigation. The industry was asking for a price increase and the Government sanctioned those increases actuated by mixed motives : (a) a measure of good-will and mutual understanding between the industry on the one side and the Government on the other; (b) the Government also being satisfied that the industry deserved some increase. This is far from saying that there was scrutiny or investigation with regard to the cost of production, the margin of profit, the return for capital invested, etc., and that the Government took the view that all the industries deserved a uniform increase of Rs. 2-75, Rs. 1-25 or Rs. 4-00, without any difference between one unit and another unit. The averment in the affidavit and the submission of the Counsel for the writ petitioners that this general increase meant a uniform increase in the cost of production for all the units is wrong. In the nature of things, it cannot possibly be correct. If an increase is given solely referable to the increase in the cost of production and not for any other reason, the increase cannot be uniform for all the units because of the wide disparity in the cost of production and because of the fact that the Government itself has maintained a three-tier system. What we mean is, when Rs. 2-75 increase is sanctioned by the Government on 1st June, 1963, it must be either the starting of the slab for A Group; and for B and G Groups there should be corresponding increase in the proportion of Rs. 69-50, Rs. 72-50 and Rs. 75-00 i.e., Rs. 2-75 plus X, or Rs. 2-75 plus Y; or if the slab is from Group G, the increase must have been Rs. 2-75-Y and Rs. 2-75 -X. The same thing would have been the case when other increases were sanctioned. When the ex-factory price has been fixed following a three-tier system, we find it difficult to conceive one uniform increase for all the units as referable to the increase in the cost of production. We have endeavoured to show that Rs. 2-75 is a general increase actuated by several considerations.

116. The position becomes clear beyond doubt when the increase of Rs. 13 was given on 1st January, 1966. As to how the sum of Rs. 13 is made up of is explained in paragraph 5 of the affidavit as follows:

Rs.

P.

(1)

Provision for increase in the cost of production

...

2

70

(2)

Interest in I. D. B. I. Loans.

...

1

30

(3)

Provision for taxation

...

3

15

(4)

Bonus

...

2

00

(5)

Provision for expansion

...

3

85

Total

...

13

00

117. Producers were required to credit to what was known as the Cement Expansion Reserve Account at the rate of Rs. 4 per tonne, consequent upon the aforesaid increase in prices.

118. It is important to notice that Rs. 2-70 alone had been given as increase in the cost of production. The other items have been sanctioned by the Government for other reasons--to improve the financial stability, the resources of the individual units, on a long range policy for the benefit of the Industry as a whole. It is again important to notice that all the other four items making up the total of Rs. 13 are the same for all the units, though in the nature of things it cannot be uniform. Interest on the loans, provision for taxation, bonus, provision for expansion are fluctuating and varying for individual units, even assuming that they have some bearing upon the fixation of the cost of production. We have to make the same comment again either in respect of each one of the five items or the total allowance of Rs. 13 that the increase cannot be uniform for all the units when the three-tier system was in force. If the entire sum of Rs. 13 is regarded as an increase in the cost of production, the Government must have given the increase on the same basis mentioned above, Rs. 13 plus X, Rs. 13 plus T or Rs. 13 - and Rs. 13 -X. We cannot conceive how all these items making up a total of RE. 13 can have the same uniform effect in the price equilibrium for all the units so as to warrant one uniform increase of Rs. 13 totally at variance with the principle underlying the three-tier system. We have endeavoured to show that when an increase of Rs. 13 was given, some portion of it only represented the cost of production and the other portion was given for other reasons concerning the industry as a whole.

119. In the Cement Control Order of 1967 the Government merely maintained the three prices of Rs. 99-50, Rs. 93-50 and Rs. 96-00, which was in vogue till January, 1966. Even when the Government gave effect to this price by issuing the Cement Control Order, there was no scrutiny, there was no investigation of cost accounting. The same thing happened in April, 1969 when the Government abolished the three-tier system and fixed the uniform price of Rs. 100. In paragraph 8 of the affidavit it is stated that the provisions of the Cement Control Order of 1967 were working generally to the satisfaction of both the Industry and the consumers due to the fixation of realistic retention prices. This is an admission that till April, 1969, the prices fixed were reasonable, which mean that the return or the profit was satisfactory to the respective units and the industry as a whole. It is in this contest of this admission that the complaint of the writ petitioners that the uniform retention price of Rs. 100 is inadequate requires to be investigated. From the affidavit it is seen that the writ petitioners accept that

if the uniform price had been fixed in the sum of Rs. 103 (Rs. 96 plus 7) for all the units, it would have been a fair price, but the only complaint is that the price was fixed by Rs. 3 less i.e., at Rs. 100 per ton. We are not inclined to accept this argument as the problem cannot be solved by mere arithmetic additions and subtractions. It is absolutely necessary to know how the price structure of Rs. 90-50, Rs. 93-50 and Rs. 96 was working with respect to the units in three groups till April, 1969. That can be done only with reference to facts and figures and on a scrutiny of the various elements like the price of raw materials, power and fuel, labour and establishment, repairs and stores, depreciation, overhead, packing, etc. etc. On their own showing the complaint of the writ petitioners gets narrowed down to this, whether anything less than Rs. 103 for the units in the G Group is a fair price, because the price of Rs. 100 is Rs. 2-50 more than Rs. 97-50 in the units of Group A and in the case of units of Group B, the difference is very small, only 50 nP. In other words, we have to focus our attention on the narrow question whether anything less than Rs. 103 per ton for the units in the G Group is not a price, i.e., Rs. 103 would be the barest minimum. Obviously, the answer to this problem can be arrived at only by finding out how the units in the G Groups were working throughout the period and in particular with Rs. 96 as the ex-factory price till April, 1969 and how they would be affected if the entire sum of Rs. 7 is not added but only Rs. 100 is fixed. Let us assume that in the first week of April, 1969 the units in the G Group would be getting X per cent, profits based upon the capital invested and other relevant considerations. When there is an increase in the cost of production by Rs. 7 due to governmental action and the price is not increased to Rs. 103 but only to Rs. 100, the disallowance of Rs. 3 may have one or two consequences. The percentage of profits would be reduced or the concerned units would be compelled to work at a loss. In other words, the percentage of profit would be not X per cent but X-Y per cent, or no profits at all and the units may be incurring a loss of "Z" lakhs of rupees. A mere reduction in the percentage of profits from X per cent, to X-T per cent, by itself would not be sufficient to hold that the price of Rs. 100 fixed per tonne is not economic.

120. We must know the actual percentage of profits which the concerned units were already making and by how much it would be reduced by not fixing the price level in the sum of Rs. 103, It may be that even after reduction of the profit from X per cent, to X-T per cent, the margin left would be such as to leave a good margin and make the price still a fair price. The situation may pose a problem only if, on this calculation the units in the G Group derived no profits and are compelled to work at a loss. Even there, the percentage of loss must be known, because if it is insignificant it may not be of much consequence. It may well be, that if such a scrutiny is made, it would establish that the concerned units had been steadily flourishing and in a prosperous condition and the units had expanded their business activities and their production capacity and the price of Rs. 100 would not only not result in any loss but maintain the profit level so as to make the price a fair price. We have no hesitation in accepting the

argument of the learned Advocate-General that without a careful scrutiny and analysis of the details with facts and figures, it is impossible to predicate, resting upon mere logic and arithmetical calculation in the abstract that anything less than Rs. 103 would not be a fair price. Mere logic, cannot solve the complex problem of a price fixation which involves a balancing of several conflicting aspects, one offsetting against another. The ready assumption, that the increase given every time, represented a uniform increase in the cost of production, for all the units alike, is clearly wrong when the three-tier system itself was introduced as a temporary measure based upon the disparity in the cost of production amongst the various units.

121. To reiterate, if increase of price was given from time to time solely referable to the cost of production, every time the increase must have been in the same ratio as 69-50, Rs. 72-50, Rs. 75-00. Without a further investigation, with facts and figures, how can it be predicated that in April, 1969 the prevailing price of Rs. 96 per ton, was "the barest minimum at the breaking point, in the sense, that addition of anything, less than Rs. 7 (representing the increase in the cost of production due to governmental action) would result in fixing a price which is wholly uneconomic in the business sense of the term. There is absolutely no warrant for making that violent assumption, At this stage, reference must be made to the letter dated 5th October, 1968, of the Cement Manufacturers' Association to the Honourable Minister for Industrial Development and Company Affairs (vide paragraph 7 (i)) of the letter in which the Industry have clearly admitted that "Whether these units (meaning the high cost units) have reached a stage when they will be able to manage with a retention price lower than Rs. 96 per ton can only be determined by a complete cost investigation by competent authority". Further, any such theory is completely exposed by the categorical admission in paragraph 8 of the affidavit that the price structure fixed under the order of 1967 was working satisfactorily till the Amendment Order.

122. We have so far discussed the matter on the footing that the periodical increase not referable solely to the increase in the cost of production. Even if it should be held that the periodical increase given from time to time was exclusively referable to the increase in the cost of production, our conclusion will be the same. Here again, without even an averment in the affidavit and without furnishing particulars by facts and figures how can it be said that the uniform price of Rs. 100 is extortionate and highly uneconomic price having no connection with the actual realities, thus contravening Section 18-G.

123. To sum up, these are the aspects which will have to be taken into account in finding whether the Government had acted in contravention of Section 18-G.

(a) 75 per cent, of the units some of whom were also in the group of Rs. 96 accept this as a fair price. This is ample evidence and abundant proof that the price fixed is a fair price for the industry as a whole.

(b) Within a short period of 8 years, from 1961 to 1969, there has been an

increase of Rs. 31 in the retention price with corresponding increase in the F. O. R. price and as a result of the Amendment Order of 1969 the F. O. R. price has now been fixed at Rs. 139-13 by an additional burden of Rs. 3-60 on the consumer. We have already adverted to the fact that in fixing a uniform F. O. R. price, the consumers in the southern region a considerable section are paying a sum of Rs. 10 more towards freight as an extra burden because of the fixation of the uniform F. O. R. price. This aspect must be borne in mind as to how far any further increase can be borne by the consumer. The Government has decided to abandon the three-tier system and to give effect to the policy of uniform price which they have already declared in unmistakable terms in 1961 as the most desirable and ideal formula. This policy is not something now resolved upon for the first time. The Government has been of the emphatic opinion that different prices based upon individual cost is not conducive to the efficiency and greater production. This is an important aspect in the social economy and the welfare of the country as a whole. Cement and Steel occupy the first rank of priority in the economy of the country as the most vital essential commodities required in all spheres of activities in a fast developing country like India. If the price of cement is increased without sufficient justification it will adversely affect the cost in all other spheres and as such, is a serious problem, to which the Government has to give very careful and anxious consideration.

124. In a vast majority of cases, the power u/s 18-G of the Act of 1951 or Section 3 of the Act of 1955 had been exercised by fixing a uniform maximum price. It would be simply futile to argue that power to control price would not include a power to fix uniform price in the instant case, both on principle and on facts; the writ petitioners cannot possibly have any grievance in the fixation of uniform prices. There has been a fair amount of responsible criticism on the evils of the fixation of varying ex-works price for individual cement producers. In page 21, paragraph 84, the Tariff Commission has adverted to the substance of this criticism.

(a) Fixation of ex-works price for the individual cement producers brought about a stagnation in the cement industry;

(b) No element of competition amongst the producers to reduce their cost of production or to improve their operative efficiency;

(c) It has engendered a feeling of complacency amongst producers as all costs are likely to be covered and no effort need be put forth to effect economies, improve efficiency and raise output.

(d) A tendency has grown to inflate costs so that in the process of getting them covered further margins of profit may become available. The low costs units are not rewarded for their efficiency and the economy they bring to bear upon their production.

125. The Government has accepted these criticisms. Indeed they have not only accepted but have acted upon this criticism (despite the recommendation of the

Tariff Commission to the contrary) and declared their policy to have a uniform price in the view that individual cost is not conducive to efficiency and greater production--vide paragraphs 4 and 5 of the Government's resolution. This Court cannot obviously sit in judgment over the wisdom or the prudence of the legislative or executive action. What steps should be taken to stabilise the price level is a matter entirely for the Legislature. An ideal free market undoubtedly is the most beneficial one to the general public, but if on account of no cohesion between the demand and supply or on account of the fact that the cost of production has not reached the proper and fair economic level price regulation becomes inevitable. Besides this, the Government is keen about abolishing control as expeditiously as possible. As a matter of fact they decontrolled cement in 1966, but were obliged to reintroduce controls again in 1967 on account of the complaints received. Even so, the Government is still adhering to its policy of progressive decontrol. It is in this context that the Government was advised that stabilising price by fixing uniform price is an important step in the scheme of decontrol. After referring to paragraph 13 of the counter-affidavit of the Central Government where it is stated that the fixation of uniform price is a step towards the Government's declared policy of decontrol, Ismail, J., has stated:

I am of the view that neither of these grounds is either relevant or tenable.

* * * * * Equally the ground in paragraph 13 of the counter-affidavit is totally irrelevant, I am unable to see what the fixation of uniform price has to do with the ultimate decontrol. As a matter of fact, if the ultimate decontrol is the object, there must be a gradual lessening of control and one of the methods by which such gradual lessening of control may be effected or brought about is not to interfere further with the existing arrangement. The only reason given in paragraph 13 of the counter-affidavit is that it was in the interest of ultimate decontrol, the Government fixed a uniform price. I am of the opinion that the ultimate decontrol "has nothing whatever to do with the fixation of uniform price and therefore no relevant consideration or justification has been placed before this Court for bringing about or prescribing the uniform price.

126. With great respect, we are not inclined to agree. In the first place, it is not the province of the Court to canvass the ultimate policy decision of the Government that fixation of uniform price is a step facilitating decontrol. We find it impossible to share the view of the learned judge that the ultimate decontrol has nothing whatever to do in the fixation of uniform price and it is not relevant consideration for prescribing the uniform price" (to quote his own words). Price control, stabilisation of price either by uniform price or price slab, control or maximum and minimum price, control of the price of the consumers, the advantages of control and decontrol are all complicated problems inter-connected on which economists, politicians and the Government authorities have divergent views depending upon the nature and the state of the industry, the demand and supply, the interest of the country, etc. etc. With great respect to Ismail, J., we do not share his view but we are inclined to the view that establishing the price

for a particular period by a uniform fixation of price would enable the industry to carry on the business of manufacture and sale at economic levels, and would also enable the industry to withstand the strain and face the competition, so that, when decontrol is introduced, the industry would have acquired sufficient sustaining force and strength to face the free market. At any rate, we are not prepared with any certainty, to assert that the fixation of uniform price " has nothing whatever to do with decontrol". If on such matters, the Court were to supplant its views in such emphatic terms, the Court would be completely usurping the functions of the Legislature.

127. It will be appropriate at this stage, to refer to two decisions of the Supreme Court of the United States : (i) 335 United States 538, and (2) 338 United States 604. In *American Federation of Labour v. American Sash Co.* 335 U.S. 538, the vires of the Arizona Constitution which provided that no person shall be denied the opportunity to obtain or retain employment because of non-membership in a labour organisation, nor shall the State or any sub-division thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labour organisation, was questioned. Justice Frankfurter, pointed out that most laws dealing with economic and social problems are matters of trial and error, that regulation which before trial appears to be demonstrably bad may belie prophecy in actual operation and that even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. The learned judge gave a note of warning that such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests--the people, (vide observations at page 553).

128. In *Secretary of Agriculture v. Central Roig Refining Co.* 338 U.S. 604, the Secretary of Agriculture acting u/s 205 (a) of the Sugar Act of 1948 made allotments of sugar quotas. The allotments and directions given by the Secretary of Agriculture u/s 205(a) of the Act were questioned as violative of due process clause. That section empowered the Secretary of Agriculture to make sugar quotas in such a manner and in such amounts as to provide a fair, efficient and equitable distribution of the quota by taking into consideration several aspects like marketing ability etc. It was held that it is a valid exercise of the power and did not violate the due process clause. At page 614. Justice Frankfurter delivering the opinion on behalf of the Court observed that the Secretary's judgment cannot be replaced by the opinion of the Court, that it was not for the Court to say that it was baseless for the Secretary to decide that increased marketing during the war years may be taken to mean improved ability to market but decreased marketing's do not justify the opposite conclusion, and it was within his (the Secretary's) province to exclude, from his determination, the processings of sugar to which proportionate shares pertained and it was not right for the Court to reject the balance, which the Secretary struck on a consideration of all the factors. Again at page 617, the learned Judge observed that the final

judgment is apt to be a hodge-podge of considerations including considerations that may well weigh with legislators but which the Court can hardly disentangle and that it is not for the Court to reweigh the relevant factors and substitute its notion of expediency and fairness. The learned judge further observed that the Court is not a tribunal for relief from "the crudities and inequities of complicated experimental economic legislation". At page 619, the learned Judge observed thus:

Plainly it is not the business of judges to sit in judgment on the validity or the significance of such views. The Act may impose hardships here and there; the incidence of hardship may shift in location and intensity. It is not for us to have views on the merits of this legislation. It suffices that we cannot say, as we cannot, that there is discrimination of such an injurious character as to bring into operation the due process clause". *Currin v. Wallace* U.S. 114. Expressions, of dissatisfaction by the Executive and in sonic quarter of Congress that the refined sugar quotas were "arbitrary", "discriminatory" and "unfair" may reflect greater wisdom or greater fairness than the collective wisdom of Congress which put this Act on the statute books. But the issue was thrashed out in Congress; Congress is the place for its reconsideration.

129. We are, therefore, with great respect to Ismail, J., unable to agree with him that fixing of uniform price has no relevance towards taking a policy decision of progressive decontrol. Further we are also of the view that it is not for the Court to substitute its judgment in the place of that of the Legislature or the delegated authority. This aspect apart, having regard to their own stand taken in the correspondence with the Government, the writ petitioners cannot be heard to say that there is any inherent vice in the fixation of the uniform price and that it is in contravention of Section 18-G. The Government's categoriat statement in paragraph 13 of its counter-affidavit that the industry itself was in favour of the uniform price was not controverted by any reply statement. When this aspect was pressed before Ismail, J., on behalf of the Central Government the learned Judge did not attach any value to the argument and stated that the counter-affidavit did not indicate what exactly was the uniform price which the industry was in favour of with respect to the learned Judge we do not think that the fact that the Government did not mention what uniform price, was acceptable to the industry, detracted in any manner, from the crucial point that the industry, on principle, was in favour of a uniform price. It is true there was lot of discussion and negotiation between the cement industry represented by the cement Manufacturers Association on the one side and the Government on the other as to the price level of the uniform price and the Government did not ultimately accept the demand of the industry but even so, the fact remains that, on principle, the industry was undoubtedly agreeable to the introduction of a uniform price. The uniform price may be fixed in a variety of methods but to a substantial extent it is undoubtedly the law of averages. The main base is to take the weighted average, the average of the retention prices which is arrived at by dividing the sale proceeds of the three groups by the total tonnage and add to or

subtract from the average so obtained: For instance, what appears to have been done in this case is as follows:

75.43 Lakh tonnes -- Rs. 90.50 = 6818 lakhs 13.13 " " -- Rs. 93.50 = 1228 "
56.16 " " -- Rs. 96.00 = 5391 " 0.50 " " -- Rs. 113.25 = 57 " _____ Rs. 13494
" _____ 13494 lakhs Rs. ----- Rs. 92.9 per tonne 145.22 lakh
tonnes (round figure) Rs. 93 per tonne

The weighted average of the retention is Rs. 93.

The Government added Rs. 7 representing the increase in the cost of production due to governmental action and fixed the figure in a round sum of Rs. 100 per ton. The weighted average principle is not something which is inherently obnoxious or extortionate so as to be summarily ruled out as perverse, or unreasonable. A perusal of the cases, particularly the recent cases in England under the Restrictive Trade Practices Act of 1956 and the cases in the United States show that the weighted average principle is a quite well-known conception in many industries and resorted to, as a guide for fixing a uniform price. If the industry had accepted this principle, i.e., uniform price formula and communicated its acceptance to the Government, the fact that the industry wanted more but the Government fixed less, will not make the policy declaration of the Government ultra vires contravening Section 18-G.

130. In the course of the arguments, the learned Advocate-General referred to the correspondence between the Cement Manufacturer's Association and the Government, to show that the industry as a whole and the Cement Manufacturers unanimously were agreeable to a uniform price. Indeed, learned Counsel for the writ petitioners, did not controvert that position, though, they too relied upon the same correspondence in support of their contention that the uniform price of Rs. 103 would be the barest minimum. In the letter dated 16th August, 1968, the Association has mentioned that all members are unanimous on the arrangement consisting of five matters of which the third is a uniform price of Rs. 96 per tonne retrospectively from 1st January, 1968. The other portion of the letter mentions the details as to how much should be added to this Rs. 96. The next letter is dated 5th October, 1968 in which in paragraph 3 (item No. 3) it is stated that the money in the Cement Regulation Account may be applied for reaching uniform retention price of Rs. 96 per tonne retrospectively from 1st January, 1968. In paragraphs 5, 6 and 8, the industry has endeavoured to point out that the idea of fixing the uniform retention price at Rs. 93 would not be fair and that the minimum must be Rs. 96. One important point which is mentioned in paragraph 7 which has been adverted to in the preceding discussion is that the question whether the units have reached a stage, when they will be able to manage with a retention price lower than Rs. 96 per tonne can only be determined by a complete cost investigation by a competent authority. In other words, it is clear admission, that without an investigation of the facts and figures, it cannot be postulated that Rs. 96 is the barest minimum and as the breaking point. The other equally important position is at page 8, where, after

discussing various aspects, it is admitted by the Cement Industry as a whole, that there is no scope for reduction in cost, to a level, lower than Rs. 96 assigned to the group of units. In other words, this is a clear admission that there is no change of high cost units reaching economic levels as to reduce the ex-factory price lower than Rs. 96 already fixed for that group. If so much is admitted, it is futile for the industry to argue that the Government is bound to maintain the three-tier system or that there is no proof that the units have not reached the economic level and self-sufficiency.

131. Next in the correspondence, to be referred to, is the telegram sent by the Association on 4th December, 1968. The Association appears to have been alarmed at some news in the papers that the Government have given up their policy of fixation of uniform price and at once this telegram was sent by the Association for the purpose of stressing before the Government that the Cement Manufacturers are unanimous over the issued of uniform retention price for the cement industry and that there is no need to continue the three-tier systems. In the latter portion of the telegram, the Association mentioned:

It may please be noted that the industry was unanimous on a uniform retention price of Rs. 96 even at the interim price adjustment stage....

The newspaper reports are likely to create misunderstanding and we want to repeat that the Manufacturers are unanimous that a uniform retention price should be granted to all Manufacturers.

132. Language cannot be more clear and more emphatic than this. We entirely agree with the learned Advocate-General that after this telegram it is useless for the writ petitioners to object to the policy of uniform price. The same idea is stressed in the letter dated 11th December, 1968. In the letter and the telegram aforesaid, the Association was at pains to point out that nothing less than Rs. 96 which was fixed for the three groups of units should be the base for the uniform price to which the Government will have to add whatever it considers proper towards the increase in the cost of production due to Governmental action.

133. The next document to be referred to is the statement made by the Hon"ble Minister of Industries before the Parliament on 14th April, 1969 concerning the cement industry with a rough survey of the events culminating in the Cement Control Order of 1967. The Hon"ble Minister has stated that what was fixed then, was only a temporary arrangement, that it was not intended that the arrangement should be continued indefinitely, and that the Government have accepted the policy of progressive decontrol in principle, and that a uniform price should be maintained for some time with a view that the industry might adjust itself to the new situation. A perusal of paragraph 5 of the statement of the Hon"ble Minister shows that the Government was clearly of the view that there should be a uniform price for the industry so that greater pressure is exercised by high cost units to find economies and at the same time the low cost units which are self-sufficient and working economically are rewarded for their

excellent work. We have already observed that in fixing the price in the case of a top-ranking essential commodity like cement, the Government cannot take any aspect in isolation. It has to take an overall picture of the entire economy of the country and the interests of the public in general, in which process, the Government should take proper note of the services rendered by the low cost units in showing great economy and self-sufficiency which are absolutely essential in a fast developing country like India. The correspondence is relied upon by the learned Advocate-General only for the limited purpose that on principle, the industry as a whole was agreeable to the policy of uniform price. We do not see any substance in the contention of learned Counsel for the writ petitioners that the correspondence should not be directed and that portion of the correspondence in which the Association has accepted a uniform price on principle dissociated from the further claim that the industry had asked for Rs. 96 plus the increase in the cost of production due to governmental action (which admittedly is Rs. 7) totalling Rs. 103. It is obvious that the demand of the industry for Rs. 103 as the barest minimum is not decisive because as admitted by the Association in their letter dated 5th of October, 1968 this question whether Rs. 96 was the barest minimum cannot be decided without a scrutiny and complete cost investigation with facts and figures.

134. This Court is not a price fixing authority; if the writ petitioners have any grievance they must first negotiate with the Government, ask for a thorough investigation with or without the aid of a Tariff Commission. It is within the exclusive sphere of governmental activities. The jurisdiction of this Court can be invoked as a last resort in very rare and exceptional cases where it could be demonstrated with the facts and figures and all the relevant materials like balance-sheets, statement of accounts and cost accounting investigation, etc., that the price fixed is extortionate, unreal and totally divorced from the various aspects, viz., (a) the economy of the country, (b) the general welfare of the public, (c) the interest of the consumer, (d) the interest of the manufacturers, (e) the fact that in the permit or licensing system, which is in the pattern of a monopoly, the consumers are denied the advantages of competition, (f) the prohibition of the import of cement, as it is familiar knowledge that foreign cement is much cheaper and if import is allowed the price would be cheaper for consumer, but yet the Government has prohibited its import with a view to make production in our country adequate and self-sufficient, (g) on account of the uniform F. O. R. price, the consumers in the south are already paying a sum of Rs. 10 as extra burden towards freight and in such a situation it will be unfair to further increase the price; (h) when there is a uniform F. O. R. price fixed in the interests of the industry as a whole, which acts sharply towards a considerable section of the consumers, i.e., in the south there is nothing wrong, nothing harsh or unjust in introducing the uniform ex-factory retention price even if it should act harshly against the producers. The Bench decision of the Delhi High Court has held that the fact that a uniform F. O. R. price acts harshly against the consumers in the south is not a ground for striking it down. We do not see why

the same principle should not apply when uniform ex-factory or retention price is fixed if it should act harshly against some of the cement producers.

135. These are all problems which the Government will have to solve and not for the Judges to disentangle. As observed already : "Accountants differ with economists and politicians may ignore both of them and in no area of economic enquiry is there so wide a gap between theoretical and empirical work as in the field which has long been considered the core of economic analysis-formation of price". It will be convenient to refer to the arguments stressed by the learned Advocate-General that Ismail, J., himself fully appreciated that it was not within the province of the Court to issue any writ of mandamus to the Government, to adopt any particular price system and that was the reason why the learned Judge clearly held that the Court cannot issue a writ of mandamus directing Government to revise the retention price of cement and also at the same time maintain a three-tier system and that it was a matter entirely for the Government whether they would maintain the three-tier system or introduce the two-tier system or they would provide a uniform price. (vide observations of the learned Judge at pages 50 and 51 of the typed papers Volume IV). The learned Advocate-General contended and in our opinion quite rightly, that on this reasoning, the learned Judge ought to have dismissed the writ petitions leaving the industry to negotiate with the Government with facts and figures as to how the price of Rs. 100 is not fair within the meaning of Section 18-G and that the writ petitioners cannot straightaway rush to this Court without giving any details--facts and figures--relying upon the abstract doctrine of an alleged violation of Article 14 especially when the industry has admitted in its Correspondence with the Hon'ble Minister that the question whether Rs. 96 is a fair proper retention price could be determined only after a complete cost account investigation by experts in the field. It is unnecessary to elaborate how the industry could present their case to the Government, with facts and figures, to be furnished by them, and what kind of scrutiny and investigation the Government should make bearing in mind the interests of the industry, the manufacturers and the consuming public. It is sufficient to say that in this proceeding in which the affidavit is totally bereft of particulars, no relief can be given.

136. Mr. M. K. Nambiyar, on behalf of Panyam Cements urged that the Government's power to vary the price is delimited by Rule 12 of the Control Order of 1967, that the Government can vary the price, only, if there is a change in any of the factors relevant for determination of the price of cement like the increase or decrease in the cost of production, or distribution, that in the instant case, the Government, admittedly have made" no investigation, and had not come to any conclusion, about an increase or decrease in the cost of production, and the variation in the price therefore, is invalid as being in contravention of Rule 12. Learned Counsel also urged that the power to vary the price under Rule 12 must be in conformity with the basic scheme underlying the Control Order of 1967, i.e., the maintenance of three-tier system," and that Rule 12 should be read harmoniously with the other provisions of the Order. In substance, the

argument is, the Government after careful investigation in the matter, had fixed the three-tier system, and unless the Government was satisfied, that the conditions had vitally changed, the power of variation, should be in consonance with that system, i.e., maintaining the three-tier system. It was further contended that the provisions of the Control Order of 1967, so long as they are in force, are binding upon the Government as well as upon the manufacturers, and that the limitation, on the powers to vary, contained in Rule 12, can be got rid of by the Government only by repealing the Cement Control Order of 1967 and issuing another independent order. In support of this contention, Mr. Venugopal relied upon the Bench decision of this Court in *Chandrasekharan Nair and Others Vs. Secretary to Government of Kerala and Others*, .

137. We do not see any substance in any of these points. In the first place there is nothing in the Cement Control Order, 1967 indicating that the Government has bound itself to maintain the three-tier system for ever. It is impossible to read into the order, any such notion of an under taking on the part of the Government. Indeed, if the intention of the Government was that any changes in the price system should be in consonance with the three-tier system, it would have been specifically mentioned so in Rule 12. In the face of the unambiguous and clear language, there is no warrant for importing any such restriction. The argument of learned Counsel overlooks the important fact that the Cement Control Order of 1969 is not issued by the Government in the exercise of the powers under Rule 12 of the order of 1967. The Order of 1969, is an independent exercise of the powers by the Government, u/s 18-G of the Act. In other words, there is one Cement Control Order of 1967 and another Cement Control of 1969, just like two separate legislative enactments. The only difference is that there are two independent legislations by a delegated authority. If the law already in force is not sufficient to cover a particular contingency, and contains certain restrictions, if the Legislature wants to remove those restrictions, the Legislature can do one of two things, either completely repeal the prior enactment and enact a new Act in the place of the former or enact an amending Act introducing necessary amendment. It is all a matter of legislative practice, a mere form and not affecting the substance or the root of a matter. So long as the Legislature has got the competence, it can bring about the change in the law in any manner.

138. The two decisions referred to above are of no relevance to this point. They are authorities for the limited proposition that if there is an order like the Standing Orders of the Board of Revenue, the provisions thereof, so long as they are in force, are binding upon the Government and the subjects alike, and the Government cannot exercise powers or pass any orders contrary to the Standing Orders then in force. If the Government were permitted to ride rough-shod over the existing orders in force, there will be chaos and utter confusion. The Order so long as it stands in that form actually binds the Government. It cannot adopt a procedure not sanctioned by the laws in force. It cannot issue orders in excess of the limits prescribed in the Order or law in force. This, however, does not mean that the Government cannot enact amendment of the Board's Standing Orders,

completely, substituting new provisions. This can be done either by repeal of the pre-existing law and enacting a fresh law or by introducing suitable amendment of the appropriate provisions. We do not see why this principle which applies to Acts of Legislature should not apply to delegated legislations i.e., orders issued by the Government from time to time. The second notification is issued under powers vested in the Government u/s 18-G. This power u/s 18-G can be exercised from time to time whenever it is necessary and the exercise of the power once, does not exhaust the power. It cannot be controverted (Mr. Nambiyar did not argue to the contrary) that the Government had ample power to repeal the Cement Control Order of 1967, issue a fresh order of 1969 containing details and provisions like the Control Order of 1967 fixing a uniform price and mentioning the same in the schedule. This power to issue such a notification repealing the prior order of 1967 is conceded despite the existence of Rule 12 delimiting the power of the Government. Once such a power of repeal, is recognised fit has to be recognised), we do not see why the Government should be compelled to introduce a change only by repeal and reinvestments and not by means of a simple amendment of the concerned provision. It is a matter of familiar legislative practice that vital changes are introduced by amendment of a particular section in an Act instead of repealing the old Act followed by a fresh enactment. There is no warrant either in principle or on authority for making a distinction between an Act of Parliament and a delegated legislation.

139. It is necessary that there must be some indication in the preamble portion of the order that the Government was satisfied about the expediency or necessity for introducing the change; but the absence of a statement to that effect by itself does not invalidate the legislation. In the recent decision of the Supreme Court in *Hamdard Dawakhana (Wakf), Delhi and Another Vs. Union of India (UOI) and Others*, , it was pointed out that the Government Order should contain a statement that it has formed the opinion that the requisite change is necessary and that there is no presumption that such an opinion has been formed by the Government at the relevant time. The Supreme Court has observed that if challenged it is open to the Government to prove that such an opinion had been formed by it at the relevant time and that the omission to mention it in the order by itself would not preclude the Government from proving the said fact independently. The Supreme Court also observed that if in the writ petition this fact was not challenged and the Government had no opportunity to prove that the necessary opinion was formed, the objection could not be urged for the first time in the appeal against the order of the High Court in the Writ Petition. In *The State of Madras and Others Vs. Sri Vanamamalai Mutt, Nanguneri*, represented by his Holiness Sri Vanamamalai Ramanuja Jeer and Others, , a Bench of this Court has taken the same view following the decision of the Supreme Court mentioned above. In the instant case, in view of the decision of the Supreme Court and the Bench decision of this Court, this point about the absence of statement of the opinion formed by the Government was not pressed before us.

140. Independently of the considerations referred to above, we are of the opinion

that even if the validity of the second order of 1969 were to be judged by interpreting Rule 12 as delimiting the power of the Government, as contended by Mr. Nambiyar, we are clearly of the view that the second order is not in contravention of Rule 12. In April, 1969, the Government took its policy decision to implement the decision which the Government had already taken in 1961 to have the uniform price in the place of the three-tier system. This decision of the Government reached in 1969, is a change and a vital change which has an impact upon the determination of the price of cement. The change in the price may be introduced consequent upon the increase or decrease in the cost of production; or the price may be changed even though the level of the cost of production remains the same.

For instance, suddenly there may be slump in the trade, huge accumulation of stock of cement consequent upon fall-in demand. In order to enable the producers to clear the stock, there maybe variation in the price even though there is no change in the cost of production. Similarly, there may be change in the rules regarding the import of foreign cement and the export of Indian cement to outside countries. That undoubtedly may require a modification in the price of cement to be sold in this country, even though there may be no-change in the level of the cost of production. For instance if there is good demand for Indian cement in foreign countries and if the price in the foreign market is appreciable, much higher than the price fixed for sale in India, the-producers will naturally export more and more the cement produced in this country resulting in the short-supply to the Indian consumers. In view of the foreign exchange earned, the Government may not be inclined to prohibit or ban export of cement, at the same time being particular that cement must be made available to the consumers in India; that can be achieved only by increasing the price of cement for sales in India so that the producers may have sufficient inducement to sell the cement in the local market instead of sending all the cement to-foreign countries. Thus it will be seen that without any change in the cost of production, a situation may arise when there should be a variation in the price of cement. It is unnecessary to refer to-further illustrations. The only condition in Rule 12 is that there should be a change "in any of the factors relevant for the determination of the price of cement". The change in any of the factors relevant for the determination of the price of cement may be a change with regard to the cement industry itself (with regard to the price of raw material,, cost of labour, cost of transportation,, increase in tax liability, etc. etc. or it may be a change in the policy of the Government. A change in the policy of the Government is undoubtedly a relevant factor bearing upon the price of cement. In fact the policy decision of the Government is inseparably connected with the determination of the price of cement. We have not the slightest hesitation in holding that the policy decision of the Government to introduce uniform price, is an important change in an important factor, relevant for the determination of price control. The condition in Rule 12 is beyond doubt satisfied. Further the words "such as an increase or decrease in the cost of production and distribution" are only

illustrative and by no means exhaustive. In the context the words "such as an increase or decrease in the cost of production are used by way of explanation to indicate that an increase or decrease in the cost of production is a change in a factor relevant for the determination of the price of cement. Change in increase or decrease in the cost of production is only one of numerous factors which are relevant for the determination of the price of cement. All the clauses in Rule 12 will have to be read in a harmonious manner and when the power to vary the price is given, if there is a change in the factor relevant for the determination of the price of cement, (which in the context may include variety of situations) there is no warrant for holding that by the mere use of the words "such as an increase or decrease in the cost of production" the power of the Government is delimited only to these two contingencies and nothing beyond the same. In this connection it should also be borne in mind that the industry itself was in favour of a uniform price. To sum up, we are not inclined to read Rule 12 in a limited manner that price may be varied only if there is an increase or decrease in the cost of production. The price may be varied for the other reasons, so long as they have got a bearing on and are relevant to the issue. When the Government introduced uniform price it is implicit in it that the Government is satisfied that such a step is necessary.

141. It only remains to deal with the complaint of infringement of Article 14 of the Constitution which found favour with the learned Judge. Arguments on this aspect of the case were addressed by Mr. V. P. Raman. We may at the threshold say that the arguments of the learned Counsel proceeded upon a misconception of the basic principles underlying Article 14. As the arguments were discursive and drifting and as the cases dealing with the scope of Article 14 were legion, we had to pinpoint and focus the attention of Counsel to the narrow area and the limited context in which Article 14 comes up for consideration in the instant case. As we shall presently show, the point raised is totally devoid of substance and the argument is founded upon the oft-quoted statement of the law that Article 14 is offended "by finding differences where there are none and by making no difference where there is one" besides freely using expressions "creating arbitrariness" "creating inequalities". This is picturesque language attractive enough, but the question is, to what extent Article 14 comes into play in the instant case. It will be pedantic, and a profitless task to refer to the wealth of case law dealing with the scope of Article 14. It is sufficient to refer to the decision of the Supreme Court in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, , where the rules are summed up by the Supreme Court vide observations at pages 547 to 549.

142. When a law is challenged as offending Article 14 it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it. Having ascertained the policy and object of the Act, the Court has to apply a dual test in examining its validity (i) whether the classification is rational and based upon an intelligible differentia which distinguished persons or things that are grouped together from others that are left out of the group, and

(it) whether the basis of differentiation has any rational nexus or relation with its avowed policy and object (vide *Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others*, .

143. We have therefore to find out the policy underlying the Cement Control Order and the object intended to be achieved by it. The paramount object of the Cement Control Order is conceived in the economy of the country, the welfare of the general public as well as the interests of the industry. Fixation of different ex-works prices for individual cement producers is most unhealthy and an undesirable feature, from the point of view of the industry, from the point of view of the social economy of the country and the interests of the general public. The inevitable evils of different ex-works prices, i.e., engendering a feeling of complacency amongst producers, no incentive on their part to effect economies, nor to improve efficiency and increase the maximum production, have been stressed before the Tariff Commission vide page 21 of the Report of the Tariff Commission. The Tariff Commission rightly took note of this criticism as legitimate. It is obvious that if this criticism was incorrect, or irrelevant or unscientific, the Tariff Commission which consisted of experts would have certainly mentioned that this criticism was either ill-founded or irrelevant or unreal. We therefore start with this, that in 1961, and for about a decade prior thereto, the price system prevalent in the cement industry, i.e., different retention prices for different individual units, was a bad and unhealthy system from several important points of view, and the sooner it was abolished and a change was brought about, the better it was, for the industry and for the economic prosperity of the country. The Government took full note of this criticism and completely accepted the same. Every aspect of the adverse criticism aforesaid was accepted by the Government, which in unambiguous terms, announced its policy decision, that there should be a uniform price for the industry when alone efficiency and greater production could be secured and that the Government was of the considered view that the existing system of different retention prices for individual units was not conducive to efficiency and greater production. The ultimate resolution of the Government was a uniform price level, the goal to be reached in due course of time, and in the meanwhile to provide a three-tier, system purely as a temporary measure on account of the disparity in the cost of production. The point of time when the Government is to actually implement its policy decision, of a uniform price, is a different question. What is relevant at this juncture is, the fact, that in 1961, the Government had declared its policy decision of a uniform price.

144. The question immediately arises whether in achieving the avowed object, the two tests mentioned above have been satisfied, i.e., whether there is a reasonable and rational classification upon an intelligible differentia and whether the basis of differentiation has any rational nexus or relation with its avowed policy and object. When a complaint of infringement of Article 14 is made in respect of such treatment of units of different categories as one class, the same two tests should be satisfied, i.e., whether treating of the units into one class is a

reasonable classification based upon intelligible differentia and whether the basis of grouping of the units as one class has any rational nexus or relation with the avowed policy and object of the Legislature. In the case of a fixation of a uniform price there cannot possibly be any doubt that both the tests are satisfied. The two things cannot be separated. One is necessarily implicit in and inseparably goes with the other. The familiar case of bus and lorry transport is the best illustration of both the tests being satisfied. With a view to prevent bus and lorry owners exploiting the general public, the Government fixes a uniform rate per mile. The margin of profit would vary from one person to another, depending upon the particular fuel used in the operation of the vehicles, whether it is petrol, diesel or charcoal gas. The margin of profit will also depend upon the number of buses or lorries owned, the previous experience, the particular route and the mileage that is operated upon by the individual owners. When the uniform rate is introduced by the Government in the interests of the general public throughout the State, the working of such uniform rate will, in the nature of things, produce different results with regard to profits and losses. There will be difference in the profits earned or the loss sustained. Such a regulation cannot be struck down under Article 14 on the ground that Government is bound to maintain the difference and it is ultra vires to treat all the different operators as belonging to one class. Any other view will make it impossible for the Government to control bus rates and lorry freights. The two tests are easily satisfied. The treating of units of different categories as one class having clear nexus or rational relation with the avowed policy and object of the Government of uniform rate cannot possibly be avoided, whether it is a price regulation or a regulation for tariff for supply of electrical energy or postal rates, because the policy is a uniform formula, though in its working there may be difference in results. The three important limbs of the legislation are--(a) the avowed object of securing a uniform price, (b) the grouping of all units into one class, and (c) this group having a rational nexus or relation with the aforesaid avowed policy (limb-A). Taxation laws for raising revenue for purposes of the State are essentially different from legislation for bringing about economy of the country and for doing good to the general public by eradicating the existing social evils. In the latter case, there is no question of infringement of Article 14, if the object is to be achieved by an appropriate uniform policy. Uniform price policy, cannot be achieved by treating different units differently. If one can visualise a uniform price, at the same time the units being treated differently in a different manner, the units can make a complaint that for achieving uniform price, there is no need to group all the units together and some other method can be resorted to. A system of uniform price is necessarily linked up with treating of all the units, alike in the price fixation. If the object is not a uniform price, but some other object, i.e., to improve the cement industry in general, to improve the import or export policy of the several units, to render financial assistance and enable sick cement industries to revive and function, it may be that for achieving any one of these objects, all the units need not be classed together and treated alike, and if without sufficient nexus, all the units are grouped together for achieving any one

of the purposes mentioned above, there may be legitimate ground for treating all the units alike even though the problems may be the same, for all the units, namely, the reviving of sick units which have suspended production. Such a conception is not possible where the policy is to introduce a uniform price. In other words, we find it difficult to have a conception of a system of uniform price, but at the same time the units being treated differently. It may be, on account of the fixing of a uniform price, the price might turn out to be highly extortionate and wholly uneconomic for certain units resulting in huge loss. In such cases the complaint is not an infringement of Article 14; it is *dehors* Article 14. Such a complaint is factually and legally a complaint of a contravention of Section 18-G. The question is only the prudence of the introduction of the uniform price and its impact upon the Government's powers u/s 18-G. We are unable to see where the Courts' jurisdiction comes in, when the Government have decided upon the fixation of uniform price for reasons which are well founded and are undoubtedly conceived in the economy of the country. This Court may take a different view about the prudence and the advantages of the fixation of a uniform price, but what jurisdiction have we to impose on the Government a different formula?

145. In this connection we may refer to the decision in *Sunshine Coal Co. v. Adkins* 310 U.S. 381, where the Supreme Court of the United States has referred to the Court's reluctance to interfere with the prudence of the policy decision taken by the executive. In that decision it was pointed out, that price control is an effective means for the production and promotion of the welfare of the economy of the country, that unstabilised prices, would cause loss of markets, and add to the afflictions which beset the particular industry and these are all matters relating to questions of policy to the wisdom of the Legislature, and to the appropriateness of the remedies to be chosen, matters which are the exclusive concern of the Legislature and not the concern of the Court. The note of warning was given by Justice Douglas who delivered the opinion of the Court that if the Court endeavoured to appraise them (the policy, wisdom of the legislation, the appropriateness of the remedy), Courts would be trespassing on the legislative domain. This note of warning applies *a fortiori* to a strategic industry like the cement industry in the economy of our country. It is obvious, the Court's responsibility is not to supplant the Government's view of the balance of the conflicting interests in the cement industry, and substitute or suggest some policy, merely to the liking of the Court sitting in judgment over the policy decision of the Government. When there are several methods of dealing with a difficult problem like fixation of price, and the Legislature or the delegated authority selects one among them (in the context of a uniform price) Courts will have no jurisdiction to strike down the law on the ground that the Legislature should have adopted another method which in the opinion of the Court is more reasonable or proper or ideal. Even so, the step taken or the machinery employed by the Government in the fixation of a fair price can be struck down, (a) if it is violative of Section 18-G (we have already dealt with this question) or (b) if it offends Article 14.

146. It is here that we have to pinpoint the area of discussion. If the price is in contravention of Section 18-G, because it is highly uneconomical and unprofitable, there is no need for the writ petitioners to invoke Article 14 at all; there is absolutely no need for the aggrieved units to make out, that in the fixation of uniform price the other units get more benefits and larger profits. The writ petitioners on making out a proper case of infringement of the provisions of Section 18-G, may get relief irrespective of the question as to how the uniform price works so far as the other units are concerned. Whether the uniform price would work differently or whether it is equally bad so far as the other units are concerned, is besides the point. The aggrieved units are entitled to say : " we do not care as to what happens to the other units, whether they are incurring losses or whether they are prospering, it is their concern. So far as we are concerned, the price fixed is in contravention of Section 18-G". If the concerned units make good these submissions they steer clear altogether of Article 14 and would be entitled to get relief totally independent of Article 14.

147. The question next arises, whether they can invoke Article 14, if they fail to make out any violation of Section 18-G. The contention of Mr. V.P. Raman, is that even if it should be held, that there is no contravention of Section 18-G, and the writ petitioners are getting some percentage of profits, they would still be entitled to invoke Article 14, if they prove, that the other units are getting much higher percentage of profits and it is in that manner that Article 14 comes into play in favour of the writ petitioners. The arguments were drifting and we could not find any cohesion in the same when once learned Counsel was asked to pinpoint and focus his attention as to how Article 14, comes into play if the complaint of the writ petitioners of the contravention of Section 18-G is found against. Learned Counsel endeavoured to make out that as a result of the amendment order of 1969, the low cost units which were already making good profits with a price of Rs. 90-50 would be making huge profits by an increase of Rs. 9-50 in the retention price in Group A, Rs. 6-50 in the retention price of Group B, as against Group C, which at the most could get only an increase of Rs. 4 in the retention price. The argument was that even if it should be held that before the introduction of uniform price, the units of A Group, the units of B Group, and the unit of C Group, were making profits now, as a result of the uniform price of Rs. 100, the margin or the percentage of profits for the units of Groups A and B, would have considerably increased bringing about in its turn inequalities between Groups A and B, on the one hand and units of Group C, on the other in the matter of quantum or the percentage of profits earned. According to learned Counsel, this uneven discrimination, is, in relation to the great difference in the margin of profits that would be earned by the two groups of units. In this connection, learned Counsel also relied upon the fact that the Tariff Commission recommended ex-factory retention price of Rs. 67-50 for Dalmia Cement (Bharat) but the Government fixed Rs. 69-50 for Group A, units with an initial advantage of Rs. 2-50 for Dalmia Cement (Bharat).

148. There is no substance in this argument; it is also opposed to several

decisions of the Supreme Court. In the first place, it should be borne in mind that if the low cost units get more percentage of profits, it is because their cost of production is considerably lower and when the increase in the price is given, the low cost units get a further increase in the percentage of profits, which cannot be helped. When the three-tier system was holding the field from 1961 to 1969, the low cost units were functioning in an environment, in which, they would be getting much higher quantum of percentage of profits. Even when the Government fixed the three-tier system in 1961, the low cost units were well established units; they had reached the stage of self-sufficiency; they were able to effect economy in their working and earned good profits. That undoubtedly was not due to any unequal treatment but it was a direct consequence of the prudent way in which they were carrying on their business activities. It is a misnomer to call the profits or the rewards, of one's own labours, as uneven discrimination or unequal treatment. Thus, it is seen that the disparity in the return or the quantum of profits, between one group of units, and the other, was something, antecedent and pre-existing prior to the Control Order, and that is the reason, why the Tariff Commission itself recommended different percentage by way of return on the capital, i.e., 14 per cent, of the capital employed for certain groups 12 per cent, for certain groups and 8 per cent, for other groups--vide page 43 of the Report of the Tariff Commission. The same disparity in the quantum of profits may hold the field in April, 1969, when the uniform price was fixed because in the correspondence of the Cement Manufacturers with the Hon'ble Minister, the units have stated in their letter, dated 5th of October, 1968, that there is no scope for reduction in cost to a level lower than Rs. 96 fixed for certain groups. It is obvious, that if the high cost units are not able to reduce the cost of production, while the low cost well-established units, are able to effect economies in working, the difference in profits between one group of units and another group of units is bound to be reflected whenever there is an alteration in the price fixation. (Note. To avoid mixing of points and to keep clear the point under discussion it is important to reiterate that the whole discussion proceeds on the footing that the complaint is not a complaint of contravention of Section 18-G, but it is an infringement of Article 14). In this connection, it is necessary to mention that when the appeals were posted for further hearing asking for some clarification, in the memo, submitted on 12th April, 1971, by Mr. V.P. Raman, on behalf of the writ petitioners, this is what is stated:

The complaint of the writ petitioners is squarely based on Article 14, which alone is applicable to them. That Companies are not citizens of India to avail of Article 19 of the Constitution, seems well settled by decisions of the Supreme Court. Should any shareholder have any grievance on this account, it is for him to move the Court by separate writ petitions. The complaint of the petitioners based on Article 14, can be dealt with as such without going into discussion as to whether the price fixed u/s 18-G, is a fair price or not. The short question is whether it is open to the Government to select certain manufacturers alone and give special favourable treatment while denying to others in an identical situation a like

benefit. This is simply an application of Article 14, and on this ground the writ petitions were allowed by the learned Single Judge.

149. Mr. Raman, reiterated that the main ground of attack of the writ petitioners is that there is favourable treatment like giving some extra benefit for certain manufacturers (Group A units) which is denied to others in an identical situation and the case is a simple application of Article 14.

150. It is settled law, that when a supervening legislation comes into operation, it is not bound to obliterate the preexisting inequalities, i.e., inequalities which were existing at the time when the supervening legislation comes into operation, and the fact that the pre-existing inequalities, taken along with the supervening legislation, maintains or produces inequalities is not a ground for striking down the supervening legislation as offending Article 14. This principle of law is well settled in the law of the United States and the Supreme Court of India, has also taken the same view in several cases.

151. Reference may first be made to the decision of the Supreme Court in *Ramjilal Vs. Income Tax Officer, Mohindargarh*, . In that case there was no Income Tax law in the State of Nabha, while the State of Kapurthala had one, and after these States were integrated, the residents of the Nabha State were assessed to Income Tax under the law of the Pepsu Union. The rates were higher than the rates of Income Tax in Kapurthala. Nabha State contended that there was discrimination in that Kapurthala State was paying less Income Tax and therefore the Pepsu regulation was discriminatory under Article 14 of the Constitution. The Supreme Court rejected this argument and Das, J., as he then was, observed as follows:

In the premises, there can be no grievance by them on the score of discrimination. The discrimination if any, was not brought about by the two Ordinances, but by the circumstance that there was no Income Tax Act in Nabha and consequently there was no case of assessment pending against any Nabha assessee. In any case, the provision that pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and the proceedings commenced is a reasonable law founded upon a reasonable classification of the assessee which is permissible under the equal protection clause and to which no exception can be taken. In our opinion, the grievance of the alleged infringement of fundamental right under Article 14, is not well-founded at all.

152. The principle of this decision was followed and applied in the decision of this Court in *Rajah of Bobbili v. State of Madras* 1952) 1 M.L.J. 174, already referred to. A similar argument was advanced with regard to the provisions of the Madras Estates Land (Reduction of Rent) Act. 1947, on the ground that the rates of rent vary with different tenants and that when many of them pay more to the ryotwari landholder and some of them pay less and, that too, when the provisions authorise reduction of rent but not enhancement thereof it is

discrimination within Article 14. This argument was rejected in the judgment of Venkatarama Iyer, J., as he then was, on the ground that the difference in the rights of several classes of tenants, is not a discrimination arising by reason of the Act but the disparity in the rates existed prior to the legislation and it is no objection to the validity of the Act that it has entirely obliterated the pre-existing inequalities--Vide observations at page 206. In the decision of the Supreme Court in *Khandlge Sham Bhat v. Agricultural Income Tax Officer* (1963) 1 S.C.J. 140 : AIR 1963 S.C. 591, the same principle was laid down. In that case, the vires of the provisions of the Kerala. Agricultural Income Tax Act of 1950, as amended by the Act of 1959, was questioned as offending Article 14, on the ground that in the matter of the imposition or the levy of the Income Tax there is a classification bringing about inequalities. The object of the amendment was to impose agricultural Income Tax on assesseees in the Madras area and also in respect of the period between November, 1956 and March, 1957, which could not be done under the pre-existing law. There were differences between the two parts of the State and because of the said differences, the Legislature took the view that the definition of " previous year" should be so-amended in respect of the Madras area, that the assessee in that area may not escape payment of agricultural Income Tax in respect of the period after the said area formed part of the Kerala State. Subba Rao, J., as he then was, held that the law will not be condemned as discriminative, though due to some fortuitous circumstances arising out of a peculiar situation some included in a class get an advantage over others so long as they are not singled out for special treatment. The statement of the law by Subba Rao, J., was referred to with approval in the latest decision of the Supreme Court in *The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another*, , paragraph 32.

153. We have already referred in some other context to the decision of the Supreme Court in *Madras State Electricity Board v. Kalyan Municipality* (1969) 1 S.C.J. 38 : AIR 968 S.C. 991, in which it was laid down that where a uniform tariff is fixed for supply of electrical energy, there is no question of undue preference in favour of one as against the other and that even if there was any inequality arbitrariness brought about, there was sufficient justification for the same.

154. After the decision in *Nebbia v. New York* 291 U.S. 502, in which the liberal view was taken that price regulation to be valid need not be necessarily confined to business affected with public interest and that it may well extend to other business activities, there were numerous occasions when the vires of price fixing regulations was questioned. The Supreme Court of the United States has uniformly been taking the view that the fact that in fixing a uniform price, high cost operators may be more seriously affected by price control, than others, is not a ground for striking down the price regulation. In summing up the effect of the case- law in *Bowles v. Willingham*¹, Justice Douglas expressing the opinion of the Court observed thus:

It is implicit in cases such as *Nebbia v. New York* 291 U.S. 502, which involved the power of New York to fix the minimum and maximum prices of milk and *Sunshine Anthracite Coal Co. v. Adkins* 310 U.S. 381, which involved the power. Bituminous Coal Commission, to fix minimum and maximum price of bituminous coal, that high cost operations may be more seriously affected by price control than others. But it has never been thought that price-fixing, otherwise, valid, was improper because it was of a class rather than an individual basis. Indeed, the decision in *Munn v. Illinois* 94 U.S. 113, the pioneer case in this Court, involved the legislative schedule of maximum price for a definite class of warehouses and was sustained on that basis.

155. Vide also the decision in *Porndan Basin Area Rate Case*, where the statement of the law in *Bowles v. Willingahm*¹, is referred to with approval, as settled law and holding the field. (Note:- This decision in *Pormian Basin Area Rate Case* 390 U.S. 747, was rendered on first of May, 1968, which shows that it is settled law in the United States that no constitutional objection can be raised with regard to the fixation of maximum price on the ground that high cost operators may be more seriously affected. In India too, the law is the same.

156. We have already referred to the decisions of the Supreme Court in *Bijay Cotton Mills Ltd. Vs. The State of Ajmer*, , and *Union of India (UOI) and Others and State of Delhi (Now Delhi Administration) and Others Vs. Bhanamal GulzariMal Ltd. and Others*, , in which the Supreme Court has laid down the principle that if the legislation is a good and reasonable legislation either in the fixation of rent or rate or fixation of price, the fact, that it may act harshly as against some of the class covered by the legislation would not be a ground for striking it down as offending Article 14. As the relevant portions in the aforesaid decisions have already been extracted in the preceding discussion, it is unnecessary to quote again the relevant passages. Even if there is inequality brought about there is sufficient justification for the same. Where a uniform price is fixed, the percentage of profit or the margin of profits which the producer makes cannot in the nature of things be the same. In vast majority of cases it will be varying. The quantum or the percentage of profits earned depends upon so many relative factors, factors which will be varying from unit to unit, like the amount of capital employed, the borrowings made, the price of raw material, the availability of raw material, the freight or the transport charges for carrying the raw material to the workspot, the cost of establishment and management charges, and on account of the various administrative circumstances, natural causes, financial resources, the rate of production, etc. Because of these factors, the cost of production in some units will be varying and will be far less than the uniform price.

157. For instance, we may refer to the illustration which we mentioned in the course of the hearing. A cement factory may have all the benefits of quarrying gypsum, the quarry being purchased outright or taken on long lease at favourable terms. It may own large number of lorries thereby reducing the

transportation charges. The shareholders or the directors may advance monies to the factories at nominal rates of interest, while the other units may be obliged to borrow at higher rates of interest. The top-ranking officials, the Managing Directors, the Executive Heads of the various Departments, Manufacturing Department, Purchase section, Sales section, Distribution section, etc., may be prepared to work for salaries far less than the salaries paid in other units; they may be very experienced and efficient people and by their drive and ability they will be able to increase production and reduce cost. They and the Labour Officer by their experience and capacity will be able to carry on business without any labour problems, like strikes, lock-outs, go-slow polities, etc. They may be able to maintain very good labour relation which is an important factor in the rate of production. We can visualise several circumstances, all contributing to a very reduced and low cost of production thereby leaving large margin of profit. Naturally therefore, when a uniform price is fixed, these low cost units will be getting a higher percentage of benefits. In its effect, it is a reward for its efficiency in management, proper control and economy in its business activities. The High percentage of profits is the measure of reward or is the measure of appreciation of the economy affected in the concerned unit. That itself is an excellent and rational basis for differentiating between the low cost units and the high cost units in the margin of profit which may be secured to them. In an industry like cement which has got the highest priority as an essential commodity vital for the growth and the economy of the country and the general welfare of the public, the Legislature cannot be charged with arbitrariness if it evolves a scheme resulting in some preference to a group of low cost units and larger percentage of profits. Indeed, in all those cases, the object of the Legislature is not to show any undue favour but it is the operation of the particular price regulation that produces the results.

158. We shall take another illustration, which again was discussed in the course of the arguments, namely, a sugar factory which produces another important essential commodity for the country--sugar. A certain sugar factory may own vast extent of land in which cane is cultivated, therefore having no need to either take lands on lease for purpose of cane cultivation or purchase cane in the market. It may also own sufficient number of lorries with the aid of which cane as well as the finished product--sugar--are transported. It may also have all the other advantages which we have adverted to in connection with the working of a cement factory like excellent labour relations, high productive capacity, efficient management, easily available finances, etc., etc. Naturally, when these factors are there, the particular sugar factory would be in a position to make higher percentage of profits when compared to another sugar factory which may not own any lands or any lorries at all with the result that the factory would be obliged to purchase sugarcane in the open market for which they have to pay extra price, again to pay higher transport charges by hiring the lorries, etc., etc. In this connection it will be relevant to refer to the decision in *Reagan v. Farmers Loan and Trust Co.*, 154 U.S. 101. in which the vires of the formation of tariff

charges for the transportation by a common carrier and the fixing of a schedule of rates was questioned. Justice Brewer, while stating that failure to produce a good return to those who have invested their money is not conclusive to strike down the tariff because it may be due to extravagance and a needless expenditure of money, wastes in the management of the road, enormous salaries, and the cost of construction would have been at a time when material and labour were at the highest price, all having an effect in the rate of profits. It was observed:

There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labour were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities, where there is not sufficient business to sustain a road. Doubtless too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

159. In the memo, filed by Mr. Raman, on 12th April, 1971, it is stated:

The complaint of the petitioners based on Article 14, can be dealt with as such without going into discussion as to whether the price fixed u/s 18-G is a fair price or not.

160. Nothing can be more damaging and suicidal than this, for the writ petitioners. On this statement, we have not the slightest hesitation in holding that the writ petitions will have to be summarily rejected. What is stated in the memo, would lead to extraordinary results. Indeed, learned Counsel was prepared to go to that extent. In order to bring out the full significance and the implications of the arguments of learned Counsel, the same can be set out in this manner:

A group units, as a result of the uniform price, may be getting between 15 to 20 per cent, interest on their capital employed, B or C group units may be getting 10 to 15 per cent, interest on the capital employed and the last group may be getting about 10 per cent, on the capital employed. Even if it should be found that the return by way of interest on the capital employed for Group B or Group C is fair return, still the fixation of the price will have to be struck down because Group A gets much higher percentage of profits, between 15 to 20 per cent.

161. A mere statement of the above illustration is sufficient to expose how untenable the argument is. We find it utterly impossible to countenance an argument of the writ petitioners the core of which is to the following effect:

True we have not reached self-sufficiency. There is no scope for reduction in the cost to a level lower than the retention price of Rs. 96 fixed for our group (vide

page 8 of volume 3- letter, dated 5th October, 1968). However much we may try, we cannot bring about economy in the cost of production. It is true that the other units, Group A units, have reached self-sufficiency and brought about economies. Even so, the percentage of profits for all the units must be the same because the industry is one cement industry. It may be for being self-sufficient, for being well established, and for having brought about economics in the production, better management and better control. Group A units should be rewarded. All that is not our concern. Yet, the Government should evolve a formula in which the percentage of profits is the same regardless of the capacity of the low cost units or the lack of equal capacity and ability on the part of the high cost units in the cement industry.

162. This argument has to be stated simply to be rejected as it leads to startling results of not only putting a premium on inefficiency but also perpetuating the very evil and mischief (engender a feeling of complacency) : which was rightly taken note of by the Government while taking their policy decision. It would be a lamentable state of law of equal protection, and nothing can be more ruinous and disastrous to the economy of the country if a manufacturer were to successfully assert a right to an equal reward though, for his inefficiency, or other reasons all concerning and peculiar to him, he is; not able to achieve the policy decision or the realisation of the declared same result of the Government. In a regulated industry, there is no constitutional guarantee that the most inefficient will survive.-- vide *Hegeman Farms Corpn. v. Baldwin* 293 U.S. 163 , already referred to in some other context.

163. We shall refer to the three decisions of the Supreme Court on which considerable reliance was placed by Mr. Raman. The first decision is the one reported in *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, . In that decision the vires of the Travancore-Cochin Land Tax Act, 1955, as amended by the Act of 1957, was attacked on the ground. inter alia that it offended Article 14. In pursuance of the legislation, a uniform land tax at a flat rate of Rs. 2 was imposed without any reference to the relevant considerations like quality of the land, fertility of the soil or the income from the land. The legislation in question was levying tax under Article 265 of the Constitution. Even so it had to satisfy the test of guarantee of equal protection in law, under Article 14. The Supreme Court pointed out that if the Legislature had classified persons or properties into different categories which were subject to different rates of taxation with reference to the income of the property, such a classification would not be open to attack and that different kinds of property may be subjected to different rates of taxation and that so long as there was a rational basis for the fixation, it would not offend Article 14. The Supreme Court also observed that if the same class of property similarly situated is subjected to taxation Which, results in inequality, the law may be struck down as creating inequality amongst holders of the same kind of land. In that case the land tax levied was a flat rate, whether or not a person made an income out of the property, whether or not the property was capable of yielding any income. The result was that one person

might get nothing out of the land because it is desert. The other person might own lands yielding large income without having to spend much. The third man might own land which might get some income after investing labour and capital totally disproportionate to the income. In some cases the man might be getting large profits without much of an expense because the land was very fertile and capable of yielding good crops. The Supreme Court took the view that there was no attempt of classification in the impugned Act in principle or policy and a levy of uniform land tax on all the lands without any difference offended Article 14 as it created an inequality. Speaking for ourselves, we find this case has no relevance whatever to the instant case. Though the observations about the scope of Article 14 have been referred to in the subsequent decisions of the Supreme Court, the important point to notice in this decision is that the object of the Kerala Act was only to raise revenue for purposes of the State by levying land tax. If that is all the declared policy or object of the Act, that purpose can be achieved by conforming to Article 14, i.e., by levying land tax taking note of the soil and the quality of the land and the income from the land. There is no justification for levying uniform tax on all lands without reference to income. Applying the dual test of the policy or the object of the legislation and how far a particular provision is necessary to achieve that object as constituting the real nexus it is obvious that the uniform levy cannot be justified. The crucial point which distinguishes this decision is, the policy or the object of the Legislature was not to levy uniform land tax but only to raise the revenue. If the policy itself is to bring about parity in the levy of land tax and uniform tax is levied, the fact that it may impose unequal burden would not make it offend Article 14. In this connection, in order to bring out this point of distinction aforesaid, it is necessary to refer to the decision of the Supreme Court reported in *State of Andhra Pradesh Vs. Kannapalli Chinna Venkata Chalamayya Sastri*, already referred to in some other context, approving the statement of the law in *Rajah of Bobbili v. State of Madras* (1952) 1 M.L.J. 174 in which it was held that legislation to bring about uniformity in the rents payable by the ryots of land governed by the Estates Land Act, to the level of the land tax payable by the Ryotwari pattadar was held valid and not offending Article 14 because the very policy and object of the enactment is to bring about parity.

164. The next decision relied upon is the decision reported in *State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others*. In that case, the vires of the Andhra Pradesh Land Revenue Additional Assessment and Cess Revision (Amendment) Act of 1962 was questioned. The main object of the enactment was to "rationalise the land revenue assessment" in respect of lands in the areas of the Telengana and Andhra Pradesh areas. The schedule to the Act contained certain rates of land revenue. The Supreme Court affirming the decision of the High Court of Andhra Pradesh held that the land revenue was not scientifically settled on the basis of *taram*, i.e., the quality and productivity of the soil and that it ignored that basis and adopted a thoroughly arbitrary method of fixing the rate on the basis of the *ayacut* which had no reference to the quality and

productivity of the land. After an investigation by the Land Revenue Reforms Commission, they made certain recommendations and the ultimate legislation gave up the principle of taram based upon the quality and fertility of the land, and accepted a flat rate. The Supreme Court observed that there was no reasonable relation between the extent of the ayacut and the land revenue payable and the adequacy of water supply. After a detailed discussion of the serious infirmities, the Supreme Court observed at page 1461:

It is, therefore, clear that the ayacuts do not correspond to the number of months of water supply; indeed, any tanks which supply water for a longer duration have smaller ayacuts. Tanks supplying water for equal duration fall under different classes. In a larger number of cases the minimum rate is more than 100 per cent, of the earlier assessment indicating thereby that the minimum rate has no relation to the quality or the productive capacity of the soil. In short, both sections 3 and 4 in fixing the minimum flat rate for dry or wet lands, as the case may be, have ignored the well established taram principle; and in the cases of wet lands an attempt has been made to classify different systems on the basis of the ayacuts but the said test is unreasonable and has no relation to either the duration of water supply or to the quality or the productivity of the soil. The classification attempted in either case has no reasonable relation to the objects sought to be achieved, namely, imposition of fair assessments and rationalisation of the revenue assessment structure.

165. While dealing with the scope of Article 14, it was further observed:

While the article prohibits discrimination, it permits classification. A statute may expressly make a discrimination between persons or things or may confer power on an authority who would be in a position to do so. Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately. A statutory provision may offend Article 14 of the Constitution both by finding differences where there are none and by making no differences where there is one. Decided cases laid down two tests to ascertain whether a classification is permissible or not. viz. (1). the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The said principles have been applied by this Court to taxing statutes. This Court in *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, , held that the Travancore Cochin Land Tax Act, 1955, infringed Article 14 of the Constitution, as it obliged every person who held land to pay the tax at the flat rate prescribed, whether or not he made any income out of the property or whether or not the property was capable of yielding any income. It was pointed out that that was one of the cases where the lack of classification created in-equality.

166. The above extract contains the oft-quoted statement of the law that "Article

14 is offended both by finding differences where there are none and by making no difference where there is one". From what has been mentioned above it will at once be seen that this case too, has no relevance and is easily distinguishable. The object of the impugned Act was a "rationalisation of the revenue assessment structure" and imposition of fair assessments in the lands in the Telengana area and in the Andhra Area. The Supreme Court with great respect rightly held, that for achieving this declared policy or the object of the Legislature of a rationalisation of the revenue assessment structure, it was not necessary to levy a uniform land tax ignoring the well-accepted relevant considerations like the income of the land, fertility of the land, etc. In other words, the Supreme Court held that the dual test was not satisfied, namely, the arbitrary levy of a flat rate classifying all the lands of different varieties together had no nexus nor relation to the object of the enactment. The object of rationalisation of the revenue assessment structure did not warrant the kind of arbitrary levy of land revenue. The Supreme Court found there was no inter-relation between the object sought to be achieved by the Legislation and the actual provisions thereof.

167. At this stage it would be relevant to refer to the decision of the Supreme Court reported in *Jalan Trading Co. v. Mill Mazdoor Sabha* (1967) 1 S.C.J. 189 : AIR 1967 S.C. 697, in which the actual scope of the doctrine "that Article 14 would be offended both by finding differences where there are none and by making no differences if there is one" was explained. In this case, the vires of the Payment of Bonus Act of 1965 was questioned, particularly the provision in Section 10 making minimum bonus payable, whether or not there are profits in the relevant accounting year. The Supreme Court pointed out that it is not for the Court to consider whether the scheme for payment of minimum bonus is the best, in the circumstances, or a more equitable method could have been devised, to avoid in certain cases undue hardship and that if the classification is not patently arbitrary, the Court will not rule it discriminatory merely because it involves hardship or inequality of burden. It was further observed that even if the wisdom of the Legislature or the scheme is open to debate and even if it could be demonstrated that the scheme is not the best in the circumstances, or the choice of the Legislature may be shown to be erroneous, the Court cannot interfere so long as the dual test of intelligible classification and rationality of the relation with the object of the law is satisfied. Section 10 of the Act provided that even if there has resulted trading loss in the accounting year, the employer is bound to pay bonus at 4 per cent, of the salary or wage earned by the employee or Rs. 40 whichever is higher. There was also a further provision for carrying forward the excess remaining after payment of bonus in the previous year to the next accounting year a provision popularly described as "set off" and "set on" in industries dealing with the topic of bonus. The argument was that there was inherent dissimilarity between the various establishments--establishments which had suffered losses and establishments which were making profits were all treated alike by a compulsory provision for payment of bonus and this is offending Article 14, because persons or objects which are unequal are treated in

the same manner and are subjected to the same burden, and that discrimination inevitably results. In support of this contention reliance was placed upon the *Kunnathath Thathunni Moopil Nair Vs. The State of Kerala and Another*, already referred to. Shah, J., as he then was, delivering the judgment of the Bench did not accept this argument. The *Moopil Nair's case*¹, was distinguished on the ground that it contained several peculiar features and it was in the context of those features that the Supreme Court had held that an imposition of a uniform liability upon lands which are inherently unequal in productive capacity amounted to discrimination and the lack of classification created inequality. The learned Judge observed that the decision in *Moopil Nair's case*¹ is not to be understood as laying down law in such wide terms that imposition of uniform liability upon persons, the-objects or transactions which are unequal must of necessity lead to discrimination. Towards the end of paragraph 27 the following significant statement occurs.

Equal treatment of unequal objects, transactions or persons is not liable" to be struck down as discriminatory unless there is simultaneously absence of a rational relation to the object intended to be achieved by the law. Plea of invalidity of Section 10 on the ground that it infringes Article 14 of the Constitution must, therefore fail.

168. From the above it is clear that if the Legislature has declared the object or policy and the policy is achieved by equal treatment of unequal objects, Article 14 has no application. In other words, if the dual test is satisfied, namely, a particular object or policy of the Legislature and that object or policy being achieved by the particular provision, i.e., if real nexus is established between the one and the other, Article 14 has no application even though there is undoubtedly an unequal treatment of persons dissimilarly situated. *Hidayatullah, J.*, as he then was, delivering the judgment on behalf of himself and Justice : *Ramaswami*, explained in the same manner, the scope of the statement of the law in *Moopil Nair's case*¹, (Note: On this point about Article 14 all the five Judges took the same view. It is only upon the scope of Sections 33, 34 and 37 of the Bonus Act of 1955, which has no relevance to the present discussion that *Shah, J.*, *Wanchoo, J.* and *Sikri, J.* took one view while *Hidayatullah, J.* and *Ramaswami, J.* took a different view). The discussion is found in paragraphs 66 and 67 of the judgment. The learned Judge observed that the decision in the *Moopil Nair's case*¹, is distinguishable and cannot be explained by analogical application to a case of minimum bonus which is intended to promote industrial peace and to be a first step towards the goal of need based wage. The principle underlying these observations equally apply to the instant case. The maximum retention price is intended to secure and promote equitable distribution of cement at fair prices, most essential step towards the goal of the economy of the country and an important step towards progressive de-control. The learned Judge went on to observe that every uniform legislation can be made to appear ridiculous by citing a few extreme examples and comparing them and that under the Act, a prosperous establishment could be shown to be placed on the same

footing as another establishment not so prosperous but the Court would not strike down the Act on that ground. It was further observed that differences must exist, but that does not prevent the making of uniform laws for them, provided the law made has a rational relation to the object sought to be achieved.

169. The learned Advocate-General, stressing the above point of distinction, contended that the argument that Article 14 would be offended in every case in which persons or objects dissimilarly situated are treated alike, is not correct; the law was not laid down in such wide terms in the decision of the Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, , and that a law which is uniform even though it acts harshly against some and does not secure equal benefits for all cannot be struck down as offending Article 14 so long as the dual test of the object or the policy of the Legislature and the achieving of that policy by the provisions of the Act are established, i.e., the nexus or the inter-relation between the achieving of the object and the provisions of the Act. We are clearly of the view that this argument of the learned Advocate-General is perfectly sound and supported by ample authorities referred in the preceding discussions.

(i) See Diwan Sugar and General Mills (Private) Ltd. and Others Vs. The Union of India, , the discussion at the bottom of page 632, where the Supreme Court refers to an instance in which while fixing a uniform price for sugar, an individual factory due to factors for which the producer might himself be responsible, there would not be reasonable margin of profits, the cost of production being more. That is an instance of persons dissimilarly situated being treated alike by uniform price fixation.

(ii) Union of India (UOI) and Others and State of Delhi (Now Delhi Administration) and Others Vs. BhanaMal GulzariMal Ltd. and Others, at p. 482, where the Supreme Court observed that where the uniform price for steel is fixed the validity of the price fixation cannot be questioned on the ground that it acted harshly against particular stock-holders and what is important is the general effect of the impugned fixation of price, and (iii) Bijay Cotton Mills Ltd. Vs. The State of Ajmer, , the observations at page 35.

170. After this clear pronouncement of the Supreme Court in Jalan Trading Co. (Private Ltd.) Vs. Mill Mazdoor Union, explaining the limited scope of the doctrine the writ petitioners have no case to argue. We may also add that learned Counsel for the writ petitioners made no effort to meet this point of distinction stressed by the learned Advocate- General supported by several decisions of the Supreme Court referred to above.

171. We may next refer to the decision of the Supreme Court in Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others, , to which reference was made in the course of the arguments. In that case, the vires of the Andhra Pradesh Sugar Case (Regulation of Supply and Purchase) Act XLV of 1961 was questioned as offending Article 14 amongst other grounds. Section 21 of the

Act contained the provision for levy of tax on purchase of sugarcane. There were three categories of rates : (a) A particular rate of tax on purchase of cane made by factories producing sugar by means of vacuum pan process, (b) a lower rate for purchases made by Khandasari units who produced sugar by the open pan process and (c) factories purchasing canes and who manufacture jaggery. The argument was that different rates of tax on purchases offended Article 14. The Supreme Court rejected this argument holding that there was a reasonable basis for classification, that Khandasari units and units purchasing jaggery are all units which deserve encouragement and between the three categories, there was a sufficient rationalisation in the classification of these three units. The discussion is found in paragraphs 15 and 16. This legislation was introduced amongst other purposes to prevent exploitation of the cane growers of the factories and also to levy the purchase tax. The point which the Supreme Court decided was that a law levying tax under Article 265 should be in conformity with Article 14 and that different rates of purchase tax was justified by reasonable classification. From this it was sought to be argued that the Legislature was bound to maintain the three-tier system seeing the differences between three groups of units. It is impossible to agree with this contention. It is for the Legislature to decide whether there should be three different retention prices or one uniform price. When once a uniform price is resolved upon there can be no complaint that it acts harshly as against some. If the uniform price is so ridiculously low, or no price at all, it may offend Section 18-G, but Article 14 has no relevance. It must be borne in mind, that the fair price is such a price which would secure production and equitable distribution and also fair from the point of view of the manufacturer and the consumer. The question of costs plus reasonable margin of profits should not be considered in isolation from the other aspects underlying Section 18-G.

172. The next case to be referred to is the decision in *The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another*, . In this case, the Kerala Plantation (Additional Tax Act of 1960 as amended by the Additional Tax) Amendment Act of 1967 was questioned as offending Article 14. The Act provided seven different kinds of plantations and imposed a uniform rate of Rs. 50 per hectare and it also laid down principles on which this uniform levy of Rs. 50 was made. In the case of coconut, arecanut, rubber, coffee and pepper plantations, plants capable of yielding produce- are to be counted and then the hectares are determined by dividing the total number of plants by a certain figure. In respect of tea plantations and cardomum a different method was given. Originally, the tax was Rs. 8 per acre or Rs. 20 per hectare and it was increased to Rs. 50 by the Amendment Act of. 1967. The vires of the Act was questioned on the ground that there was no reasonable classification, the Act did not take note of difference in situations like fertility and yield between the plantations belonging to the same category and that it was discriminatory inasmuch as the Act treated plantations of different kinds as if they are equal in all respects by reducing them to a common measure of hectare. The Supreme Court analysed

the provisions of the Act and held that there was proper and sufficient machinery provided in the Act to equalise the different plantations for the purpose of taxability. In paragraph 10, this aspect was discussed about how the distinction is made between coconut, arecanut, rubber, coffee and pepper on the one side and tea and cardamom on the other. What is relevant for our present discussion is the observations at para. 18 in which the Supreme Court has reiterated the same principle as laid down in *Khandige Sham Bhat v. Agricultural Income Tax Officer* (1963) 1 S.C.J. 140 : AIR 1963 S.C. 591, already referred to, that a uniform formula cannot be condemned as discriminatory merely because of the fact that due to some fortuitous circumstance arising, out of a peculiar situation some included in a class get an advantage over others so long as they are not singled out for special treatment. This itself shows that a uniform rule in certain circumstances, though the policy of the rule is to introduce uniformity, may in its application bring about different results. It will be relevant to mention that the object of the enactment was not to bring about equality or parity in the levy of plantation taxes so as to impose same burden upon all lands of every description, but the object of the enactment is to levy additional tax according to the categories of the plantations, the extent of the land, the income, the yielding capacity and such other relevant considerations. In levying that tax, bearing in mind the particular features, the Legislature has enacted the machinery of levying Rs. 50 per hectare. What emerges from this decision is that there was a reasonable basis for the classification.

173. It will be convenient at this stage to refer to the contention of Mr. Raman on the question of burden of proof. Relying upon the statement of law in Basu's Constitution, 5th Edition, page 493, he contended that on the face of it, the Cement Control Order has made no attempt to make any classification and it has singled out a group of units for favourable treatment and so any presumption, of constitutionality is of no avail. We see no substance in this contention. On the face of the Cement Control Order there is no discrimination and there is no special treatment in favour of a group. The Cement Control Order shows the fixing of a uniform price and it does not single out any group for special treatment. If higher profits accrued to the group A units, it is the actual operation of the Cement Control Order, and not due to any special treatment made in their favour by the Government. Further, we are of the view that this argument is really against the writ petitioners. Assuming that there is a special treatment in favour of the group A units there is sufficient justification for the classification. The Tariff Commission as well as the Government have accepted the position that these well-established units have become self-sufficient and shown economy and increased production, and such units deserve higher percentage of return and reward, because the way in which they carry on their business activity contributes to the social welfare of the country and the prosperity of the public in general, undoubtedly a relevant consideration to be taken note of by the Government. If the Government evolve a price policy which, on its own face, does not show any discrimination but in its application secures

some advantages to group A units, on that ground, the legislation cannot be struck down as invalid for the obvious reason, as observed by Subba Rao, J., (as he then was) in *Khandige Shan Bhat v. Agricultural Income Tax Officer* (1963) 1 S.C.J. 140 : AIR 1963 S.C. 591 : "they are not singled out special treatment".

Even if the A group units are singled out so as to get an advantage of an increase in profits, we have in the preceding paragraphs held that there is ample justification for such differential treatment.

174. It only remains to conclude this portion of the case with the same comment that writ petitions are totally bereft of particulars as to how there is discrimination. Unless facts and figures are given showing the quantum of percentage of profits earned by group A and the other groups and unless a detailed statement with reference to the Balance Sheet, Profit and Loss Account, etc., etc. is given in such a manner as to enable the Court to form a comparative picture, no relief can be given on a more doctrinaire approach and simple arithmetical calculations, additions and subtractions in the abstract. All the points which we have mentioned in the preceding discussion about the want of pleading and total lack of particulars with regard to Section 18-G apply a fortiori where the complaint is a complaint of violation of Article 14. The decisions already referred to have adverted to the necessity for giving full particulars in the case of a complaint of infringement of Article 14.

175. For all these reasons Writ Appeal No. 156 of 1970 has to be allowed and the Writ Petition No. 2244 of 1969 filed by Madras Cement Ltd., has to be dismissed. Similarly, Writ Appeal No. 137 of 1970 has to be allowed and the Writ Petition No. 2243 of 1969 filed by India Cements, Ltd., has to be dismissed.

176. So far as Writ Petition No. 2243 of 1969 filed by Chettinad Cement Corporation, Ltd., is concerned, we were at one stage inclined to take the view that there is an infringement of Article 14. The Chettinad Cement Corporation went into production only in 1968 and on 8th April, 1968 this factory was included in the Schedule as Item No. 26 with an ex-factory price of Rs. 96. There was no scrutiny or investigation whatever when it was included in the Schedule on the only ground that its production capacity is 2 lakhs tons, the standard applied to the other ordinary units.

177. So far as Assam Cements is concerned, the Government by its order dated 16th April, 1969 has fixed the retention price as Rs. 125-50 per tonne.

In the statement by the Honourable Minister for industries before the Parliament on 14th April, 1969 the Honourable Minister has stated that special prices will have to be fixed for Assam Cements, J.K. Minerals and Travancore Cements, as they are sub-standard units, their production capacity being less than 2 lakhs tons, and separate prices would be fixed after a scrutiny of the relevant aspects.

178. We are also of the view that it is not appropriate that stereotyped affidavits should have been used in all the three petitions. Excepting the preamble portion

of each of the affidavits containing a brief reference to the unit concerned, the other portion of the affidavits in the three writ petitions is verbatim reproduction, word for word. The Chettinad Cement Corporation has naturally suffered by this kind of common treatment, as though this unit sails with the other units without any difference. There are several features which differentiate the Chettinad Cements from the other units, because they were all governed by individual cost prices, and a three-tier system enforced by the Government. Chettinad Cements is undoubtedly a new born industry in infancy and without any scrutiny what the Government has done is to include it in the Schedule and contemporaneously with it, fixed the price as Rs. 96. We were also of the prima facie view that the attempt of the Government, to justify the grouping of Chettinad Cement Corporation in the same as group C. (Rs. 96 unit) on the simple ground that its total production capacity is 2 lakhs tonne is not proper. We have expressed our doubts about the vires of clubbing Chettinad Cements Corporation in Group C, especially in the background of the Government fixing a price of Rs. 123. 50 for Assam Cements. We would have considered this problem in greater detail if a clear affidavit had been filed giving full details and particulars of this unit in comparison with other units, i.e., if a complete picture for a comparative study had been furnished to us. We also observed in the course of the hearing that the counter-affidavit filed by Mr. Narayanan, Secretary to the Board of Chettinad Cement Corporation, as a counter to the affidavit filed by Mr. Aggarwal, General Manager of Dalmia Cement (Bharat) Ltd. was not sufficient. Here too, there was only a doctrinaire approach (without any particulars) and a general attack of the vires of the order on the ground that units differently situated were all grouped together as one class. Ultimately we gained the impression, that learned Counsel preferred that his client, Chettinad Cement Corporation, should stand or fall on the stand already taken and on the allegations in the affidavit.

179. For all these reasons, Writ Appeal No. 153 of 1970 has also to be allowed and W.P.No. 2243 of 1969 of Chettinad Cement Corporation, Ltd. has to be dismissed. The result of the judgment is that the Cement Control (Amendment) Order, 1969 is valid and has to be given effect to. We direct that the petitioner in W.P.No. 2243 of 1969, the petitioner in W.P. No. 2244 of 1969 and the petitioner in W.P. No. 2243 of 1969, shall each pay a sum of Rs. 2,500 towards costs in this Court as well as in the proceedings before Ismail, J., to the learned Advocate-General, who appeared on behalf of the Central Government No. costs for Counsel for interveners.