

(1971) 02 DEL CK 0007
In the Delhi High Court
Case No : Civil Writ No. 896 of 1969

Upper Ganges Sugar Mills Ltd.

APPELLANT

Vs

The Sugarcane (Additional) Price Fixation Authority etc.

RESPONDENT

Date of Decision : 24-02-1971

Acts Referred:

Citation : AIR 1971 Delhi 285 : (1971) 1 ILR Delhi 644

Hon'ble Judges : V.S. Deshpande, J;Hardayal Hardy, J

Bench : Division Bench

Advocate : N.A. Palkhivala, A.C. Bhabra, Ravinder Narain, R.K. Choudhary, N.R. Khetan and B.P. Maheshwari, for the Appellant; B. Sen B.N. Kirpal and Devinder K. Kanpur, for the Respondent

Judgement

V.S. Deshpande, J.—Acting under clause 5 and the Schedule of the Sugarcane (Control) Order, 1966, the Sugarcane (Additional) Price Fixation Authority (Respondent No. 1) passed an order on 29th March 1968 ordering the petitioner sugar mill to pay to the cane growers an additional price of three paise per maund and of twelve paise per quintal for sugarcane purchased by it in 1960-61 and 1961-62 respectively. The order was confirmed in appeal by the Joint Secretary to the Government of India on 3rd January 1969. The virus of Clause 5 and the Schedule of the Sugarcane (Control) Order, 1966 and the correctness of the above mentioned orders are challenged in this and the connected writ petition (Civil writ 897 of 1969) under the following circumstances :

2. Under sub-section (1) and (2) (c) of Section 3 of the Essential Commodities Act, 1955, the Central Government is empowered to promulgate orders to secure the availability of an essential commodity at a fair price and to control the price at which it may be bought or sold. Accordingly the Sugar (Control) Order, 1955 laid down the considerations to be taken into account by the Central Government in fixing the price of sugar. The validity of this Order was upheld by the Supreme Court in Diwan Sugar and General Mills (Private) Ltd. and Others Vs. The Union of India, . The maximum price of sugar was fixed by the Central Government

apparently because sugar enjoys a sellers' market. Sugar is made exclusively from sugarcane juice. The price of sugarcane, Therefore, is the most important element in the fixation of the price of sugar. Sugarcane is a food-crop. Section 3(2)(b) of the Essential Commodities Act, 1955 empowers the Central Government to provide by order for maintaining or increasing the cultivation of food-crops including the cultivation of sugarcane. It is the price which the cultivators could obtain for sugarcane which would induce them to decide to grow sugarcane. Alternative crops could be grown in the same land and, Therefore, the price of sugarcane has to be such as to make its cultivation attractive as compared to the cultivations of other crops and the prices obtainable for such other crops. The regulation of the cultivation of sugarcane under the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1963 was upheld by the Supreme Court in Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, . The sugarcane is a heavy crop which is difficult to transport. It is also quickly perishable. It has a buyers' market and, Therefore, the minimum price at which the sugarcane could be bought by the sugar producers from the cane growers had to be regulated by the Central government by issuing the Sugarcane (control) Order, 1955, the validity of which was upheld by the Supreme Court in A.K. Jain and Others Vs. Union of India (UOI) and Others, .

3. While Sugarcane could be purchased at the minimum price fixed under the sugarcane (Control) Order, 1955, the sugar could be sold by the sugar producers at the maximum price fixed under the Sugar (Control) Order, 1955. There was no machinery by which the cane growers could share in the comparatively high price of sugar obtained by the sugar producers. The Sugarcane (Control) Order, 1955 was, Therefore, amended in 1958. By this amendment, the price at which sugar produced from sugarcane was sold by the producers of sugar was made a relevant consideration in fixing the minimum price of sugarcane. The price of sugarcane was linked with the price of sugar by the addition of Clause 3-A which provided that the sugar producer shall pay to the cane growers, in addition to the minimum sugarcane price fixed under clause 3, a further amount, if found due, in accordance with the provisions of the Schedule which was also added to the Sugarcane (Control) Order, 1955 by the amendment in 1958. The Schedule contained a formula by which a certain percentage of the price of sugar obtained by the sugar producers in the market became payable to the cane growers from whom the sugar producers had bought the sugarcane. The formula was as below:-

$$X \times P - T - C - S - Y.$$

100

"X" was the percentage cost of sugarcane to the total cost of sugar excluding taxes as determined by the Central Government from time to time on the basis of the recovery and duration of season the factory for the year. This was thus a

notional figure. "P" was the average ex-factory price of sugar and its by-products. "T" was the excise duty and cess on sugar. "C" was the actual cost of transport of sugarcane incurred by the sugar producer. "S" was the selling commission paid by the sugar producer while "M" was the weight of the sugarcane divided by the weight of the sugar produced there from. "Y" was the minimum price already paid by the sugar producer for the sugarcane. The result of this formula was to be equal to the actual amount of additional price of sugarcane payable by the sugar producer to the cane grower. In 1962 on the representation of the sugar producers, the Government decided to allow the sugar producers to deduct expenses of rehabilitation from the price of sugar obtained by them before working out the additional price payable by the sugar producer to the cane grower. In 1962 on the representation of the sugar producers, the Government decided to allow the sugar producers to deduct expenses of rehabilitation from the price of sugar obtained by them before working out the additional price payable by them to the cane growers. This had to be done retrospectively from 1958 to 1962. The Sugarcane Control (Additional Powers) Act, 1962 was, Therefore, passed to enable the Government to amend the Sugarcane (Control) Order, 1955 either prospectively or retrospectively in respect of any matter for which provision had been made in clause 3-A and the Schedule thereof. The Sugarcane (Control) Amendment Order, 1962 was, Therefore, passed u/s 3 of the Essential Commodities Act, 1955 read with Section 2 of the Sugarcane Control (Additional Powers) Act, 1962 to enable deduction of a reasonable allowance for rehabilitation by replacing "C" by "R" in the formula in the Schedule of the Sugarcane (Control) Order, 1955. Subsequently, the Sugarcane (Control) Order, 1966 was passed as a measure of consolidation. Clause 5 and the Schedule of this Order were the same as clause 3-A and the Schedule of the Sugarcane (Control) Order, 1955 as amended in 1958 and 1962.

4. It is this linking of the price of sugarcane with price of sugar and the effect given to it by the impugned orders which is the target of attack in this and the connected writ petition. Shri N.A. Palkhivala learned counsel for the petitioner during his argument confined his attack only to the following grounds, namely :-

(1) Clause 5 and the Schedule of the Sugarcane (Control) Order, 1966 as also clause 3-A and the Schedule of the Sugarcane (Control) Order, 1955 were ultra virus Section 3 of the essential Commodities Act, 1955 and were not validated by the Sugarcane Control (Additional Powers) Act, 1962.

(2) Alternatively, these provisions were unconstitutional being contrary to Article 14 of the Constitution as they discriminated between sugar producers and producers of other essential commodities and also between the more efficient sugar producers and the less efficient ones.

(3) Even if these provisions were held to be valid, the impugned orders were liable to be quashed on the ground of an error of law apparent on the face of record inasmuch as the amounts claimed by the petitioner as rehabilitation

expenses were illegally disallowed either wholly or partly.

5. We examine below the contentions of the learned counsel in the order in which they are set out above.

I. Shri Palkhivala did not dispute that the Central Government had the power to fix the prices of sugarcane and sugar. What he objected to was the linking of the price of sugarcane with the price of sugar. What he objected to was the linking of the price of sugarcane with the price of sugar. He argued that such linking was not fixing any fair price of the sugarcane purchased by the sugar mills. On the contrary, the Central government was thereby implementing a scheme enabling the cane growers to share in the profits earned by the sugar producers. Such profit sharing was not contemplated by Section 3 of the Essential Commodities Act. The provisions of the Sugarcane (Control) Orders enabling the Government to do so were, Therefore, ultra virus the Essential Commodities Act. By way of analogy, it was pointed out that Legislature had to pass a separate statute for the payment of bonus to the industrial workers. The payment of bonus could not be brought about by linking the wages of industrial workers with the profits earned by their employers.

6. What was the ambit of the power to fix prices conferred by Section of the Essential Commodities Act on the Central Government? The expressions used to denote this power are "fair prices" and "controlling the price" of an essential commodity like sugar. The same power was exercisable in respect of sugarcane which was the food-crop out of which sugar was made to ensure the maintenance and increase in the cultivation of sugarcane. The Legislature did not lay down any criteria for the price control. On first impression, Therefore, the conferment of such wide powers on the Central Government without any guidelines would appear to be excessive delegation of subordinate legislative powers. The objects for which the powers are to be exercised are, however, stated in Section 3(1) of the Essential Commodities Act, 1955, namely, to maintain or increase supplies of essential commodities and to secure their equitable distribution and availability at fair prices. These are, Therefore, the guidelines according to which the prices are to be fixed by the Central Government. According to the learned counsel, however, these guidelines did not authorise the Central Government to lay down the further criteria for the fixation of sugarcane prices with a view to link the price of sugarcane with the price of sugar. The point at issue, Therefore, is whether such linking of the two prices was in the contemplation of the Legislature in enacting the Essential Commodities Act.

7. In the opening paragraphs of the counter-affidavit filed by the Union of India and also in the Supreme Court decision in Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, a, the history of the regulation and control of sugarcane price has been set out. They show that ever since the Sugar Industry Protection Act, 1932 was passed, the Government has pursued the policy of ensuring the payment of a fair price for sugarcane bearing a reasonable relation

to the price of sugar. Under S. 3 of the Sugarcane Act, 1934, powers were conferred on the Provincial Governments to notify controlled areas and to fix minimum prices for the purchase of sugarcane intended to be used in a sugar factory and to prohibit sugar factories from purchasing the sugarcane otherwise than from the sugarcane growers. The minimum prices fixed by the Government of Uttar Pradesh and Bihar bore definite relationship to the price of sugar realized by the sugar producers. In 1953, the South Indian Sugar Mills Association in consultation with the cane growers evolved a formula known as "SISMA" formula under which the sugar producers paid to the cane growers an extra price over and above the minimum price which had been fixed by the State Government for the sugarcane for 1952-53. An All India formula for linking the price of cane with the price of sugar was also evolved and applied on a voluntary basis from 1953-54 season. When, Therefore, the Essential Commodities Act, 1955 was enacted, the fair price for sugarcane could be understood by the Legislature to mean not only a minimum price but also the sharing by the cane growers in the higher price of sugar realized by the sugar producers. Thus, the vague phrases "fair price" or "price control" used in Section 3 of the Essential Commodities Act, 1955, assume considerable meaning because of its history and context.

8. Further, the fixation of "fair prices" and price control" are a difficult job capable of being performed by the Government or such agency as is in possession of necessary economic and social data. It involves experimentation so that by trial and error the proper criteria for the fixation of "fair prices" and "fair control" may be evolved. It is not always possible for the Legislature, Therefore, to lay down a priori criteria of price fixation.

9. The Essential Commodities Act became law on 1st April 1955. On 2nd April 1955, the Central Government appointed an expert Committee known as the Gopalkrishnan committee for examination of the formula linking the sugarcane price with the price of sugar. In the very first sentence of its Report, this Committee stated that "the question of passing on to the cane grower a legitimate share of the price realized for sugar by factories has been under consideration of the Government for some time past". The Committee recommended that the sharing of the sugar price by the cane growers should be put on a compulsory basis. The Sugarcane (Control) Order, 1955 was, Therefore, amended in 1958 by the insertion of a new clause 3-A providing for payment of an amount in addition to the minimum cane price, where found due, to the cane growers to be calculated in accordance with the formula given in the Schedule. The price linking formula was further examined by the Tariff Commission in 1961 in the light of its previous Report on the Cost Structure of Sugar and Fair Price payable to the Sugar Industry (159) and the price linking formula was amended as per the Tariff Commission Recommendation (1961) by the Sugarcane (Control) Amendment Order, 1962 issued u/s 3 of the Essential Commodities Act, 1955 and Section 2 of the Sugarcane Control (Additional Powers) Act, 1962. The data collected and considered by the Government, by the Gopalkrishnan Committee and by the Tariff Commission thus directly formed the basis of the

enforcement of the price sharing system. This socio-economic data served as the basis of the amendments of 1958 and 1962 to the Sugarcane (Control) Order, 1955, and of the Sugarcane Control (Additional Powers) Act, 1962.

10. The criteria for the payment of additional price laid down by the Government in clause 3-a and the Schedule inserted in the Sugarcane (Control) Order, 1955 by the amendment of 1958 were expressly approved by the Parliament in enacting the Sugarcane Control (Additional Powers) Act, 1962. The power to link the sugarcane price to the price of the sugar and thus compel the sugar producers to pay to the sugarcane growers a percentage of the price of sugar obtained by them was expressly conferred on the Central Government both prospectively and retrospectively by this Act of 1962. The significance of the Act of 1962 is twofold. Firstly, it enabled the Government to further amend the price formula by allowing deduction of the rehabilitation expenses to the sugar producers retrospectively for the years 1958 to 1962. Secondly, it conferred on the Central Government a substantive and separate power to enforce such price linking quite apart from the power already given by Section 3 of the Essential Commodities Act, 1955. Learned counsel for the petitioner Shri Palkhivala argued that statute has two dimensions, namely, one of time and the other of subject-matter. According to him, the sole object of the Act of 1962 lay in the time dimension to enable the Central Government to give retrospective effect to the proposed amendment at the price linking formula. He argued that the power to lay down and enforce the price linking formula was not contained in Section 3 of the Essential commodities Act and was not given by Section 2 of the Act of 1962. We have already given reasons above to show that the power was already contained in Section 3 of the Essential Commodities Act. We are also of the view that the Act of 1962 has both the dimensions of time and subject matter. For, the Act enables the Government to enforce the price linking both retrospectively and prospectively. This substantive power is conferred by it on the Government in addition to the power conferred by Section 3 of the Essential Commodities Act.

11. It is true that the impugned orders have been made in 1968 and 1969 under the Sugarcane (Control) Order, 1966 which purports to be issued u/s 3 of the Essential Commodities Act but does not mention the Sugarcane Control (Additional Powers) Act, 1962 as an additional source of its power. It is well-established, however, that the power having been vested in the Central government which it purported to exercise can always be attributed to the right source of power, namely, the Act of 1962 even though the Order of 1966 does not expressly purport to be issued under the Act of 1962 and mentions Section 3 of the Essential Commodities Act alone as the source of power. (Shri Roshanlal Gautam Vs. State of Uttar Pradesh and Others, and Gopal Narain Vs. State of Uttar Pradesh and Another,). Even if it is assumed for the sake of argument that Section 3 of the Essential Commodities Act did not authorise the price linking system and, Therefore, the Sugarcane (Control) Order, 1966 was ultra virus as it was not issued under the Sugarcane Control (Additional Powers) Act, 1962, even then the effect would be that the Sugarcane (Control) Order, 1955 as amended

in 1958 and 1962 would remain unrepealed and valid inasmuch as the amendment of 1962 was expressly made both u/s 3 of the Essential Commodities Act, 1955 and Section 2 of the Sugarcane Control (Additional Powers) Act, 1962. That would be sufficient to support the enforcement of the price linking system.

12. Learned counsel for the petitioner characterised the price linking system as a system of profit sharing. It has to be borne in mind, however, that the additional price is made payable to the cane growers by the sugar producers from the price of the sugar obtained by them and before their profits are determined. The cane growers are, Therefore, sharing not in the profits of the sugar producers but in the price obtained by them and before their profits are determined. The cane growers are, Therefore, sharing not in the price obtained by the sugar producers for sugar. The reason is that sugar is made almost entirely of sugarcane juice. In practice, however, the grower of sugarcane and the maker of sugar are different. This accident, however, should not mean that the maker of the sugar should be allowed to get away with a price which is disproportionately larger than the price paid by him to the cane grower for the sugarcane. The finished product, i.e. sugar, is regarded as a result of the joint contributions of the cane growers and the sugar producers. It is the price of sugar, Therefore, which has to be shared between them. What has been already paid by the sugar producer to the cane grower is the minimum price. In fixing the minimum price, it might not have been possible to estimate precisely how much price the sugar will obtain. This is why a link had to be established between the minimum price of the sugarcane and the maximum price of the sugar. This was on method on ensuring an equitable distribution of the price of sugar between the cane growers and this sugar producers. Another method could be to link the price of sugar cane from the start with the price of sugar instead of first fixing the minimum price for sugarcane and then obtaining an additional price for the same. It is understood that since 1962 onwards the payment of additional price has become unnecessary as to start with itself the sugarcane price is linked with the sugar price. Both these methods are for sharing the sugar price between the cane growers and the sugar producers and not for profit sharing between the two. There is absolutely no analogy between the Minimum Wages Act and the Payment of Bonus Act on the one hand and the fixation of the minimum price for the sugarcane under clause 3 of the Sugarcane (Control) Order, 1966 and the payment of additional price for sugarcane under clause 5 thereof. It cannot be argued, Therefore, than an additional price for sugarcane could not be made payable under the Sugarcane (Control) Order, 1966 inasmuch as payment of bonus was not made payable under the Minimum Wages Act without resort to the Payment of Bonus Act.

II. Can it be seriously argued that the linking of the price of sugarcane with the price of sugar discriminates against the sugar producers and in favor of the producers of other essential commodities? The list of essential commodities u/s 2(a) of the Essential Commodities Act includes widely divergent things. None of

them can be compared to sugar and sugarcane. Before a petitioner raises the plea of discrimination under Article 14 of the Constitution, it is necessary that he must plead and prove that two persons or things which are alleged to have been differently treated belonged to the same class and are similarly situated. It is only then that the question whether a reasonable classification exists between them and whether the classification is justified can be considered. As the petitioner has not shown that the other essential commodities are similarly situated with sugar and sugarcane, no comparison with them is possible. It cannot be said, Therefore, that the Government could have resorted to a price linking system in fixing the prices of other essential commodities as it did in respect of sugar and sugarcane. The first aspect of the alleged discrimination has , Therefore, no basis.

13. Shri Palkhivala then argued that the price of sugar obtained by a more efficient sugar producer would be more than the price obtained by the less efficient ones. For, according to him, with the same amount of sugarcane of the same quality a more efficient producer would produce a larger amount of sugar than would be done by a less efficient producer. this argument seems to be based on the assumption that the letter "P" in the formula in the Schedule of the Sugarcane (Control) Order, 1966 is the actual price obtained by a particular sugar producer. It is only the actual price obtained by one sugar producer which can be larger than the actual price obtained by another sugar producer working on the same amount of sugarcane. It is only then that the former would be required to pay a larger amount of additional price to the sugarcane grower. But "P" represents only the average ex-factory price realized by a sugar producer. The ex-factory price of the sugar is also fixed at the same rate for all sugar producers by the Sugar (Control) Order, 1955. It is not possible to say, Therefore that the quantum of sugar produced by an efficient sugar producer could always fetch a larger amount of sugar price than would be fetched by a less efficient sugar producer. Secondly, the role of management would appear to be less important than the quality of sugarcane in the production of sugar. The larger quantum of sugar may, Therefore, result not so much because of the efficiency of management but because of the efficiency of management but because of the better quality of sugarcane. Under Sections 15 and 16 of the U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 as brought out in the Supreme Court decision in Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, the State Government had the power to reserve areas from which alone sugarcane could be purchased by a particular sugar producer. By clause 4 of the Sugarcane (Control) Order, 1955 also power was given to the Central Government to prohibit or restrict or otherwise regulate the export of sugarcane from any area for supply to different factories. Due to this arrangement, a particular sugar producer would pay additional price no sugarcane only to the cane growers in a particular area. It would be difficult, Therefore, to compare for the purposes of Article 14 the additional price paid by such a producer with the additional price paid by another producer to different cane growers for cane

supplied from a different area. Lastly, there would be other factors such as the efficiency of labour, accidents, strikes, etc., which would also influence the element of quantum of sugar produced. It cannot be said, Therefore, that the price linking formula discriminates against the more efficient sugar producers.

14. It was also argued that cane growers were paid the same minimum price for their cane irrespective of the quality of the cane. Such a complaint, if any, could be heard only from the cane growers and not from the petitioner. No such case is made out in the petition. This contention, Therefore, cannot support any grievance of the petitioner. It was also said that good cane sold to bad producers would secure no additional price to the cane growers while bad cane sold to good producers may still result in the payment of additional price. As already stated above, cane growers of different producers, there is no room for such a comparison. It was also said that the same cane grower would get additional price from an efficient sugar producer but not from an inefficient one. It was not shown, however, that the same cane grower could supply cane to different sugar producers. This question also is, Therefore, academic. It is to be noted that the price of sugarcane fixed under the sugarcane (Control) Order is initially the minimum price only. Such a minimum price did not purport to be a fair price. It could not be argued., Therefore that after the fixation of the minimum price, no additional price could be made payable to the cane growers.

III. The claim to rehabilitation expenses is based on paragraph (5) of the Schedule to Sugarcane (Control) Order, 1966 which runs as follows:-

""R" is such allowance per maund or quintal of sugar for the factory as may be deemed reasonable by the Central Government, having regard to the amount actually spent by the factory on rehabilitation during the year and the amount transferred as reserve to a special rehabilitation account during the year".

The rehabilitation expenses are, Therefore, to be determined for each year separately and not over a period of years. The petitioner has not transferred any amount as reserve to a special rehabilitation account during the years 1960-61 and 1961-62. It is only such amounts, Therefore, which can be claimed by him as rehabilitation allowance as may be deemed reasonable by the Government. In deciding what is reasonable, Government has to have regard to the amount actually spent by the factory on rehabilitation. Shri Palkhivala assailed the impugned orders in this respect on two grounds. Firstly, the Sugarcane (Additional) Price Fixation Authority and the appellate authority wrongly thought that only a physical replacement of machinery or building by a new one would amount to rehabilitation. Secondly, the expression "having regard to" did not exclude consideration of expenses other than those incurred on actual rehabilitation.

15. Shri Palkhivala was on good ground in his first criticism of the impugned orders. The order dated 29-3-1968 by the Sugarcane (Additional) Price Fixation Authority is not a speaking order. It is not known. Therefore, how it determined

the rehabilitation expenses and whether it took the right or wrong view of rehabilitation expenses and whether it took the right or wrong view of rehabilitation. The appellate order dated 3-1-1969 is fortunately a speaking order. Its perusal shows that rehabilitation allowance as wrongly disallowed either wholly or partly on several items by the appellate authority. The basis for understanding the contentions of the petitioner informed the Government that the present installed capacity of the factory is 2575 tons and sought sanction to increase the installed capacity to 3200 tons per day. The petitioner enclosed a tentative list of requirements in which Item No. 8 related to boilers. Three boilers of 7500 sq.ft. heating surface each were asked for. Subsequent experience showed that boiler no. 7 brought the installed capacity to 3200 tons. Boiler No. 8 was required to bridge the gap between the installed capacity and the actual capacity. It was mentioned that one boiler of 7500 sq. ft. heating surface out of these three had already been sanctioned. On 25-11-1957 (at page 102 of the record) the petitioner informed the Government that it had practically installed all the items sanctioned under the license for increasing the installed capacity to 3200 tons. On 8-7-1958 (R-2) the Government wrote to the petitioner that although most of required additional plant and machinery had been installed, the petitioner had not achieved the extended capacity of 3200 tons and asked for the reasons for the same. The Government observed that the capacities at the centrifugal and boiler stations appeared to be inadequate for a crushing rate of 3200 tons per day. If the installed capacity had not been 3200 tons, the Government could not have expected the factory to reach the crushing capacity to 3200 tons per day. When the Government said, Therefore, that the capacities at the centrifugal and boiler stations appeared to be inadequate they must be understood to mean that the actual capacities or the actual production or performance were inadequate they must be understood to mean that the actual capacities or the actual production or performance were inadequate and not that the rated capacity or the installed capacity was inadequate. On 15-7-1958 (R-3) the petitioner explained the reasons for an average crush of 2667 tons per day against a licensed capacity of 3200 tons . In this letter also the petitioner stated that the existing boiler capacity was definitely inadequate for 3200 tons crushing capacity. But the petitioner was determined to push up this crushing to 3200 tons in the coming season. This would also indicate that it was only the actual crushing capacity which was inadequate and not the installed capacity.

16. When the Government asked the petitioner to explain why the actual production was less than 3200 tons it was clear that the Government knew that the installed capacity is calculated according to the rated capacity of the machinery and plant. A machinery or a plant is manufactured to give a certain output. This is its rated or installed capacity. As the machinery or the plant gets older its installed capacity is not equal to the actual production. The actual capacity or the actual production becomes less and less than the installed or the rated capacity. It is to bridge the gap between the installed capacity and the actual production that rehabilitation expenses are to be incurred. Such

rehabilitation may take two forms. The old machinery may either be physically discarded and new machinery of the same actual capacity is substituted or new machinery is added to the old machinery. As the old machinery may not have become completely useless, it is not usually discarded physically. It is cheaper to add the new machinery side by side to the old one. In such a case rehabilitation consists not of physical replacement of an old asset but the replacement of the lost actual capacity of the old asset by the new machinery. This replacement of the lost actual capacity of production is as good rehabilitation as the physical replacement of a discarded asset.

17. The petitioner had originally six boilers. It obtained the seventh boiler in 1957-58 and thereby made up an installed capacity of 3200 tons. But the old boilers were not giving an output of steam equal to their installed capacity. It was necessary, Therefore, to add another boiler to bridge this gap between the installed capacity and the actual capacity. The expenditure on the purchase of the eighth boiler was claimed by the petitioner by way of rehabilitation. The case of the petitioner is clearly explained in the memorandum of appeal filed by the petitioner before the appellate authority. At pages 112 and 113 of the paper-book, it is clearly stated that the purchase of the eighth boiler was necessary to make good the difference between the rated capacity and the actual steam produced by them which was below the rated capacity. This argument was reproduced in the order of the appellate authority (Page 119 of the paper book.) But the appellate authority does not show any appreciation of the argument on page 120 of the paper book. The appellate authority failed to keep clear the distinction between the installed capacity and the actual production. It disallowed the expenses on the purchase of the boiler in the apparent belief that the purchase of the eighth boiler was by way of expansion or addition as distinguished from rehabilitation. As already explained above though the purchase of the eighth boiler was made after the installed capacity of 3200 tons had been reached the actual capacity of the boilers was not reaching 3200 tons and, Therefore, the purchase of the eighth boiler was by way of rehabilitation to bring up the actual production to the rated capacity.

18. On 19th August 1958 (R-4) the Government told the petitioner that the licensed expansion of the factory could not be deemed to be completed unless the capacities at the centrifugal and boiler stations were increased in accordance with the expansion program. It was observed that some items of machinery were yet to be installed to achieve the licensed extended capacity of 3200 tons. This again means the additional machinery to be installed would bridge the gap between the installed capacity and the actual capacity. On 26-8-1958 (R-5) the petitioner wrote to the Government that it required another boiler to cope up with the steam demand for a daily crushing rate of 3200 tons. This also shows that the additional boiler was required to bridge the gap between the installed capacity and the actual production. On 29-10-1959 (at page 126 of the paper book) the petitioner explains the actual heating surface of the boilers which was below their rated capacity or installed capacity. Therefore, on 5-12-1959 (at page

127 of the paper book) the Government informed the petitioner that there was no objection to the installation of two boilers of 5000 sq. ft. heating surface each in connection with the substantial expansion of the factory up to 3200 tons of crushing capacity. What is called expansion here is itself rehabilitation inasmuch as these boilers would bridge the gap between the installed capacity of the old boilers which was 3200 tons and the actual capacity which was less than 3200 tons. On 27-3-1960 (at page 129) the petitioner is explaining the installation of a boiler of 7500 sq.ft. heating surface sanctioned for the capacity of 3200 tons. This again does not mean that the installed capacity of 3200 tons had not been reached by the petitioner. It only means that the actual capacity or actual production was less than the rated capacity and that the new boiler was required to bring up the actual capacity up to the installed capacity. On 23-12-1961 (R-7) also the petitioner is explaining how it is trying to match the actual capacity of 3200 tons showing that the installed capacity of 3200 tons was already there, but the performance was not up to it. In the annexure to R-8 Item No.27 is boilers which explains the steam pressure produced by the old and the new boilers showing how the new boilers were installed by way of rehabilitation of the lost capacity of the old boilers. All this correspondence leads to the same conclusion, namely, that the major portion of the expenditure claimed by the petitioner on account of rehabilitation has not been considered by the authorities under the misapprehension that any expenditure which did not result in the physical replacement of an old Item was not by way of rehabilitation.

19. The same remarks apply to the other items such as chimney and draught fans, vacuum filter, new pan and massecuite pumps. At page 113 of the paper book, the petitioner explained that though the three existing chimnies had an installed capacity of 3200 tons per day, Chimney No. 1 had holes in it and Chimney No. 2 had fallen. It was necessary, Therefore, to install a Chimney and draught fans to replace Chimney No.1. At page 121 of the paper-book, the appellate authority regarded this expenditure also as on expansion or addition and not as rehabilitation inasmuch as the new chimney did not physically replace the old one but only replaced the lost capacity of the old one. The expenditure on the vacuum filter and new pan was also claimed by way of rehabilitation but does not seem to have been so understood by the appellate authority.

20. From a perusal of the impugned orders, it is not clear what principles were followed by these authorities in determining the correctness or otherwise of the claim of the petitioner for rehabilitation expenses in respect of several items. In respect of the boilers and the chimnies, the claims have been disallowed wrongly under the misapprehension that a physical replacement of an item was necessary for rehabilitation. This was a mistake of law apparent on the face of the record of the appellate order. It vitiates the order which is, Therefore, liable to be quashed.

21. Shri Palkhivala relied on the decision of the Privy Council in Commissioner of Income Tax v. Williamson Diamonds Ltd. 1958 Ac 41, followed by the Supreme Court in Commissioner of Income Tax, West Bengal Vs. Gangadhar Banerjee and

Co. (Private) Ltd., , for the proposition that the words "having regard to " do not restrict the power of the authority to the stated consideration other things also. These decisions have to be understood in the context in which they were given. The question was whether the filed that having regard to losses previously incurred by the company or to the smallness of the profits made, the smallness of the profits made, the payment of a dividend or a larger dividend than that declared could be unreasonable. It was held that capital losses, though not included in the word "losses" could still be taken into account by the Commissioner even though they were not mentioned as relevant considerations in the statute. The reason was that it was impossible to arrive at a conclusion as to reasonableness by considering only the two matters, namely, the losses previously incurred and the smallness of the profits. The capital losses had, Therefore, to be taken into account. The present case is distinguishable from these decisions. The concept of "rehabilitation" is clear. Any expenditure incurred to bridge the gap between the installed capacity and the actual performance or production or capacity of a machinery or plant would be regarded as expenditure by way of rehabilitation. It cannot be said that any other expenditure has to be taken into account in determining rehabilitation under the cane (Control) Order, 1956. What the authority has to determine is a reasonable allowance. The letter "R" in the formula stands for reasonable allowance. The only factor in determining what is reasonable stated in the formula is the rehabilitation expenses. It is not necessary to consider any; other factor before the authority can decide what is reasonable allowance. The authority is not Therefore, required to take anything else into consideration in determining that mount of "R" under the formula.

22. We, Therefore, set aside the impugned orders dated 29th March 1968 and 3rd January 1969 and direct the Sugarcane (Additional) Price Fixation Authority or its present equivalent to consider the claim of the petitioner to rehabilitation allowance in the light of the following principles:-

(1) The installed capacity of the plant of the petitioner sugar mill as a whole and of the individual items of the machinery, etc., was of crushing capacity of 3200 tons per day.

(2) The Sugarcane (Additional) Price Fixation Authority shall first determine whether the actual capacity if the plant and/or of any of the individual items of the machinery, etc., was below the installed capacity of 3200 tons per day in the years 1960-61 and 1961-62.

(3) If so, the Authority shall then find out how much of the expenditure claimed by the petitioner as rehabilitation allowance in each of these years has contributed to bridge the gap between the installed capacity and the actual capacity of the plant and/or of any of the individual items of the machinery, etc., and allow only such expenditure as rehabilitation allowance in the particular year. For instance, the expenditure as rehabilitation allowance in the particular year. For instance, the expenditure on the purchase of a particular item may contribute

to the increase in the actual capacity beyond 3200 tons per day. If so, only that part of the expenditure would be allowable as being for rehabilitation as contributed to the increase of the actual capacity up to 3200 tons. Similarly, even if an item is purchased in the relevant year 1960-61 and 1961-62 it is only that part of the purchase money which was spent in the year 1960-61 and 1961-62 which is allowable as rehabilitation expenditure for that particular year. Payments made either before or after these years are not to be considered for the purpose of determining rehabilitation allowance for each of these two years. It is not necessary that the old item must be physically discarded before the new item purchased. Both can continue to be used side by side and the actual capacity of both will have to be taken into account to determine to what extent the gap between the installed capacity and the actual capacity is bridged by the new item.

(4) Expenditure not incurred for such rehabilitation is not to be allowed as reasonable allowance under paragraph (5) of the formula stated in the Schedule of the Sugarcane (Control) Order, 1966.

23. The writ petitions (Civil Writs 896 and 897 of 1969) Therefore succeed partially and are allowed as above. In view of the divided success, we make no order as to costs.

24. Order accordingly.