

INDIA CEMENT LTD. ETC.

UNION OF INDIA AND OTHERS

AUGUST 21, 1990

[J.S. VERMA, M.M. PUNCHHI AND K. JAYACHANDRA
REDDY, JJ.]

Cement Control Order 1967 Clause 12—Fixation of uniform retention price—Legality of.

The appellants filed writ petitions in the Madras High Court challenging the fixation in 1969 of a uniform retention price of Rs.100 per tonne of cement instead of the existing three different retention prices for different categories of producers fixed earlier on the basis of the recommendations made by the Second Tariff Commission in 1961. The grievance of the appellants was that the fixation of a uniform retention price to be paid to all producers for the cement produced by them and acquired by the State Trading Corporation amounted to discrimination contravening Article 14 of the Constitution. The challenge was rejected by a Single Judge and, thereafter, a Division Bench of the High Court.

Cement has been a controlled commodity for a long time and its production, distribution and price were regulated by Cement Control Orders issued by the Central Government from time to time in exercise of the powers conferred under sections 18G and 25 of the Industrial (Development & Regulation) Act, 1951.

On behalf of the appellants it was contended that the impugned Order made in 1969 fixing a uniform retention price for all three categories of cement producers treated unequals as equals; that the increase of Rs.7 per tonne was to be made to the existing three-tier retention prices, but an irrational basis was adopted in fixing the uniform price of Rs.100 per tonne which resulted in an unequal increase to the three different retention prices then existing; that clause 12 of the Cement Control Order, 1967 did not permit one uniform retention price; and that atleast in the case of Chettinad Cement Corporation Ltd. discrimination was proved on the basis of the distinction made by the High Court in the case of M/s Travancore Cement Ltd. The appellants however did not dispute before this court that no grievance would survive if the uniform retention price was fixed at Rs.104 per tonne instead of Rs.100.

On behalf of the respondents it was asserted that the industry itself had sought a revision of the prices and had accepted in principle that there should be one uniform retention price.

Dismissing the appeals, this Court,

HELD: (1) The fixation of Rs. 100 per tonne as the uniform retention price for the entire industry with the solitary exception of M/s Travancore Cement Ltd. for which justification had been shown, was on a rational basis taking into account all relevant data and factors including the cement industry's acceptance of the principle of a uniform retention price for the entire industry, the only difference being in the price actually fixed at Rs. 100 per tonne instead of Rs. 104 per tonne claimed by the cement industry. It is obvious, therefore, that the principle of a uniform retention price for the entire industry had not been faulted. [857H; 858A-B]

(2) The principle of fixation of a uniform price for the industry was an accepted principle and this had to be done by fixing the uniform price on the basis of the cost of a reasonably efficient and economic representative cross-section of manufacturing units and not with reference to the cost in relation to each unit, [859A-B]

M/s. Shri Sitaram Sugar Company Limited & Anr. v. Union of India & Ors. and U.P. State Sugar Corporation Ltd. & Anr. v. Union of India & Ors., J.T. 1990 (1) SC 462, referred to.

(3) Fixation of a uniform retention price being clearly permissible and the same having been determined at Rs. 100 per tonne on the basis of expert opinion, founded on relevant factors, there was no scope for interference within the limits of permissible judicial review in the present case. [859E]

Anakapalle Co-operative Agricultural & Industrial Society Ltd. v. Union of India, [1973] 2 SCR 982 and *The Panipat Cooperative Sugar Mills v. Union of India*, [1973] 2 SCR 860, referred to.

(4) The Central Government's power under Clause 12 of the Cement Control Order, 1967 to refix the price can be exercised 'having regard to any change in any of the factors relevant for determination of price of cement'. The meaning of the expression 'having regard to' is well-settled. It indicates that in exercising the power, regard must be had also to the factors enumerated together with all factors relevant for

A exercise of that power. One such factor specified in Clause 12 is “such as an increase or decrease in the cost of production or distribution.” [860B-C]

B (5) No material has been produced by the appellant to show that M/s Chettinad Cement Corporation is a similar substandard unit without any capacity for expansion, so that it too must continue to be an uneconomic unit like M/s Travancore Cement Ltd. deserving a similar treatment. [860F-G]

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 2192-93 of 1972.

C From the Judgment and Decree dated 23.4.1971 of the Madras High Court in Writ Appeal Nos. 155 and 157 of 1970.

G.L. Sanghi, K. Parasaran, S. Krishnamurthy Iyer, K.K. Venugopal, D.N. Mishra and Ms. Lira Goswami for the Appellants.

D V.C. Mahajan, Gobind Das, N.L. Kakar, C.V. Subba Rao, B.R. Aggarwala, T.C. Sharma, Mrs. Sushma Suri and Ms. Sushma Manchanda for the Respondents.

The Judgment of the Court was delivered by

E VERMA, J. Both these appeals are against the common judgment of the Madras High Court (hereinafter referred to as ‘the High Court’) by a certificate under Article 133(1) of the Constitution prior to its amendment. The appellants’ writ petitions were dismissed by a common judgment dated 18.12.1969 by a learned Single Judge of the High Court and thereafter, the writ appeals were dismissed by a Division Bench of the High Court on 23.4.1971. The grievance of the appellants before us is, as it was in the High Court, against the fixation of a uniform retention price in 1969 to be paid to all producers for the cement produced by them and acquired by the State Trading Corporation. In short, the appellants’ grievance is that the fixation of a uniform retention price for all producers in 1969 instead of three different retention prices for different categories of producers, as was done earlier, amounted to discrimination contravening Article 14 of the Constitution.

H The background in which the argument of discrimination has to be tested may now be stated. Cement has been a controlled com-

modity for a long time and its production, distribution and price were regulated by Cement Control Orders issued by the Central Government from time to time in exercise of the powers conferred under the Industries (Development & Regulation) Act, 1951. The arrangement made in 1856 was that the entire quantity of cement produced by all producers was acquired by the State Trading Corporation which distributed it throughout the country at a uniform price on f.o.r. basis. The price payable by the State Trading Corporation to the producer was, however, the 'retention price' or 'ex-works' or 'ex-factory price' fixed by the Government. In accordance with the recommendations of the First Tariff Commission in 1958, the Central Government fixed f.o.r. and ex-factory prices for a period of three years from July 1958, under the Cement Control Order, 1958. Even though the consumer price was one uniform f.o.r. destination price, there were different retention prices for cement relating to the producers. In case of a new unit commencing production, the Government fixed suitable retention price for it on the basis of cost of production.

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Pursuant to representation by the cement industry for revision in the prices, the Second Tariff Commission was set up by the Government to examine the question. The Tariff Commission, after a comprehensive study, submitted its report on 26.8.1961. In the report, it was noticed that fixation of ex-works price for individual cement producers had brought stagnation in the cement industry due to lack of competition and incentive amongst producers to reduce the cost of production, improve the operational efficiency and increase the output. It was observed that instead of rewarding efficiency, it had promoted a tendency to inflate costs which facilitated increase in the margin of profit to the producer. The Tariff Commission ultimately grouped the various units under three broad categories on the basis of return on the capital employed. These were: the lowest cost group, the high cost group, and those whose cost of production was in between the other two groups. Accordingly, the Tariff Commission recommended different retention prices for the manufacturers of cement. The Government generally accepted the recommendations and passed the Cement Control Order, 1961, fixing three different retention prices for three different groups of manufacturers. The Central Government from time to time permitted increase in the retention prices so fixed.

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The Central Government decided on decontrol of cement w.e.f. 1.1.1966, but the cement industry imposed a system of self-regulation and set up an unofficial body known as "Cement Allocation and

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- A Coordinating Organisation". The cement was to be distributed to consumers at uniform f.o.r. destination price all over India. This price included a freight component. A cement regulation account was also established to which a manufacturer would either contribute or draw from depending on the actual freight incurred. This system was not found workable and the Central Government decided to re-impose
- B control. The Cement Control Order, 1967 was passed under Section 18G and Section 25 of the Industries (Development & Regulation) Act, 1951, to be effective from 1.1.1968. Under this Order, the three-tier retention price system was continued and the retention prices fixed for the three groups were specified in the Schedule as Rs.90.50, Rs.93.50 and Rs.96. Both the appellants fell under the category for which the retention price specified in the Schedule was Rs.96.
- C Under this Cement Control Order, the system of uniform consumer price was preserved and freight equalisation was maintained by requiring the manufacturer to either contribute or draw from the cement regulation account set up under clause 9 of the Order. The Cement Controller replaced the Cement Allocation and Co-ordinating
- D Organisation,

- Pursuant to the representation made by various manufacturers, the Central Government enquired into the increase in the cost of production since 1.1.1966. In consultation with the concerned authorities, it was estimated that the weighted average increase in the cost of
- E production since 1.1.1966 was Rs.7 per tonne. The Central Government then issued the Cement Control (Amendment) Order, 1969 on 14.4.1969 effective from 16.4.1969 by which the Cement Control Order, 1967 was amended and in respect of all cement manufacturers, except M/s. Travancore Cement Limited, Kottayam, a uniform retention price of Rs. 100 per tonne was fixed.

- F The appellants filed writ petitions in the Madras High Court challenging the fixation of a uniform retention price of Rs.100 per tonne in this manner on the ground that it violated Articles 14 and 19(1)(g) of the Constitution. As earlier stated, the challenge was rejected by a Single Judge and thereafter, a Division Bench of the
- G High Court. Hence, these appeals by a certificate granted by the High Court under the unamended Article 133(1) of the Constitution of India.

- The challenge before us in these appeals is based only on Article 14 of the Constitution. Shri K. Parasaran, learned counsel for the
- H appellant in the Civil Appeal No. 2193 of 1972 (*Chettinad Cement*

Corporation Ltd. v. Union of India, contended that the impugned Order made in 1969 fixing a uniform retention price for all three categories of cement producers treats unequals as equals. He argued that the fixation of three different retention prices earlier was based on the Tariff Commission's Report on the postulate that different producers were differently situated with different cost of production and therefore, the fixation of different retention prices for them was reasonable. He next contended that increase in the cost of production being the real cause for re-fixation of a higher price, the exercise purports to be under Clause 12 of the Cement Control Order, 1967, which does not permit fixation of the same price for all producers in spite of the difference in their cost of production, particularly when the Schedule to the order initially specified different prices for them. He also contended that on the finding of the High Court that the Chettinad Cement Corporation Ltd. (appellant in Civil Appeal No. 2193 of 1972)—a newly born unit in infancy—has suffered by this common treatment because there are several features which distinguish the Chettinad Cement Corporation Ltd. from the other units, fixation of the same price for this appellant is discriminatory, particularly when a distinction was made in the case of M/s. Travancore Cement Ltd., Kottayam, for which a higher retention price was fixed. Shri Parasaran, therefore, contended that atleast in the case of this appellant, discrimination is proved on the basis of the High Court's finding of fact and a direction for re-fixation of a reasonable price for this appellant would be justified. Shri G.L. Sanghi, learned counsel for the appellant in Civil Appeal No. 2192 of 1972, advanced a slightly modified argument. He too referred to Clause 12 of the Cement Control Order, 1967 to contend that fixation of one uniform retention price for all producers is not permissible thereunder. He argued that the increase of Rs.7 per tonne was to be made to the existing three-tier retention prices, but an irrational basis was adopted in fixing the uniform price of Rs.100 per tonne which results in an unequal increase to the three different retention prices then existing. Both the learned counsel contended that the result, therefore, is that whereas producers for whom the retention price fixed earlier was Rs.90.50 per tonne have got an increase of more than Rs.7, the producers for whom the retention price was fixed at Rs.96 per tonne have been given an increase of less than Rs.7. It was, therefore, contended that fixation of the uniform retention price of Rs.100 per tonne in case of all cement producers except M/s. Travancore Cement Ltd., Kottayam, is discriminatory resulting in contravention of Article 14 of the Constitution.

To recapitulate, the arrangement in vogue from 1956 was that

A the cement produced by all the producers was acquired by the State Trading Corporation which distributed the commodity throughout the country at a uniform price on f.o.r. destination basis. The price payable by the S.T.C. to the producers was known as the 'retention price' or 'ex-works' or 'ex-factory price' at a uniform rate. On a representation by the industry for revision of prices, the Government appointed B the Second Tariff Commission to go into the question. The Tariff Commission, after a comprehensive review, submitted its report on 26.8.1961, and recommended the fixation of different retention prices for different groups of cement producers. The Government generally accepted the recommendations of the Tariff Commission and fixed three different retention prices which remained in vogue till fixation of C a uniform retention price by the impugned Order in 1969.

It may be mentioned that the fixation of three different prices instead of one uniform retention price in the intervening period was challenged before the Rajasthan High Court on the ground that it was discriminatory, but that challenge was rejected in *Jaipur Udyog Ltd. v. D Union of India*, AIR 1969 Rajasthan 281.

Thereafter, the cement industry sought a further revision of the prices and the industry accepted in principle that there should be one uniform retention price or ex-factory price in place of the three-tier system, though the claim of the industry was that the uniform price be E fixed at Rs.96 instead of Rs.93. The real controversy, therefore, between the cement industry and the Central Government was, whether the addition of Rs.7 per tonne for fixation of a uniform retention price should be made to the sum of Rs.96 or to Rs.93. In other words, if the uniform retention price were fixed at Rs.104 F per tonne instead of Rs.100 per tonne, there was no grievance to anyone in the cement industry against fixation of the uniform retention price. Even at the hearing before us, in reply to this specific query by us, learned counsel for the appellants did not dispute that no grievance would survive to the appellants if the uniform retention price was fixed at Rs.104 per tonne instead of Rs.100 per tonne. In substance, the G grievance of both the appellants, therefore, is only to this extent and the argument of discrimination has been advanced for this purpose.

In the counter-affidavit filed on behalf of the Central Government, the manner in which the uniform retention price for the industry was fixed at Rs.100 per tonne has been elaborately explained. A portion of the counter-affidavit, relied on by the High Court also, is as H under:

“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 1.1.1966, 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 Governmental actions since 1.1.1966, 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, i.e. Rs.69.50 per tonne prescribed in 1961 together with subsequent increases amounting in all to Rs.21. The weighted average retention price on the basis of three different retention prices amounted to Rs.93 per tonne. The uniform price for the industry was thus fixed at Rs.100 i.e. Rs.93 per tonne, the weighted average of the three retention prices on the basis of actual production plus Rs.7 per tonne, as a result of the increase in the cost of production due to Governmental actions since 1.1.1966. 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 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.”

The assertion in the counter-affidavit of the Government is that the industry was itself in favour of a single uniform retention price which was taken into account by the Government in fixing the uniform price. This was not rebutted by the appellants. The High Court has rightly relied on this fact. It is, therefore, clear that the fixation of Rs. 100 per tonne as the uniform retention price for the entire industry with the solitary exception of M/s. Travancore Cement Ltd., Kotta-

A yam, for which justification has been shown, was on a rational basis taking into account all relevant data and factors including the cement industry's acceptance of the principle of a uniform retention price for the entire industry, the only difference being in the price actually fixed at Rs. 100 per tonne instead of Rs. 104 per tonne claimed by the cement industry. It is obvious that the fixation at Rs. 100 per tonne being shows to be made on a principle which has not been faulted, the actual fixation at Rs. 100 instead of Rs. 104 to be received by the industry is not within the domain of permissible judicial review if the principle of a uniform retention price for the entire industry cannot be faulted.

C The principles of price fixation permitting the fixation of a uniform price for the entire industry are no longer debatable after the recent decision of a Constitution Bench in *M/s. Shri Sitaram Sugar Company Limited & Anr. v. Union of India & Ors.*, and *U.P. State Sugar Corporation Ltd. & Anr. v. Union of India & Ors.*, JT 1990 (1) SC 462 even if the same were debatable when the controversy arose in the present case. In this decision, the Constitution Bench while affirming the earlier decisions of this Court in *Anakapalle Co-operative Agricultural & Industrial Society Ltd. etc. v. Union of India & Ors.*, [1973] 2 SCR 882 and *The Panipat Cooperative Sugar Mills v. Union of India*, [1973] 2 SCR 860 reiterated the settled principles. It was pointed out that what is best for the industry and in what manner the policy should be formulated and implemented, bearing in mind the object of supply and equitable distribution of the commodity at a fair price in the best interest of the general public, is a matter for decision exclusively within the province of the Central Government and such matters do not ordinarily attract the power of judicial review. It was also held that even if some persons are at a disadvantage and have suffered losses on account of the formulation and implementation of the Government policy, that is not by itself sufficient ground for interference with the Governmental action. Rejection of the principle of fixation of price unitwise on actual cost basis of each unit was reiterated and it was pointed out that such a policy promotes efficiency and provides an incentive to cut down the cost introducing an element of healthy competition among the units. Similarly, the criticism against the principle of weighted average adopted in fixation of price was rejected as baseless. It is obvious that even if there be no price control, the uneconomic units would be at a great disadvantage and, therefore, the position should not be different for the purpose of price fixation. The "cost-plus" price fixation perpetuates inefficiency in the industry and is against the long-term interest of the country. It was held "that

price,, is to be arrived at by a process of costing with reference to a reasonably efficient and economic representative cross-section of manufacturing units." It is, therefore, clear that the principle of fixation of a uniform price for the industry is an accepted principle and this has to be done by fixing a uniform price on the basis of the cost of a reasonably efficient and economic representative cross-section of manufacturing units and not with reference to the cost in relation to each unit. Obviously, such a practice is in larger public interest and also promotes efficiency in the industry providing an incentive to the uneconomic units to achieve efficiency and to reduce their cost. In the same decision, the permitted scope of judicial review was summarised as under:

"The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi-judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it."

In the present case, we find that the fixation of the uniform retention price at Rs. 100 per tonne is based on the weighted average increase of Rs. 7 in the cost of production and the weighted average retention price on the basis of three different retention prices determined at Rs. 93 per tonne on the basis of expert opinion. Fixation of a uniform retention price being clearly permissible and the same having been determined at Rs. 100 per tonne on the basis of expert opinion, founded on relevant factors, there is no scope for interference within the limits of permissible judicial review in the present case.

A brief reference to Clause 12 of the Cement Control Order, 1967 may also be made. Clause 12 reads as under:

"12. POWER TO VARY THE PRICES AND TO ALTER THE SCHEDULE

The Central Government may, having regard to any change in any of the factors relevant for the price of cement, such as an increase or decrease in the cost of production or distribution, by notification in the Official Gazette, vary the price fixed in this Order or alter the Schedule to this Order as appear to it to be necessary."

A We are unable to appreciate how Clause 12 in any manner restricts the Central Government's power to fix a uniform retention price for all the units specified in the Schedule to the Order, even though different prices were specified in the Schedule as initially enacted. The Central Government's power to refix the price can be exercised 'having regard to any change in any of the factors relevant for determination of price of cement'. The meaning of the expression 'having regard to' is well-settled. It indicates that in exercising the power, regard must be had also to the factors enumerated together with all factors relevant for exercise of that power. Once such factor specified in Clause 12 is "such as an increase or decrease in the cost of production or distribution".

B Admittedly, the fixation of the uniform retention price at Rs.100 per tonne was made on the industry's demand for revision of the price as a result of increase in the cost of production, the only dispute between the industry and the Central Government being with regard to the extent of increase and not to the effect of increase or the mode of increase by fixation of a uniform price. It is, therefore, difficult to appreciate the support that the learned counsel for the appellants seek

C from Clause 12.

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The only surviving question for consideration is the argument in Civil Appeal No. 2193 of 1972 for a differential treatment to the appellant, M/s. Chettinad Cement Corporation Limited, on the analogy of M/s. Travancore Cement Limited, Kottayam. In the counter-affidavit of Shri G. Ramanathan, Under Secretary to the Government of India, the reason for treating Travancore Cement Limited differently has been clearly stated. It has been stated that it is a sub-standard unit with a capacity of 50000 tonnes per annum only without any scope for expansion while the standard capacity for a unit is two lakh tonnes per annum; so that this unit is not capable of expanding the capacity and it is on the whole an uneconomic unit deserving a special consideration. No material has been produced by the appellant, M/s. Chettinad Cement Corporation Limited, to show that it is a similar sub-standard unit without any capacity for expansion, so that it too must continue to be an uneconomic unit like M/s. Travancore Cement Limited, Kottayam deserving a similar treatment. The counter-affidavit, therefore, shows a rational basis for classifying M/s. Travancore Cement Limited, Kottayam, differently as a sub-standard and an uneconomic unit without any scope for improvement in comparison to other units. This argument also is untenable.

H As a result of the aforesaid discussion, we do not find merit in

any of the contentions advanced in support of these appeals to support the challenge on the basis of Article 14 of the Constitution to the fixation of a uniform retention price of Rs.100 per tonne in 1969 by the impugned Order or to the practice of a uniform retention price being followed upto 1979. A

These appeals are accordingly dismissed. In the circumstances of the case, the parties shall bear their own costs. B

R.S.S.

Appeals dismissed.