Shree Digvijay Cement Co. Ltd. & Anr vs Union Of India & Anr on 17 December, 2002

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Bench: H.K. Sema

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           CASE NO.:
Appeal (civil)  46 of 1993

PETITIONER:
Shree Digvijay Cement Co. Ltd. & Anr.

RESPONDENT:
Union of India & Anr.

DATE OF JUDGMENT: 17/12/2002

BENCH:
Y.K. Sabharwal & H.K. Sema.

JUDGMENT:
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J U D G M E N T [With CA Nos. 45, 47 and 48 of 1993] Y.K. Sabharwal, J.

The appellants are cement manufacturers. They challenge the legality and validity of Clause 9A of the Cement Control Order 1967 (for short, 'the Control Order'). Clause 9A and some other clauses were incorporated by amendments made in the Control Order in the year 1982. Clause 9A requires every producer to pay to the Cement Regulation Account (for short, 'CRA') an amount at the rate of Rs.9/- per metric tonne of production of non-levy cement. This payment to be made by the producer on production of non-levy cement was withdrawn on 15th December, 1986. One of the manufacturers (Andhra Cements) filed the writ petition in the High Court challenging the validity of the clause in September 1986; two of them (Mysore cement and Raymond Woolen) filed writ petitions in 1987 and Digvijay Cement in the year 1992. Their principal contention before the High Court was that the amount payable under Clause 9A was in the nature of tax and there was no authority of law to impose that tax. Undoubtedly, no tax can be levied or collected except by authority of law. The contention of the writ petitioners did not find favour with the High Court and, therefore, these appeals were filed on grant of leave.

Cement is a schedule industry under the provisions of the Industries (Development and Regulation) Act, 1951 (for short, the 'Act'). Section 18G of the Act, inter alia, empowers the Central Government to provide for regulating the supply and distribution of any article relatable to any schedule industry. The acute shortage of cement in the country resulted in the making of the Control Order in exercise of powers conferred by Sections 18G and 25 of the Act. The cement manufacturing units in India were located in different places. Some of the units manufacturing cement were located at a long distance from consumption centres. A huge amount on freight had to be incurred in transporting the cement from various factories to the market. The manufacturing cost varied depending upon the age of the unit, manufacturing process and technology utilized etc. The transportation cost varied considerably depending upon the location of the unit. In the Control Order a mechanism was devised for equalizing the freight cost on the cement. An equalization account was provided for in the Control Order. Different ex-factory retention prices were provided in respect of various cement manufacturing units keeping their varying cost of production. It provided for the manufacturer to get a retention price to cover his cost and yield a reasonable return to the manufacturer. A uniform FOR (free-on-rail) destination price for cement was fixed in respect of the whole of India irrespective of the distance over which the cement had to be transported. The excess of FOR destination price realized by a cement manufacturer over his retention price, subject to certain adjustments, had to be paid by the cement manufacturers into the Cement Regulation Account (CRA). In cases where freight actually incurred was in excess of the specified amount, the differential amount was paid to the manufacturer out of the CRA.

The operation of the Control Order brought out certain serious problems affecting the cement industry. The control resulted in the fall of the fresh investments in the cement industry. Further, there were consistent demands for revision of the retention prices on the basis that the cost of manufacture had increased considerably. The burden of CRA increased rapidly because of the rapid increase in fuel and transport cost. The CRA went into deficit. It was unable to meet its commitments.

Considering the problems, the Government on 23rd March, 1981 constituted a high level Committee to review the developments of the cement industry and recommend measures to accelerate its progress including incentives and fair prices. The terms of reference of that Committee were :

> "(i) To review the present system of pricing in the cement industry (consisting of existing factories, new factories and mini cement factories), including the merits of establishing uniform prices for different varieties of cement, suggest modifications to ensure the healthy growth of this industry including the achievement of production at optimal levels and recommend fair prices payable to producers for the next pricing period commencing from April 1982;
>
> (ii) To review the incentives (including rebates and concessions) available to cement factories and suggest what change in these should be made to rapidly augment the domestic production of cement. In this connection, also review the incentives available for the erection of cement factories in remote, difficult and deficit areas and recommend what alternatives should be made in these to accelerate the production of

cement in these areas in a cost-effective manner;

(iii) To review the progress of modernization and introduction of technological improvements (including efficiency in the use of energy; research and development and quality control) in domestic cement factories and recommend measures (including system of incentives to accelerate these in order to reduce costs and effect economies in domestic production; and

(iv) To consider any other matter relating to rational development of the cement industry."

After detailed and exhaustive study of all aspects in relation to cement industry, a large number of recommendations were made by the aforesaid Committee including recommendation for a partial decontrol so that the cement manufacturers are allowed to sell a certain specified percentage of their production in the open market without any price control. It was expected that the cement prices in the open market would be far higher than the controlled prices and this would create incentives for the fresh investment in the cement industry. The Committee felt that the need for freight subsidy by payment, out of the CRA would have to be continued otherwise serious problems would arise in remote and far-flung areas. It was noticed that there is already sizeable deficit in the CRA which would make it unable to make its past payment commitments. The Committee, therefore, recommended, as an integral part of the package of amendments, that an amount of Rs.10/- per MT should be recovered from the cement manufacturers for payment into the CRA on every tonne of cement produced, irrespective of whether it was levy cement or non-levy cement.

With some modifications, the recommendations of the Committee were accepted by the Central Government. The Central Government allowed partial decontrol. It allowed sale of non-levy cement to the extent of 33.34% and not 25% as recommended by the Committee. Further, instead of recommended payment of Rs.10/- per MT, the Central Government reduced the payment to the CRA at the rate of Rs.9/- per MT. It was felt that the payment into CRA on decontrolled quantity of cement was necessary because to the extent of decontrol, there will be no contribution into the CRA of the differential amount between FOR destination price and the manufacturer's retention price. It was felt that the Government's duty and obligation to pay freight subsidy on the controlled output of levy cement which accounted for 66.66% of the total production continued and was expected that this burden would increase sharply because of substantial increases in the transport cost. The CRA would, therefore, balance in this situation of decontrol only if the said contribution of Rs.9/- per MT was received into CRA on the non-levy cement. It was also contemplated that the sale price of the non-levy cement would be far higher than the price of the levy cement and, therefore, there will be no unnecessary burden on the cement manufacturers inasmuch as this will be passed on to the customers in the shape of higher prices. It seems that by and large, the cement industry welcomed the new package pricing policy. It complemented the High Level Committee for departing from the conventional approach to the problems of pricing and distribution and submitted report to the Government which will stimulate the cement industry and ensure its healthy growth.

It appears that out of a large number of cement manufacturers in India, only four manufacturers, namely the appellants, challenged clause 9A and consequent payment under the said clause, three of them filing the writ petitions after the liability to pay had been withdrawn and one manufacturer in September 1986. The High Court by the impugned judgment did not accept the contention that the payment under Clause 9A amounted to tax and, thus, upheld the validity of the impugned clause. The High Court held that the partial decontrol and the impugned contribution was one single integrated and inseverable package.

The contention urged on behalf of the appellants is that the payment under Clause 9A constitutes levy and collection of tax without authority of law. It is contended that Clause 9A is ultra vires Section 18G of the Act. The impugned clause requires the manufacturers to compulsorily pay Rs.9/- per MT on the non-levy cement produced by them. There is no authority under the Act to levy or recover such a payment. It was contended that no tax can be imposed by any subordinate legislation unless the principal statute specifically authorises such imposition. The submission is that the Act does not authorise levy and recovery of any such tax and, therefore, Clause 9A is ultra vires the Act.

Clause 3 of the Control Order contains prohibition to remove the cement from the precincts or premises of the manufacturer. Clause 4 empowers the Central Government to direct sale or transport of cement to any person or class of persons and on such terms and conditions, as may be specified in the Order. The obligation on the producer to maintain and produce the accounts as the Central Government may require is provided in Clause 6. Clause 7 provides that the ex-factory prices admissible to the producer for the different varieties of cement shall be as specified in the Schedule, namely, the retention price. Clause 8 provides the price at which the producer can sell the cement.

Clause 9 provides for payment by the producer of the cement into the CRA. Clause 9 reads as under :

> "Payment to cement regulation account.
>
> 9. (1) Every producer shall, in respect of each transaction by way of sale of cement effected by him or in respect of every removal of cement made by him, under clause 3 pay within one month of the close of the month in which such sales or removals take place, to the Development Commissioner for Cement Industry, an amount equivalent to the amount, if any, by which the free on rail destination price of such cement exceeds the aggregate of the following amounts, namely :-
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> (i) the ex-factory price of such cement calculated in accordance with the rates specified in the Schedule;
>
> (ii) selling and distribution expenses calculated at the rate of Rs.4.00 per tonne;
>
> (iii) the excise duty paid thereon; and

(iv) in the case of packed cement, the charges fixed by the Central Government in respect of packing under the first proviso to clause 8 and where a producer uses second hand jute bags in excess of the limit, if any, specified under the second proviso to that clause such charges as proportionately reduced :

provided that the expenditure incurred by the producer on freight by the cheapest mode of transport or where any other mode of transport has been specified by the Central Government under clause 4, by such mode of transport in respect of such transaction shall be reimbursed to the producer by the Development Commissioner for Cement Industry from out of the Cement Regulation Account referred to in clause 11."

Clause 10 provides for the maximum price at which cement could be sold.

Clause 11 stipulates the maintenance of CRA and the purpose for which the amount credited into CRA could be spent. Clause 11 reads as under :

"Cement regulation account.

11. (1) The Development Commissioner for Cement Industry shall maintain an account to be known as the Cement Regulation Account to which shall be credited the amounts paid by the producer under clauses 9 and 9A and such other sums of money as the Central Government may, after due appropriation made by Parliament by law in this behalf, grant from time to time.

(2) The amount credited under sub-clause (1) shall be spent only for the following purposes, namely :-

(i) paying or equalizing the expenditure incurred by the producer on freight in accordance with the provisions of this Order;

(ii) equalizing concession, if any, granted in the matter of price, freight supplies to Government or public or for purposes of export under the second proviso to clause 8 or for import;

(iii) expenses incurred by the development Commissioner for Cement Industry in discharging the functions under this Order subject to such limits, if any, as may be laid down by the Central Government in this behalf.

(iv) such reimbursement of expenses by the Development Commissioner for Cement Industry as may be incurred by the producers of cement for the purpose of increasing the production for securing the equitable distribution and availability at fair prices of cement.

> (3) The Development Commissioner for Cement Industry shall cause accounts to be kept of all moneys received and expended by him from out of the Cement Regulation Account and he shall prepare and submit such report and returns relating to the said account as may be required by the Central Government from time to time.
>
> (4) The balance, if any, remaining unspent in the Cement Regulation Account shall be disbursed in accordance with such directions as may be given by the Central Government in this behalf."

The amendments made to the Control Order on 28th February 1982, that are relevant for appreciation of respective contentions are as under :

> "Applicability.
>
> 1A. The provisions of the said Order except clause 9A thereof shall apply only in relation to levy cement.
>
> Definitions.

2. In this Order, unless the context otherwise requires,--

> (a) to (cc) ...
>
> (d) "levy cement" means that part of production of cement with reference to the installed capacity of a cement plant as may be determined by the Central Government, from time to time, not being more than per cent of the installed capacity of the cement plant;
>
> (e) "non-levy cement" means that part of production of a cement plant which is in excess of the production mentioned in sub-clause (d).

9A. Every producer shall, in respect of the production of non-levy cement pay to the Cement Regulation Account an amount at the rate of rupees nine per metric tonne of such production, within one month of the close of the month in which such production takes place."

It is apparent that except Clause 9A, no other clause of the Control Order applies to non-levy cement. There is no control on supply, distribution or price of the non-levy cement. The non-levy cement is free from price and distribution control in contrast to levy cement. Whereas in respect of levy cement, under Clause 9, the cement producers were required to pay into CRA the difference between FOR destination price charged by them and the retention price admissible to them, in respect of non-levy cement under Clause 9A, they were required to pay in CRA Rs.9/- per metric tonne. According to the appellants, in respect of non-levy cement whatever money is paid by the buyer of the cement to them becomes their money and thereafter the requirement of payment as provided in Clause 9A is a compulsive payment and hence a tax. For such a tax, it is contended, there is no sanction of law. The contention is that the impugned clause is a compulsion on manufacturers of non-levy cement to pay Rs.9/- per metric tonne as above, which constitutes levy and recovery of tax that cannot be imposed by any subordinate legislation unless the principal statute specifically authroises such imposition. There is no such authorization in the Act. Therefore, it is contended that Clause 9A is ultra vires the Act.

In support of the submission that the impugned levy under Clause 9A, in fact, i s a tax, learned counsel for the appellants has placed reliance on the decision of the House of Lords in Attorney-General v. Wilts United Dairies [1922 (91) Law Journal Reports (Kings Bench) 897]. In that case, the Food Controller was empowered by the Defence of the Realm Regulations to make orders regulating or giving directions with respect to the production, manufacture, treatment, use, consumption, transport, storage, distribution, supply, sale or purchase of or other dealing in or measures to be taken in relation to any article as appear to him necessary or expedient for the purpose of encouraging or maintaining the food supply of the country. It was found that there was disparity in the prices of milk prevailing in different areas and in order to equalize these prices, the Food Controller purporting to exercise powers conferred on him by the Defence of the Realm Regulations, entered into agreements with the defendant-company by which the latter were permitted to purchase milk within certain defined areas on terms that they should pay him a sum of two pence per gallon for this privilege. The defendant-company which was required to make this payment, refused to do so and to the information laid against it raised the contention that the charge amounted in effect to a tax levied in an unconstitutional manner. The company succeeded in the Court of appeal and the Attorney General brought the matter in appeal before the House of Lords. In dismissing the appeal, Lord Buckmaster after accepting the argument based upon the extreme difficulty of the situation in which the country found itself owing to the war, and the importance of securing and maintaining vital supplies essential for the life of the community, proceeded to consider the question whether a power to make such a levy was granted. The statute had confined the duties of the Food Controller to regulating the supply and consumption of food and taking the necessary steps for maintaining proper supplies. It was observed that :

> "The question before this House is not whether or not that was a wise and necessary step to take having regard to the difficulties by which the whole question of the milk supply was surrounded; the only question which we have to decide is whether there was any power conferred upon the Food Controller to do what he did. They Attorney-General has urged your Lordships to consider the extreme difficulty of the situation in which the country found itself owing to the war, and the importance of all the officials who had charge of our vital supplies being enabled to act under the powers conferred upon them without fear of technical and vexatious objections being taken to the powers which they used. All that may be readily accepted but it cannot possibly give to any official a right to act outside the law; nor can the law be unreasonably strained in order to legalise that which it might be perfectly reasonable should be done if, in fact it was unauthorized. The real answer to such an argument is to be found in this, that in times of great national crisis Parliament should be, and generally is, in continuous session, and the powers which are required for the purpose of maintaining the integrity of the country, both economic and military,

> ought always to be obtained readily from loyal Houses of Parliament. The only question here is, Were such powers granted?
>
> There are only two sources from which those powers can possibly be derived. One is the Act creating the Ministry, and the other the Regulations under the Defence of the Realm Act. Neither of these either directly or, in my opinion, by inference, enabled the Food Controller to levy the payment of any sums of money from any of His Majesty's subjects. The statute of 1916 confines his duties to regulating the supply and consumption of food and taking the necessary steps for maintaining a proper supply of food. The powers so given are no doubt very extensive and very drastic, but they do not include the power of levying upon any man payment of money which the Food Controller must receive as part of a national fund and can only apply under proper sanction for national purposes. However, the character of this payment may be clothed, by asking your Lordships to consider the necessity for its imposition, in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that the money so raised can only be described as a tax the levying of which can never imposed upon subjects of this country by anything except plain and direct statutory means."

(emphasis supplied by us) In Attorney General for New South Wales v. Homebush Flour Mills Ltd. [56 C.L.R. 390 at 400] the High Court of Australia held that when the exaction of money by a Government in obedience to what is really a compulsive demand, the money paid is paid as a tax.

Reliance was also placed on the decision of Privy Council in Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd. [1933 AC 168]. The case was concerned with the legality of certain adjustment levies imposed on farmers by an adjustment Committee created by an enactment of British Columbia by which the disparity in the production of fluid milk as compared with milk products was sought to be countered. It was contended on behalf of the State that the levies were not taxes but merely a scheme for pooling profits in a provincial trade. Lord Thankerton speaking for the Board said :

> "The main issue of this appeal is whether the adjustment levies are taxes,.... In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory committee... They are enforceable by law. Compulsion is an essential feature of taxation. The Committee is a public authority, and the imposition of these levies is for a public purpose. The fact that moneys so recovered or distributed as bonus among the traders in the manufactured products market does not affect the taxing character of the levies made."

Reliance was also placed on A. Venkata Subba Rao v. State of Andhra Pradesh [(1965) 2 SCR 577]. In this case the Government of Madras passed various orders for procurement and distribution of paddy and rice. Persons were appointed as procuring agents and wholesalers and their duty was to procure rice from specified areas at prices specified by the Government from time to time and to deliver it at prices so specified to the Government or to the persons nominated by it or to other licensed purchasers. The purchasing agents were to get the difference between the purchase price and the sale price. During the year 1947-48 the Government increased the price and this resulted in excess profits to procuring agents. The Government insisted that this excess sum so earned by the procuring agents should be paid to the Government and this sum was directed to be collected as surcharge. It was held by the Supreme Court that recovery of this money amounted to a tax imposed by an executive fiat without any legislative sanction on the capital value of the stocks of foodgrains held on a particular date.

This Court observing that if there is no legal basis for these demands by the Government, it is not possible to characterize them anything else than as taxes; they were imposed compulsorily by the executive and are sought to be collected by the State by the exercise, inter alia, of coercive statutory powers, though these powers are vested in Government for very different purposes. This Court has approved the statement of law and the essential characteristics of tax as contained in the aforequoted observations of Lord Thankerton.

For deciding the validity of Clause 9A, in view of the aforesaid legal position , it is to be determined whether the contribution payable amounts to compulsory exaction of money and hence has an essential feature of taxation. The core ques tion that has to be decided is as to whom the money paid by the buyers of non-le vy cement belongs. The real question, therefore, is: are the appellants merely holders of the money paid to them by their customers for purchase of non-levy ce ment and are not, in fact, entitled to it or the money, in fact, belongs to them ? In support of the contention that the money, in fact, does not belong to the appellants and they are merely holders thereof, learned counsel for the responde nts, besides placing reliance on two decisions, one of the Calcutta High Court u pholding the validity of Clauses 4A and 4B of the Aluminium Control Order, 1970 and the other of Delhi High Court upholding validity of Clause 9 of the Control Order, has placed, rather emphatically, strong reliance on the background, scheme and the circumstances under which Clause 9A was inserted in the Control Order by 1982 amendment. We have already noticed that Clause 9A was inserted while simultaneously introducing partial decontrol of cement. No fault can be found with the object behind the levy in question. As a result of partial decontrol, the cement manufacturers were expected to earn huge profits by sale of non-levy cement in open market. There was no limitation or restriction on sale price. The effect of Clause 9A was to make them contribute, out of those profits, Rs.9/- per metric tonne into the CRA. Howsoever laudable the object behind the levy and collection of any sum of money may be, but if it does not have sanction of law, it has to be struck down. The contention that the partial decontrol and contribution under Clause 9 are inseparable and part of the same scheme, though looks attractive at the first brush but closer examination thereof shows that it has no substance. The question before this Court is only about the validity of Clause 9A for want of legal sanction to impose the levy and collect that amount and not about the validity of the partial decontrol. From the affidavit of the respondents filed in this Court as well, it appears that on payment of the sale price of the non-levy cement by the buyers to the sellers, i.e., the cement manufacturers, the amount so paid becomes their property - amount belongs to them, though they may have passed on the burden to the customers, it cannot be held that the appellants are merely holders of that amount. It would be useful in this connection to quote from the affidavit filed on behalf of the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion which itself shows that the money received by sale of non-levy cement becomes the money of the sellers. The affidavit states :

> "Further, it was contemplated that the non-levy open market cement price would be far higher than the levy price or the controlled price by much more than the required contribution of Rs.9/- per MT and, as a result, the said contribution of Rs.9/- on the non-levy cement would be easily and effortlessly passed on by the cement manufacturers to their customers in the shape of higher prices. In fact, this is exactly what happened. Thereafter, the non-levy cement price was at all points of time far higher than the levy cement price. For example, in June 1985, the levy price of cement was Rs.532/- per MT whereas, on the other hand, the non-levy price of cement per MT was as much as Rs.1660/-, i.e., three times the levy price. Even earlier, right from February 1982 onwards, when the Cement Control Order, 1967 was amended, the non-levy cement price was at least double the levy cement price and the manufacturers, therefore, realized a sale price for his 33.34% non-levy production a total sale price which was much more than the retention price in respect of the 66.66% production of levy cement. The said contribution of Rs.9/- per MT of non-levy cement was, therefore, passed on by the cement manufacturers and was wholly recovered from their customers. This factual position was made abundantly clear by the letter dated March 12, 1982 addressed to the Government of India by the Cement Manufacturers Association which showed that the contribution to the Cement Regulation Account at Rs.9/- per MT of non-levy cement was built into the price of non-levy cement and recovered from the customers."

The decisions relied upon by learned counsel for the respondents have no relevance. In Union of India & Ors. v. Hindustan Aluminium Corporation Limited & Anr. [AIR 1983 Cal. 307] while examining the validity of the aforenoticed provisions of Aluminium Control Order, 1970, it was held that the person challenging the validity of the clause which related to the fixation of retention price of indigenous aluminium (Clause 4A) and fair price of aluminium (Clause 4B) is merely the holder of the money. In that case, the Government had fixed the sale price of indigenous aluminium which was considered to be fair and within the pecuniary limits of the consumers. The Government, finding that mere fixation of sale price would serve no purpose of the consumers and consequently the objectives under Section 3 of the Essential Commodities Act, 1955 cannot be achieved, introduced the concept of retention price in order to obviate the difficulties of the consumer. The Calcutta High Court held that as the retention price fixed for HINDALCO was lower than the sale price, HINDLCO has to pay to the Aluminium Regulation Account, the sum which is the difference between the sale price and the retention price. Under these circumstances, it was held that the steps taken by the Government by fixation of the retention price for each producer and the sale price and the provision for payment to the Aluminium Regulation Account were necessary in the interests of the consumers so as to maintain supply of aluminium consistent with the demand thereof and to make it available to the consumer at a fair price.

Likewise, in R.D. Aggarwala & Anr. v. The Union of India & Anr. [ILR 1974 (2) Delhi 520], the Delhi High Court was concerned with the validity of Clause 9. In that case, the contention that was urged was :

> "the requirement in clause 9 that every producer should pay to the Controller the balance that remains from out of the f.o.r. destination price, and the provision in clause 11(4) enabling the Government to disburse the unspent amount in the Cement Regulation Account in any manner it likes, amount to a colourable exercise of the taxing power of the State, and beyond the legislative competence of the executive under Section 18G of the Act, in-as-much as the out-right deprivation of the balance of the freight in the hands of producer and the power of the Government to disburse the same as it likes, amount to a direct and variable levy of tax without any authority of law under Article 265 of the Constitution."

The High Court held that the contention was based on the assumption that the producer was deprived of the balance of the freight in his hands. It was clear that the producer was not entitled to the said balance of freight according to the scheme of the Control Order. The Court said :

> "Coming now to the contention urged by the learned counsel, it was based on the assumption that the producer was deprived of the balance of the freight in his hands. It is clear from what has been stated above that the producer was not entitled to the said balance of the freight according to the scheme of the Control Order. Once it is held, as we did, that the fixation of the ex-factory or retention price is valid, it would follow that the balance of the f.o.r. destination price that remains after deducting the said retention price and the other items allowed to be deducted by the producer under clause 9 of the Control Order, does not belong to the producer and, therefore, he cannot be said to be deprived of the same when he pays to the same to the Controller under clause 9. In that view, the payment of the balance to the Controller cannot be described as levy of tax qua the producer. Nor can it be a tax qua the consumer, as the amount of freight is paid by the consumer as part of the f.o.r. destination price."

The High Court, therefore, held that the balance of FOR destination price does not belong to the purchaser under the scheme of the Control Order and cannot, therefore, be regarded as tax qua the producer.

Factual matrix of the two cases relied upon by learned counsel for the respondents and of the present case is entirely different. As already noticed, there is no control on price of sale of the non-levy cement. Except Clause 9A, no other clause of the Control Order is applicable to non-levy cement. There is no sale price, there is no retention price and the manufacturers are free to sell the non-levy cement at whatever price they like. There is no power in the subordinate legislation to impose levy on that cement which is not covered by the Control Order.

It is no doubt true that in taxing legislation, legislature deserves greater latitude and greater play in joints. This principle, however, cannot be extended so as to validate a levy which has no sanction of law, however, laudable may have been the object to introduce it and howsoever laudable may have been the purpose for which the amount so collected may have been spent.

It is clear from the above discussion that the impugned levy under Clause 9A is a compulsory exaction. The amount paid by the customers of non-levy cement belongs to the appellants. Such a levy amounts to levy of tax and, therefore, invalid for want of sanction to levy such a tax. Clause 9A is, therefore, ultra vires Section 18G of the Act. To this extent we set aside the impugned judgment of the High Court.

The next question is: whether the appellants are entitled to refund of the contribution made by them under Clause 9A of the Control Order? There is no automatic right of refund. In Mafatlal Industries Ltd. & Ors. v. Union of India & Ors. [(1997) 5 SCC 536], the Constitution Bench has held that the right to refund of tax paid under an unconstitutional provision of law is not an absolute or an unconditional right. Similar is the position, even if Article 265 can be invoked. The principles of unjust enrichment are applicable in claim of refund. The claimant has to allege and establish that he has not passed on the burden to another person. The Constitution Bench has held whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the requirement as explained in the judgment. Where the burden of duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. Real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reason, it is just and appropriate that that amount is retained by the State, i.e., by the people. The doctrine of unjust enrichment is a just and salutary doctrine. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State for the State represents the people of the country. No one can speak of the people being unjustly enriched.

In the present case, it is clear that the burden of payment under Clause 9A was passed on to the customers. The President of the Cement Manufacturer Association, soon after the insertion of the amendment in February 1982, in a communication dated 12th March, 1982 sent to the Secretary of Ministry of Commerce, Department of Industrial Development, Government while giving break-up of the price of non-levy cement added in the said price, a sum of Rs.9/- per MT payable under Clause 9A on production of the non-levy cement. Further, it appears that the levy under Clause 9A was accepted by the entire cement industry except the challenge made by the four appellants by filing the writ petitions; one just before the contribution under Clause 9A was withdrawn and three after it was withdrawn. Besides the principles of unjust enrichment on equitable principles which squarely apply here, the applicants are not entitled to claim refund of amount paid into CRA under Clause 9A. It is evident that the amount so deposited was expanded for the purpose under the Control Order. Under these circumstances, we direct that pursuant to declaration of invalidity of Clause 9A of the Control Order, the amount of contribution already paid under Clause 9A will not be liable to be refunded to the appellants.

The appeals are accordingly allowed to the above limited extent. In the facts and circumstances of the case, parties are left to bear their own costs.