

Moot Court Problem

THE BACKGROUND

1. Around 2009, when internal government reports were predicting a steady rise in inflation, the Government of Maharashtra noticed a rather strange trend: limestone prices for local limestone were seen to fall consistently. Being slightly alarmed (considering that limestone was a nascent industry, and also perhaps considering that limestone units were being set up in marginal constituencies in the state and were seen as having prospects for substantially increasing employment) the Government of Maharashtra constituted a committee to study the sector.

2. In early 2010, an internal note was circulated indicating that the fall in prices of local limestone was caused in a substantial part by increased cement being brought in to the state from outside. One of the major uses of local limestone was as a raw material for cement units in the State: as, however, cement was being increasingly brought from outside the State, demand for local limestone was dropping and forcing a reduction in prices. The State government announced in a press release that, in these circumstances, it was strongly considering "*introducing measures for the protection and promotion of our limestone units and ensuring that limestone sector remains profitable*".

THE FIRST BILL

3. After greater study, the State Government was of the view that restricting the entry of cement was the only realistic way of controlling the rise of 'external' cement in the domestic market. Accordingly, the State Government tabled a Bill titled the "Regulation of Cement Markets Bill, 2010", which sought to impose restrictions on the quantity of cement which could be brought in to the state from outside the state. It was proposed to

auction 'cement quotas' to external manufacturers: each manufacturer of cement could only bring in so much cement as his quote permitted.

4. Although the Bill received support from most persons across the political spectrum, there were some concerns raised (particularly by bureaucrats from the law ministry) that such a Bill would offend federal principles, particularly since cement was stated to be an industry of national importance – critics pointed to entries in the Schedule of the Industries (Development and Regulation) Act, 1951 in support of their arguments. The governments of Rajasthan and Uttar Pradesh (which sent a substantial amount of cement into Maharashtra) were worried, and raised their concerns at an all-India Chief Ministers' Meeting.

5. In view of the deliberations at that meeting, the Chief Minister thought it best to refer the Bill to the Advocate General for his Opinion. The Advocate General opined that the bill as framed ran the risk of unconstitutionality as violating the principles of freedom of inter-state trade and commerce.

THE IMPUGNED ACT

6. Having regard to the Advocate General's opinion, the Bill was withdrawn. Pressure from the “limestone lobby” however mounted, and the State Government felt it was critical to address the problems of the sector. Accordingly, in early 2011 the state government introduced the "Maharashtra Local Industries (Regulation and Promotion) Bill, 2011". This Bill was enacted and came into force on April 1, 2011 as the Maharashtra Local Industries (Regulation and Promotion) Act, 2011. The Statement of Objects and Reasons indicated this entire history, and stated “... *similar problems may also arise in the case of other industries. The Act is introduced with a view to solve these problems*”.

7. The complete text of the Act is annexed as Annexure - A.

8. Immediately, “*cement, to the extent such cement is sold within Greater Mumbai or the Districts of Pune, Ahmednagar or Chandrapur*” was notified as a 'notified good' under the Act, and the notification was duly laid before the legislature. Till now, no other notification u/s 2 has been made in respect of any other goods.

9. The State Government thus began collecting the tax, much to the chagrin of external cement manufacturers. The effect of the Act was that external manufacturers found their costs increased by 12.5 percent insofar as goods were sold in the specified areas (which, it turns out, are the areas where 90% of cement sales in the state occur), while local cement industries faced no such difficulty. In turn, this meant that local cement industry - and, therefore, the local limestone industry - began to blossom. The effect – industry experts have pointed out – is that cement industries based outside Maharashtra are likely to lose out on almost 75% of their market share.

THE CHALLENGES AND THE APPEALS

10. Shortly after the coming into force of the Act, several manufacturers of cement based outside Maharashtra challenged the constitutional validity of the Act. Around 11 writ petitions were filed before the Bombay High Court in June 2011. These petitions were consolidated, with the lead matter being taken up as *Girivandan Traders v. State of Maharashtra*. The Bombay High Court granted ad-interim stay on collection of tax till August 2011. The grounds of challenge were that the levy constituted hostile discrimination, and that the Act was in violation of Articles 301 to 304 of the Constitution of India. It was also contended that the Act was outside the legislative competence of the State Government. It was urged that the law could not be justified under Entries 52/54 of List II or under any other entry, and the tax *ex facie* was not on the mere entry of goods into a local area or on mere sale of goods. Instead, the tax was on such specified goods which were manufactured with raw materials from outside the State.

It was also argued that no other entry in List II or III was relevant. Consequential prayers were made for refund of the tax collected along with compound interest. The State of Maharashtra filed an affidavit-in-reply. The State contended that the Act created a valid classification which had a rational nexus with the object, there was no hostile discrimination, and that a tax law was outside the scope of Articles 301 to 304 of the Constitution of India. It was also contended that in pith and substance the law was a regulatory measure for promotion of industries in the state. The State submitted that the Act was within the legislative competence of the states under several Entries in List II and III. In August 2011, the ad-interim stay was not extended. The writ petitions were admitted and posted for final hearing in December 2011, but interim protection was not granted.

11. The Bombay High Court finally dismissed the writ petitions in January 2012. The High Court held:

A. This was not a case of hostile discrimination. The state has great latitude in deciding the subject of tax, the rate of tax, etc. On facts, the classification made for the purposes of enacting the levy were valid.

B. The Act was not invalid for excessive delegation. The notifications by the State Government were to be made in accordance with the object of the Act: thus there was sufficient guidance given to the executive. Further, the procedure of laying before the legislature constituted a sufficient safeguard.

C. The State's argument that tax laws are not subject to the restrictions imposed under Articles 301 to 304 was incorrect. However, the tax collected in the present case could be categorized as "compensatory" and did not amount to a restriction on inter-state trade and commerce. There is no direct and immediate impediment to the movement of trade.

D. The legislation was within the legislative competence of the State: the subject matter of the Act was within Entries 26, 27, 52 and/or 54 of List II.

E. In the circumstances, no question of refund arose. However, even assuming that the tax was unconstitutional, refund if any must be claimed to the extent permissible under the Maharashtra Value Added Tax Act only; and writ jurisdiction could not be exercised for granting refund in such a case.

12. Since the enactment of the Act till the end of May 2012, additional sales tax of approximately Rs. 350 crores has been collected from the 11 petitioners. In June 2012, the Government of Maharashtra announced a "Package Scheme of Incentives for Limestone and Cement Industries" was launched, which provided for the grant of capital subsidies to local limestone and cement units. Coincidentally (or perhaps, not so coincidentally), an amount of Rs. 350 crores was allotted towards this scheme. The Government Resolution introducing the scheme stated the scheme was to give effect to "the policy of the recent legislative measures in particular the Regulation and Promotion of Local Industries Act, 2011." Till date, approximately Rs. 50 crores of the allotted Rs. 350 crores have been actually disbursed to local industries.

13. Meanwhile, a Special Leave Petition against the Bombay High Court's Order was filed in the Supreme Court. The grounds were much the same as before the High Court. However, the State government also took the additional point (with leave of the court) that in any event, the state government had created a policy of distributing the amounts collected and had changed its position, so no order of refund should be made. In any event, compound interest could not be allowed.

14. The Leave was granted and is presently posted for final hearing before the Hon'ble Supreme Court of India.

Annexure – 1

Maharashtra Local Industries (Regulation and Promotion) Act, 2011

(Maharashtra Act No. *** of 2011)

An Act to consolidate and amend the law relating to the regulation, promotion and protection of certain industries and the levying of certain taxes and fees for orderly industrial development in the State of Maharashtra

1. Short title, extent and commencement.-(1) This Act may be called the Maharashtra Local Industries (Regulation and Promotion) Act, 2011.

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(2) It extends to the whole of the State of Maharashtra.

(3) This Act shall come into force on and from the 1st day of April, 2011

2. Definitions.-In this Act, unless the context otherwise requires:

(a) words and phrases used in this Act and not defined herein, but defined in the Maharashtra Value Added Tax Act 2002, shall bear the meaning assigned therein

(b) "*notified goods*" means "*such goods which are produced either inside or outside the State, but substantial raw materials for which are acquired outside the State, as the State Government may notify, having regard to the objects of this Act: Provided that, every such notification shall be laid before the State Legislature in accordance with s. 5.*"

3. Charge of Additional Tax.-

(1) Additional tax shall be charged on all notified goods at a rate of 12.5 percent of market value or such other rate as may be prescribed by the State Government.

(2) Additional tax imposed under sub-section (1) shall be collected as if it were levied under the Maharashtra Value Added Tax Act 2002 and, for the purpose of assessment,

appeals and incidental matters including the payment of tax and interest thereon, the provisions of the Maharashtra Value Added tax Act, 2002 shall apply.

(3) Notwithstanding anything in any other law to the contrary, it shall not be permissible for the dealer to add the amount of the tax to the price of the goods being sold.

4. Creation of Fund.-

A sum equivalent to so much of the additional sales tax as may be practicable in the opinion of the State Government, may be used for the promotion of industries dealing with the same goods as the notified goods, including for the development of adequate markets in such goods

5. Procedure for notification.-

(1) The State Government shall cause every notification made under sub-section (b) of section 2 to be laid before each house of the State Legislature, along with a statement indicating the manner in which the notification is consistent with the objects and purposes of this Act.

6. Miscellaneous.-

(1) The provisions of this Act shall be given effect to notwithstanding anything contrary in any other law for the time being in force.

(2) Tax charged under this act shall be in addition to and not instead of any other tax which may be paid by the dealer.

(3) The State Government may by notification extend any exemption or deduction provision in force under any other law to the payment of additional tax under this Act: Provided that such notification shall be laid before each house of the State Legislature.

7. Removal of difficulties.-

(1) If any difficulty arises in giving effect to the provisions of this Act, the State Government may, by general or special order published in the *Official Gazette*, do anything not inconsistent with such provisions which appears to it to be necessary or expedient for the purpose of removing the difficulty. In particular and without prejudice

to the generality of the foregoing power, any such order may provide for the adaptations or modifications subject to which any earlier law shall apply in relation to the proceedings in respect of the year ending immediately before the appointed day:

(2) Every order made under this section shall be laid, as soon as may be, after it is made, before each House of the State Legislature.