Serial Nos.05 & 6
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP (C) No.280/2016 with
WP (C) No.281/2016

Date of Order: 09.02.2022

Megha Technical & Engineers Pvt. Ltd Vs. State of Meghalaya & ors

Star Cement Limited Vs. State of Meghalaya & ors

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Dr. A Saraf, Sr.Adv
For the Respondent(s) : Mr. A Kumar, Advocate General with
Mr. H Kharmih, GA

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The challenge in these two writ petitions is to the validity of a State enactment that already stands repealed upon the goods and service tax regime having taken over.

2. According to the petitioners, the cess imposed by the State of Meghalaya by the Meghalaya Cement Cess Act, 2010 (Act No.5 of 2011) was completely illegal, without any authority and grossly prejudicial to the petitioners and others connected with the cement industry. The petitioners submit that when a tax is imposed by a State or the Union in accordance with law, a further levy may be added thereto by way of a cess, where the quantum realised by way of the cess is earmarked for a special public beneficial purpose. The petitioners refer to the education cess which is imposed on income-tax and cess charged in various other fields by way of

an additional levy but which is earmarked for a special purpose and may not be subsumed as a part of the general revenue of the Union or the State.

3. Section 3 of the impugned Act of 2010 is the charging section:

> "3. On and from the coming into force of this Act, there shall be levied and collected a cess on produced Cement from any person or factory who produce cement within the State."

4. Section 4 of the Act indicates the rate of cess. Section 6 of the Act, on which much emphasis has been placed by the State, provides for the manner of collection and payment of cess. Section 6 of the Act is set out:

> "6. (1) The cess under this Act shall be leviable and payable in the manner as may be prescribed.
>
> (2) Unless the cess due under this Act has been paid no person shall remove or transport or attempt to remove or transport any produced cement from any factory, stack-yard, warehouse and godown for sale or transfer."

5. According to the petitioners, for any State to impose a tax or collect a cess thereon, the relevant field has to be discovered in List-II of the Seventh Schedule to the Constitution. The petitioners submit that since the charging section makes it incumbent on the person manufacturing or producing cement within the State to be liable to pay cess, it amounts to a kind of additional excise duty which is sought to be imposed though in the guise of cess.

6. In such connection, the petitioners place Entry 84 from the Union List as it stood prior to the 101st Amendment to the Constitution which was effected in 2016. Entry 84 of the Union List, at the time that the impugned Act was enacted, read thus:

> "84. Duties of excise on the following goods manufactured or produced in India, namely:-
>
> a) Petrol crude;
> b) High speed diesel;
> c) Motor spirit (commonly known as petrol);

d) Natural gas;
e) Aviation turbine fuel; and
f) Tobacco and tobacco products."

7. It is evident that since cement was not included as one of the excepted products in Entry 84 of List I, no impost could have been levied by any State on the manufacture of cement notwithstanding such process of manufacture being within the geographical limits of the State. And, for the same reason that the State had no authority to impose any tax or the like on the manufacture of cement in the State, it did not possess any authority to levy cess on such manufacture. There appears to be little room for the State to try and justify its authority in enacting the said Act of 2010 or the levy imposed thereby. Though the State has relied on Entry 54 of the State List, it does not appear that such entry authorises the State to impose a kind of excise duty with a different name. Entry 54 of the State List, as it stood prior to the 101st Amendment to the Constitution, permitted tax on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92A of the Union List. It is not necessary to even refer to Entry 92A of the Union List to ascertain the exact authority available to a State under Entry 54 of the State List as it stood at the time that the impugned Act was brought into force. At the relevant point of time, the field covered by the entry authorised the levy of the tax on the sale or purchase of goods. In other words, the levy would be on the sale or purchase and be confined only to such sale or purchase.

8. However, from the charging section in the impugned Act, which is Section 3, the levy in this case and the liability which is imposed thereby pertains to "any person or factory who produce cement within the State." Though Section 6 of the impugned Act provides for the manner of

collection and payment of cess and in sub-section (2) thereof prohibits the removal of cement without cess being paid, the expression "sale or transfer" in the final part of Section 6(2) of the impugned Act does not imply that the levy would be on the sale or transfer. The expression "sale or transfer" governs the word "remove" – or, more precisely, the action of removing or transporting or attempting to remove or transport – used earlier in the same provision. At any rate, just like a river cannot rise above its source, Section 6 and the manner of collection of levy cannot override the charging section which imposes the tax on the manufacturers and producers of cement in the State.

9. In plain words, the State had no authority to impose any tax or cess on the manufacture or production of cement, whether by the said Act or by any other disingenuous device; and, in all fairness, no further attempt is made on behalf of the State to justify the legislative illegality except to suggest that after the GST regime has been put in place, the impugned Act of 2010 has been repealed and the same is no longer relevant.

10. The firmer limb of the State's argument is that since the component of cess, like excise duty, would have been passed on by the manufacturer or producer to the customer, the petitioners cannot be refunded the amounts collected from them, even if the levy may have been illegal or without authority. In essence, the State invokes the doctrine of unjust enrichment in the sense that the customer bore the brunt of the levy of cess and since the manufacturer or producer would not be able to reasonably identify the users of the product or distribute the amount refunded to such persons, the manufacturer or producer would not be

entitled to any refund to retain it for personal benefit as the perceived illegal additional expense has been borne by the end-user of the product.

11. The principle is too well established to be questioned. Yet, it will not do for a State in a constitutional republic wedded to the rule of law to suggest that it may indulge in arbitrary or irrational or illegal generation of funds without being liable to return the same upon the Court finding the process to be illegal. If only as a deterrent, some mechanism has to be put in place to ensure that the State does not indulge in a similar exercise in future to augment its revenue and later present a fait accompli argument to a constitutional Court.

12. There is no doubt that there is no available mechanism to assess the quantum of the levy that may have been passed on to the customer or may have been absorbed by the manufacturers. It is possible that a part of it had been passed on and a part absorbed by reducing the profit element. It is equally possible that the entirety of the impost had been passed on to the customers. Yet, it has to be taken into account that notwithstanding the product in the present case being cement, which is indispensable in certain cases, any additional levy on the price of a product reduces the quantum of sale or manufacture in the usual course. In such sense, the manufacturers and producers of cement in the State may have taken a hit as a direct consequence of the illegal impost, for which they ought to be compensated.

13. Again, it cannot be said with any degree of certainty as to whether the illegal levy amounted to a specific percentage of loss of revenue or any loss at all. However, just like in the case where a contract cannot be performed, a ballpark figure of around 15 percent has been judicially recognised in this country to be the loss of the perceived profit, an the ad

hoc figure of 20 percent in the case may reasonably be taken to be the amount of loss that was occasioned to the manufactures and producers of cement in this State as a result of the illegal levy of cess by the State without any authority. It is made clear that this figure of 20 percent is arrived at as a rough and ready measure and so that it acts as a deterrent to discourage the State from acting in such high-handed manner and extorting money without authority.

14. So that the deterrent is effective, it is necessary that 30 percent of the total realisation on account of the cess collected under the impugned Act of 2010, which the government was not entitled to receive and cannot be permitted to appropriate, is earmarked for a public project. For such purpose, the Chief Secretary of the State will affirm an affidavit to be filed within eight weeks from date and indicate the quantum of the cess that was collected under the impugned Act of 2010. Thirty percent of the amount so ascertained and indicated in the Chief Secretary's affidavit will have to be earmarked by the State for purchasing advanced medical equipment at the additional cancer wing which has been set up in the Government General Hospital in Shillong. It is made clear that the ad hoc amount of 30 percent will be over and above what the State is otherwise obliged to spend on the additional cancer wing and any grant that the State may be entitled to obtain from the Union in such regard. A copy of the relevant affidavit shall also be forwarded to the office of the Accountant-General, along with a copy of this order, for verification.

15 Accordingly, WP (C) Nos.280 and 281 of 2016 are disposed of by holding that the State had no authority to impose cess in terms of the impugned Act of 2010 and by annulling the Act as ultra vires the

Constitution and requiring the State to refund 20 percent of the amount realized on such count from the individual petitioners to such petitioners and investing 30 percent of the total amount of cess realised under bogus legislation for the purpose of procuring the equipment for the cancer wing of the Government General Hospital in Shillong as aforesaid.

16. Since the refund directed to be made to the petitioners appears to be more than sufficient, no additional order is made as to costs.

17. In the unlikely event that the relevant affidavit of the Chief Secretary is not received by the department within the time directed, the department shall bring the matter to the notice of the Court for appropriate action to be taken in such regard. The directions contained in this order for refund are confined only to the present petitioners who had challenged the Act prior to it being repealed and before the GST regime came into place.

18. The refund to the petitioners should be made within four months from date, failing which the amount will carry interest at the simple rate of 6 percent per annum from the date of default till the date of payment.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
09.02.2022
"Lam DR-PS"