

*Before Jawahar Lal Gupta & Ashutosh Mohunta, JJ*

**HEALTH AID FOODS SPECIALIST PVT. LTD.—Petitioner**

*versus*

**THE STATE OF PUNJAB AND OTHERS—Respondents**

C.W.P. NO. 14809 OF 2000

20th November, 2001

*Punjab General Sales Tax Act, 1948—Ss. 5 & 5-A—Industries (Development and Regulation) Act, 1951—Schedule II & S.10—Punjab Dairy Development Board Act, 2000—Ss.10 & 12—Constitution of India, 1950—Schedule VII, List II Entries 15, 27, 54 & 60, List III Entry 33—Milk & Milk Product Order, 1992—State Government abolishing purchase tax on milk & levying Cess on the milk plants @ 10 paise per liter on their licensed capacity—Cess—What is—Fee or tax—Distribution between—A tax need not be supported by any consideration of service but a fee is levied essentially for services rendered—No provision in the 2000 Act for utilization of the proceeds of the Cess to provide any service or special benefit to the Milk Plants—No element of quid pro quo between the Board and the Milk Plants—Cess imposed by the Government is a tax & not a fee—Milk Plants, a scheduled industry, already controlled by the Central Government & governed by the provisions of 1951 Act & the 1992 Order—No difference between the functions/powers of the Board from those assigned to the Development Councils under the 1951 Act—Central Government only competent to impose the Cess, if any—State Legislature not authorised to impose the impugned levy under any of the Entries in List II—Impugned levy of Cess by the State Legislature ultra vires & without jurisdiction—Petitions allowed while holding the levy of Cess invalid.*

Held, that there is a well—recognised distinction between 'Tax' and 'Fee'. Quid pro quo is still an essential ingredient of a 'Fee'. It has been well recognized since the decision of the Constitution Bench in 'Commissioner Hindu Religious Endowments v. Lakshmindra Thirtha Swamiar of Sri Shirur Mutt', AIR 1954 SC 282. It was reiterated in 'Kewal Krishan Puri v. State of Punjab (1980) SCC 416. The subsequent decisions have diluted the ratio of decision in Kewal

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Krishan Puri's case. But the distinction between 'Tax' and 'Fee' has not been completely obliterated. The payer of fee has to get some special benefit. This test is not satisfied in the present case. Thus, the impugned impost is not a 'Fee' but a 'Tax'.

(Para 66)

Further held, that the 'milk plants' are a 'scheduled industry'. These are governed by the provisions of the Industries (Development and Regulation) Act, 1951 and the Milk and Milk Product Order, 1992. The Parliament has clearly declared that it is expedient in public interest to vest the control in the Central Government. Keeping in view the declared objective and the provisions of the 1951 Act, it is clear that the State Legislature has invaded the territory occupied by the Parliament. Thus, the impugned impost is ultra vires.

(Para 66)

Further held, that the State Legislature is not competent to levy the impugned Cess under any of the "Taxing Entries" in Lists II and III of the VIIth Schedule to the Constitution.

(Para 66)

H.L. Sibal, Sr. Advocate with V.K. Sibal and Vikas Mor,  
Advocates, *for the Petitioners*

M.C. Berry, Sr. Deputy Advocate General, Punjab, *for  
respondent Nos. 1 & 3*

Amarjit Singh, Advocate *for the respondent No.2.*

### JUDGMENT

*JAWAHAR LAL GUPTA,*

(1) Is the levy of Cess under the Punjab Dairy Development Board Act, 2000, "at the rate of 10 paise per litre of the licensed capacity of a milk", *ultra vires* the Constitution? This is the primary question that arises for consideration in this bunch of 13 petitions.

(2) Learned counsel for the parties have referred to the facts in CWP No. 14809 of 2000. These may be briefly noticed.

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(3) On March 17, 1997, the Petitioner—Company was registered under the Milk and Milk Product Order, 1992. It was authorized to process 40 thousand litres of milk per day. It is engaged in the production of Ghee, Skimmed Milk, Powder, Butter and Cream. A copy of the provisional registration certificate issued to the petitioner is at Annexure P.1 with the writ petition. The petitioner is also registered under the Punjab General Sales Tax Act, 1948 and the Central Sales Tax Act, 1956 (hereinafter refer to as the 1948 and the 1956 Acts respectively).

(4) Under the 1948 Act, the milk purchased for making Ghee, Paneer and Butter etc. was, hithertofore, subjected to a purchase tax @4%. A surcharge @10% of the purchase tax was also levied under section 5A of the Act.

(5) On July 19, 2000, the Governor of Punjab promulgated the Punjab Dairy Development Board Ordinance, 2000. It was issued to “provide for the creation of Punjab Dairy Development Board for coordination between the organizations engaged in Dairy Sector, to up-lift professional standard of the Dairy Industry in the State and to develop modern dairy farming technology, system and to levy Cess on the milk plants by abolishing purchase tax on milk.”

(6) By this Ordinance, the purchase tax was abolished. Instead a Cess at the rate of 10 paise per litre of the licensed capacity of a milk plant was levied. In exercise of the powers under the Ordinance, the Rules called “the Punjab Dairy Development Board Rules, 2000” was also framed. These rules were published in the Punjab Government Gazette of July 26, 2000.

(7) On August 17, 2000, the Director, Dairy Development Punjab, issued a notice to the petitioner directing it to pay Cess @10 paise per litre of its licensed capacity for the period from July 19, 2000 to September 30, 2000. A copy of this notice is at Annexure P.2 with the writ petition.

(8) Aggrieved by the levy and demand for payment on account of the Cess, the petitioner approached this Court through a petition under Article 226 of the Constitution. It was listed for preliminary hearing before a Bench of this Court on November 2, 2000. The Bench admitted the petition for hearing before a Division Bench. At the time

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of this preliminary hearing, it was pointed out that after the Ordinance, Act No. 20 of 2000 had been promulgated. It had been published in the Official Gazette on October 20, 2000. In view of this position, the petitioner was permitted to file an amended petition. Thus, the amended petition challenging the provisions of the Act was filed.

(9) The petitioner alleges that the “substance of the impugned levy is a tax on licensed capacity...” The State Legislature is not competent to levy the Cess under any tax entry in List II or List III of Schedule VII to the Constitution. The impost on the licensed capacity is arbitrary and illegal. On these premises, the petitioner prays that the Act and the demand raised thereunder be annulled by the issue of an appropriate writ or direction.

(10) The respondents contest the petitioner’s claim. On December 4, 2000, a written statement was filed on behalf of the Punjab Dairy Development Board (respondent No. 2, as constituted under the impugned Act) by Mr. Ashok Goyal, IAS, Member Secretary of the Board. In this written statement, certain preliminary objections were raised. It was pleaded that a writ in the nature of certiorari cannot be “issued to quash an Act.” A second objection was raised that prior to July 19, 2000, the petitioner used to pay the purchase tax and the surcharge under Section 5 and 5A respectively of the Punjab General Sales Tax Act, 1948. The purchase tax had been abolished and by the impugned provisions “a substituted Cess has been imposed @ 10 paise per litre on the licensed capacity of the milk plant...” The petitioner’s challenge to the legislative competence is met by pointing out that “Entry 15 deals with preservation, protection and improvement of stock and prevention of animal diseases and veterinary training and practice. Entry 27 deals with production, supply and distribution of goods subject to the provisions of Entry 33 of List III. Entry 54 which deals with taxes on the sale or purchase of goods other than newspapers...Entry 60 taxes on professions, trade, callings and employments. Similarly, even List III—Concurrent List...also supports the legislative competence of the Punjab Assembly for imposing the Cess on the milk plants. Entry 33 deals with trade and commerce and the production, supply and distribution of food stuffs including edible Oil Seeds and Oils.” On the basis of these Entries, the respondents maintain that “the Cess on milk plant is certainly within the legislative

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competence of the Punjab Assembly. **Therefore, the tax/Cess which is being collected by the answering respondent is authorized by law...**" (emphasis supplied). Thus, it is admitted that the impugned levy is a tax. However, it is pleaded that it had been validly imposed.

(11) In the reply on merits, it has been averred that "in pith and substance, the Cess imposed is that of purchase tax for the reason that there may be preservation, protection and improvement of stock by adopting implementation of modern method in dairy development. On these premises, the second respondent maintains that the levy and demand are just and legal.

(12) So far as the State of Punjab and the Director, Department of Dairy Development (respondent Nos. 1 and 3), are concerned, the reply was initially filed on March 7, 2001 by Mr. Balbir Singh, the Director. This was virtually a reproduction of the reply filed on behalf of respondent No. 2. By referring to Entries 15, 27, 54 and 60 in List II and Entry 33 of List III in preliminary Objection No. 3, it was averred that the levy is within the legislative competence of the State Legislature. In para 14 of the reply on merits, it was added that "it is patent from the preliminary objection No. 3 that the State legislature has competence to impose milk Cess under numerous Entries which are 'Entries concerning tax.' These Entries are not non-tax Entries." Thus, it was maintained that the "State has levied the Cess with the authority of law and the same is being collected by answering respondent Nos. 1 and 3."

(13) On May 14, 2001, C.M. No. 13935 of 2001 was filed under Order 6 Rule 17 for permission to amend the written statement filed on behalf of respondent Nos. 1 and 3. It was averred that the word 'tax' was required to be replaced with the word 'Fee/Cess.' The permission was granted. The amended written statement was taken on record. It preliminary objection No. 3 of the amended written statement, it has been averred as under :—

"That in so far as the legislative competence of the respondent State is concerned, there is adequate indication in List II to the VIIth Schedule appended to Article 246 of the Constitution of India. For example Entry 15 deals with preservation, protection and improvement of stock and prevention of animal diseases and veterinary training

and practice. Entry 27 deals with production, supply and distribution of goods subject to the provisions of Entry 33 of List III. Entry 66 provides for imposition of fee in respect of any matter in List II. As such, the said impost is in the nature of a fee."

(14) Still further, it has also been averred that "the fee being charged from the petitioner is going to be spent on the development of their milk shed area and as such, there is direct co-relation between the money being collected from them in the shape of Cess and the improvement of their respective milk shed areas so as to bring about qualitative and quantitative improvement in the entire dairy sector." The Dairy Development Department has "written letters to all the milk plants to prepare and suggest schemes for the improvement of their respective milk shed areas." Thus, it is pleaded that there is an element of quid pro quo and the levy is valid.

(15) The position that emerges from the pleadings of the parties is that initially, all the three respondents had admitted that the impugned imposed is a tax. However, at a later stage, respondent Nos. 1 and 3 have taken a somersault. they have pleaded that the levy is a fee for the services which shall be provided. However, the Board has not changed its categorical stand that the levy is a Tax.

(16) Learned counsel for the parties were heard. Mr. Sibal, learned counsel for the petitioners, contended that the milk processing units are a 'scheduled industry' controlled by the Union of India. The units are governed by the provisions of the Industries (Development and Regulation) Act, 1951 (hereinafter referred to as the 1951 Act). The field being occupied, the State was not competent to promulgate the impugned legislation. Secondly, it was contended that the Act makes no provision for any special service to those who bear the burden of the levy. There is no element of quid pro quo. thus, the plea that the impugned Cess is a fee cannot be sustained. The impugned levy is in fact a tax. It is beyond the legislative competence of the State Legislature. The arguments of Mr. H.L. Sibal were supplemented By Mr. V.K. Sibal. He contended that the provisions of the Act are arbitrary. It provides no mechanism for safeguarding the interests of the milk plants. Even if there is no utilization of the licensed capacity, the tax is levied. The petitioners are made to bear the burden while the beneficiaries are the public and the milk producers.

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(17) The claim made on behalf of the petitioners was controverted by M/S M.C. Berry, Sr. Deputy Advocate General, Punjab, who appeared for Respondent Nos. 1 and 3 and Mr. Amarjit Singh who appeared for the Resondent-Board. It was submitted that the plea that the field is covered or that the 1951 Act governs the matter, has not been raised in the petition. Thus, it could not be entertained. It was further submitted that the petitioners were initially paying purchase tax. It has been substituted by the present fee. A perusal of the declared objectives of the Act shows that the petitioners viz. the Milk Plants shall gain. Thus, the levy is legal and valid.

(18) After hearing learned counsel for the parties, we find that the following questions arise for consideration in this bunch of petitions :—

1. Is the impuned levy a fee or a tax ?
2. Is the impugned levy illegal and invalid as the state legislature has impinged upon a field that was already occupied ?
3. Was the state legislature competent to impose the impugned levy.

*Regarding 1. Is the impugned levy a fee or a tax ?*

(19) Mr. Sibal submitted that the Act provides for improvement of general facilities. These have to be necessarily provided by the State in the discharge of its ordinary functions. It contemplates no special service to the milk plants. Thus, it is a tax and not a fee. On the other hand, learned counsel for the respondents contended that even though the Act does not contemplate any direct service to the petitioners, yet, they are the ultimate beneficiaries if the declared objectives are achieved. Thus, the levy is a 'Fee' and not a 'Tax'.

(20) It would be useful to notice the relevant provisions of the impugned Act at the threshold. The Act has been promulgated "to provide for the creation of the Punjab Dairy Development Board, for coordination between the organizations engaged in dairy sector, to uplift professional standard of the dairy industry in the State, to develop modern dairy farming technology system and to levy Cess on the milk plants by abolishing Purchase Tax on milk". Section 2 provides

the definitions. Clause (d) defines a 'milk plant' to mean "a milk handling, processing or manufacturing units registered under the Milk and Milk Products Order, 1992 of the Government of India". Section 3 empowers the State Government to establish the Punjab Dairy Development Board "by notification in the Official Gazette." Clause (2) gives the constitution of the Board. The Chief Minister is the Chairman. The Minister in-charge of Animal Husbandry and Dairy Development is the Deputy Chairman. Minister for Cooperation is the second Deputy Chairman. The Chief Secretary, the Secretaries to Government of Punjab, Departments of Finance, Cooperation, Animal Husbandry etc. Agriculture, Local Government and the Vice Chancellor, Punjab Agricultural University, Ludhiana, are the *ex officio* members. The Dairy Development Advisor to be appointed by the State Government and five representatives of milk plants, four representatives of reputed milk producers, two representatives from the milk consumer organizations, two representatives from the Punjab Dhojhi (milk vendors) Union, all to be nominated by the State Government, are the members. One officer to be nominated by the State Government from amongst the Joint Secretary, Additional Secretary or Special Secretary working in the Department of Animal Husbandry, Fisheries and Dairy Development is the *ex officio* Member Secretary. The Board as constituted in terms of sub-section (2) is "a body corporate having perpetual succession..."

(21) Under Section 9, it has been provided that "the Board shall be a nodal agency for coordinating, planning and organizing programmes of dairy development in consultation with the State Government so as to promote dairy sector on modern, scientific and commercially viable lines". Section 10 enumerates the powers and functions of the Board. Under Section 11, the Board has been empowered to create posts and appoint officers and other employees "with the prior approval of the State Government". The conditions of service of the officers and employees as also their functions and duties can be determined by the Board by framing Regulations under the Act. Section 12 provides for the levy and collection of Cess. Section 13 authorises the constitution of the Punjab Dairy Development Fund. It has to be "administered by the Member Secretary of the Board". The amount of Cess has to be credited to the Fund within such period as may be prescribed. The accounts of the Fund have to be audited annually by the Examiner, Local Fund Accounts. Section 14 permits



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the Board to delegate its powers and functions to "any of its functionaries". Section 15 empowers the State Government to issue directions to the Board. Section 16 grants protection against suit, prosecution or legal proceedings for action taken in good faith. Section 17 authorises the State Government to make Rules for carrying out the purposes of the Act by notification in the Official Gazette. Under Section 18, the Board can make regulations which are consistent with the provisions of the Act and the Rules framed thereunder. Under Section 19, the State Government can direct that "this Act shall during such period as may be specified in the order, but not extending beyond the expiry of two years from the date of commencement of this Act have effect subject to such adoption whether by way of modification, addition or omission as it may deem to be necessary and expedient". Under clause (2), the order is required to be laid before the State Legislature. Section 20 provides for repeal and savings.

(22) These are broadly the provisions of the Act. However, what emerges from a perusal of the provisions is that the Board has 25 members with the Chief Minister at the apex. All these members are either connected with the Government or nominated by it. Its activities are monitored by a Steering Committee with the Secretary, Department of Animal Husbandry as its Chairman. It is "a nodal agency for coordinating, planning and organizing the programmes of dairy development." The Board has to work "in consultation with the State Government." It can create posts and make appointments thereto but only "with the prior approval of the State Government." The Board is bound to "make compliance" with the directions that may be given by the Government "from time to time." Thus, it is clear that the Board is really an agency of the State Government. The government control really permeates the functioning of the Board. Mr. V.K. Sibal appears to be right in his submission that the Board is a 'shadow of the Government.' There is hardly any discernible difference between the Board and a department of the government.

(23) Mr. Sibal contended that the purchase tax was really leviable on all persons who were purchasing milk for processing and preparing milk products. By abolishing the purchase tax and imposing the Cess, the State had really attempted to adopt a populist measure so as to leave out a large Section of the taxpayers and to place the burden on only the milk plants. He submitted that the levy is in fact a tax. Is it so ?

(24) The question can be considered in the light of the provision providing for the impugned levy. It is contained in Section 12. It reads as under :—

- “12(1) Subject to the rules made under this Act, there shall be levied for the purpose of this Act, a Cess at the rate of ten paise per litre of the licensed capacity of a milk plant by abolishing the purchase tax being charged on milk.
- (2) The Cess levied under sub-section (1) shall be paid by the owner of the milk plant in such manner and to such person or officer as may be prescribed.
- (3) The arrears of such Cess levied under sub-section (1), shall be recoverable as arrears of land revenue”.

(25) A perusal of the above provision shows that the Cess has been levied at the rate of 10 paise per litre of the licensed capacity of a milk plant. It has to be paid by the owner of the plant. In case of default, the Cess can be recovered as arrears of land revenue.

(26) The first question that arises for consideration is—Is the Cess a fee or a tax ?

(27) Cess, Fee and Tax constitute a common species. There is no ‘generic difference’ between one and the other. All are “compulsory exactions of money by public authorities.” The basic difference lies in the fact that while a tax “need not be supported by any consideration of service...a fee is levied essentially for services rendered....” In case of fee, there is essentially an element of quid pro quo between the person who pays and the public authority, which collects. It is not always absent in case of a tax. However, it is not an essential pre-requisite.

(28) What is the position in the present case?

(29) The functions assigned to the Board are in no way different from those being performed by various departments of the government. Formulation of policies, coordination of activities, development of Technologies and the like are all purely governmental functions, Development of Agriculture or Dairy Farming is in no way different

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from providing facilities for Education or Health. Should the Petitioners alone be made to bear the burden of it? And what for?

(30) The Act contains no provision to say that 'the proceeds of the Cess shall be utilised to provide any service to the Milk Plants.' In fact, there is no promise of any service or special benefit. The payer shall have no right to compel the Board or anyone else to provide any facility. The Board is under no obligation to ensure a regular supply of milk, water, electricity or even labour to the Plant. In fact, the Plant may have to be closed down for non-availability of power. Yet, the Cess shall be levied. That too, on the basis of total capacity. The levy has no relation to the actual use. It has to be paid even though the plant may have been shut down for any reason.

(31) Counsel for the respondents contended that the Plants shall gain commercially. Is it so?

(32) Assuming that the Board functions efficiently and that it improves the technology, the result would be that the quality of cattle and fodder will improve. Even the yield of the cattle may increase. Who is the immediate beneficiary? The dairy farmer. The milk seller. If the quality of milk improves, they would charge more. The plants shall have to pay a higher price for it. What do the milk plants gain? Just nothing. And yet they are made to pay for it.

(33) Learned Counsel for the respondent Nos. 1 and 3 submitted that the 'Fee' shall be spent for improvement of the milk shed areas allotted to the milk plants.

(34) This contention cannot be accepted. Admittedly, the respondent have not allotted any milk-shed area to the petitioners. The Act provides for no special service to the milk plants in the milk-shed areas. This is done by the Authority under the 1951 Act. Schedule II to the Act contains (noticed in the later part) all the relevant provisions in this behalf. Still more, there is not an iota of evidence to show that the impugned levy shall be used for the benefit of the milk plants. The Cess is to be credited to the fund. The payer cannot ask for any benefit.

(35) Learned Counsel for the respondents contended that the theory of *quid pro quo* does not hold the field now. Relying upon the

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decision of their lordships of the Supreme Court in *M/S Kishan Lal Lakhmi Chand and others versus State of Haryana and others* (1), it was submitted that the benefit of fee need not be directly relatable to each individual. The claim was vehemently controverted by Mr. Sibal

(36) The matter is not resintegra. It has been considered by the Apex court in various decisions starting with '*Commissioner Hindu Religious Endowments versus Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*' (2). The Principle laid down by the 7 Judges Bench to distinguish a 'Tax' from a 'Fee' was followed in the subsequent decisions. Ultimately, in *Kewal Krishan Puri versus State of Punjab* (3), it was *inter alia* held that a 'good' and substantial portion of the amount collected on account of fees, may be in the neighbourhood of two-thirds or three-fourths, must be shown with reasonable certainty as being spent for rendering services...' This was, as said by Seervai, a rule of universal application.'

(37) This principle was undoubtedly diluted in the subsequent decisions. In *Delhi Municipality versus Mohd. Yasin* (4), O. Chinnappa Reddy J. Was pleased to observe that the "Vicissitudes of time and necessities of history contribute to changes of philosophical attitudes, concepts, ideas and ideals and with them, the meaning of words and phrases and the language itself. The philosophy and the language of law are no exceptions. ...This is particularly so where the words properly belong to other disciplines. 'Tax' and 'Fee' are such words. They properly belong to the world of Public Finance, but since the Constitution and the laws are also concerned with Public Finance, these words have often been adjudicated upon in an effort to discover their content."

(38) These 'philosophical' observations have been even commented upon by Seervai in his treatise—"Constitutional Law of India"—Volume 3 at page 2371. He notices that on the "facts found by the Supreme Court, the impugned imposition was clearly a fee because the Municipality spent a very substantial part of the increased fees as a quid *pro quo* for the services rendered." He refers to it as an "aspect of 'Judicial discipline' and its opposite 'judicial indiscipline...'"

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(1) 1993 Supp (4) SCC 461

(2) AIR 1954 SC 282

(3) (1980) SCC 416

(4) (1983) 2 SCR 999

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(39) The decision in the case of *M/S. Kishan Lal Lakhmi Chand* (supra) is symbolic of the change. From page 2407 (supra) onwards, Mr. Seervai refers to the decision in *Kishan Lal Lakhmi Chand's* case and gives reasons to question the correctness of the view. However, the limited question that arises for consideration is—Has the distinction between “Tax” and ‘Fee’ been completely obliterated? Is a levy to be classified as fee even though there is no element of quid pro quo? Has the element of benefit to the person who pays the ‘Fee’ come down from a high of 66 or 75 percent to the magic figure of Zero? We think, not.

(40) The essential difference still exists. The only change is that the courts do not insist that a major part must be spent for the benefit of the person who bears the burden. But he must get some benefit. A reasonable part of the amount must be spent to provide him a special service. Otherwise the impost may invite the criticism of being arbitrary and unreasonable. Of really being a ‘Tax’ under the garb of a ‘Fee.’

(41) Another fact, which deserves mention, is that there is a clear dichotomy in the stand taken by the respondents. In the reply, as filed initially, it was categorically admitted that the levy was a Tax. It was not even suggested that it was a fee. Subsequently, respondents 1 and 3 had taken the plea that the impugned levy is a fee. Not a tax. However, the second respondent has stuck to its original position. Thus, the respondents themselves are not clear about the truth.

(42) Taking the totality of circumstances into consideration, it appears clear that the first question has to be answered in favour of the petitioners. It is held that the impugned impost is a ‘Tax’ and not a ‘Fee.’

*Regarding 2:—Is the impugned levy illegal and invalid as the state legislature has impinged upon a field that was already occupied?*

(43) Mr. Sibal contended that the milk plants are a ‘scheduled industry.’ These are governed by the provisions of the Industries (Development and Regulation) Act, 1951. The control of these industries vests in the Union. The impugned Act is beyond the competence of the State Legislature as the field is already occupied by the 1951 Act. Is it so?

(44) Before proceeding to consider the issue, the objection of the counsel for the respondents may be noticed. It was contended that no plea regarding the 1951 Act having been raised in the petition, it should not be gone into.

(45) It is undoubtedly true that it is the case as pleaded that has to be found by the Court. It is so for the simple reason that no one should be taken by surprise. The party should get the chance to plead relevant facts. However, in the present case, the issue has to be examined in the light of the facts as already pleaded. In the light of the provisions of the Statute. Without reference to anything beyond the record of the case. Thus, the objection cannot be sustained.

(46) The 1951 Act was promulgated by the Parliament to "provide for the development and regulation of the industries specified in Scheduled I." The Food Processing Industries including the 'Milk Foods' were included in the Schedule. The object of the Act was to "provide the Central Government with the means of implementing the industrial policy which was announced in their resolution No. 1(3)-44(13)48 dated April 6, 1948 and approved by the Central Legislature." The Act was intended to bring "under central control the development and regulation of a number of important industries the activities of which affect the country as a whole and the development of which" had to be "governed by economic factors of all India import." One of the declared objectives of the Act was that "the planning of future development on sound and balanced lines" was "to be secured by the licensing of all new undertakings by the Central Government." The Central Government was given the powers "to make rules for the registration of existing undertakings, for regulating the production and development of the industries in the Schedule and for consultation with Provincial Governments on these matters." By Section 2, it was declared that "it is expedient in the public interest that the Union should take under its control the industries specified in the Ist Schedule." In Section 3(i), a 'Scheduled industry' was defined to mean "the industries specified in the Ist Schedule."

(47) Section 5 of the Act provides for the establishment and constitution of the Central Advisory Council. It also lays down its functions. Section 6 makes a similar provision in respect of the constitution of Development Councils and their functions. Section 9

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empowers the Central Government to impose Cess on scheduled industries in certain cases. Chapter III (Sections 10 to 18) provides for the regulation of scheduled industries. Under Chapter III-A (Section 18A to 18F), provisions have been made for the take over of management or control of industrial undertakings by Central Government. Similar provisions have also been made under Chapters III-AAA, III-AB and III-AC. Under Chapter III-B, the Central Government has been empowered to control supply, distribution and price etc. of certain articles, Chapter IV entitles the Central Government to inspect the units and to issue other directions. Powers to make rules etc. have also been conferred. In Schedule-I to the Act, the Food Processing Industries are mentioned at Sr. No. 27. 'Milk foods' is one of the entries in the Food Processing Industries. The Second Schedule enumerates the functions, which may be assigned to the Development Councils. These include parks for production, co-coordinating production programmes; norms of efficiency with a view to eliminating waste and improving quality and reducing costs; measures for securing the fuller utilization of the installed capacity and for improving the working of the industries, promoting arrangements for better marketing and helping in the devising of a system of distribution of sale of the produce of the industry; promoting standardization of projects; assisting in the distribution of controlled materials and promoting arrangements for obtaining material for the industry. Various other provisions for promotion, improvement and standardization are included in the Second Schedule.

(48) Another fact which deserves mention is that in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955, the Milk and Milk Product Order 1992 has been issued by the Central Government. It extends to the whole of India. Clause 2 gives the definitions. Clause 3 provides for the constitution of the Milk and Milk Product Advisory Board by the Central Government. Clause 4 lays down the functions of the Board. Under Clause 5, provision for registration of the milk plants has been made. Clause 7 governs the modification, addition or alteration in the equipment of premises. Provision for registration and renewal fee has been made in Clause 8. Clause 9 provides for the transfer of registration. Clause 10 deals with the production or handling of milk or milk products. Clause 11 provides for the collection of milk "only from the milk shed assigned under the registration certificate." Various other provisions laying

down the functions of the registering authority, submission of quarterly returns, power to enter, inspect and seize; suspension or cancellation of registration; maintenance of records etc. have also been made. Provisions for prosecution and appeals have also been made.

(49) The petitioners have been registered and granted licenses by the competent authority. By way of instance, it may be mentioned that the petitioner in CWP No. 14807 of 2000 has been granted a registration certificate by the competent authority under the 1992 Order. In the Registration Certificate, it has been *inter alia* provided that the Unit shall **“restrict the collection of milk from the milk shed and shall not collect milk from outside it except as permitted under this order.”** The unit is also required to “comply with any other direction of the registering authority/controller and the Central Government.” The hygienic and sanitary conditions have to be maintained at the factory site. The effluent treatment plant is also required to be installed. No new infrastructure can be created without the prior assent of the department. Thus, there are comprehensive provisions governing the milk plants.

(50) By way of instance, it may also be mentioned that the petitioner in CWP No. 14807 of 2000 has been granted a registration certificate by the Government of India. It can procure milk from the Districts of Amritsar and Gurdaspur etc. In condition No. 3, it has been specifically provided that the Unit “will be responsible for the development of this milk shed through extension services like veterinary aid, the fodder production, Food and Fodder Development and Cross Breeding Programme.” It has been further laid down that “with a view to encourage the Cooperatives, the applicant will give preference to collect milk from District Cooperative Milk Union, Cooperative Dairy Federation, Punjab to the extent they may supply (within granted capacity) and the applicant will help extension work of Cooperatives as well.

(51) It is, thus, clear that the units set up by the petitioners have been licensed under the 1992 Order. These are a Scheduled Industry. The grant of licence, renewal and revocation are controlled by the Central Government. The development of the milk shed areas is the responsibility of the licencees. The provisions clearly support the conclusion that the Board is under no obligation to provide services in the milk shed areas.



(52) Mr. Sibal contended that the provisions of the impugned Act relate to the matters covered by the 1951 Act. In this behalf, learned counsel pointed out that the powers of the Development Council as contained in the Second Schedule and those of the Board under the Impugned Act are akin. Is it so ?

(53) Section 10, lays down the functions of the Board. Those of the Development Councils are given in the Second Schedule to the 1951 Act. A comparative reading shall be useful.

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**S.,10**

**Sch. II**

(i) to effect coordination between all organizations engaged in dairy sector viz. the Directorate of Dairy Development, the Directorate of Animal Husbandry, the Punjab Milkfed and other agencies, such as milk plants in the Joint Sector as well as in the Private Sector;

(ii) to uplift professional standards of the dairy industry in all its aspects through the Directorate of Dairy Development, Punjab, the Directorate of Animal Husbandry, the Punjab Milkfed and milk plants in the Joint Sector as well as in the private sector;

(iii) to coordinate formulation of policies in regard to production of milk and milk products ;

(iv) to develop modern dairy farming technologies and

(1) Recommending targets for production, co-coordinating production programmes and reviewing from time to time.

(2) Suggesting norms of efficiency with a view to eliminating waste, obtaining maximum production, improving quality and reducing costs.

(3) Recommending measures for securing the fuller utilization of the installed capacity and for improving the working of the industry, particularly of the less efficient units.

(4) Promoting arrangements for better marketing and helping in the devising of a system of distribution and sale of the produce of the industry which would be satisfactory to the consumer.

(5) Promoting standardization of products.

(6) Assisting in the distribution of controlled materials and promoting arrangements for obtaining materials for the industry.

(7) Promoting or undertaking inquiry as the materials and equipments as to methods of production, management and labour utilization, including the discovery and

systems for meeting the local demand of high quality milk and for promotion of the dairy industry for socioeconomic uplift of milk producers ;

(v) to establish centers in rural area for demonstration in the manner in which programmes can be taken up ;

(vi) to plan and formulate policies for quick genetic up gradation and development of milk animals, where necessary by arranging for transfer of technology from abroad with Government of India's prior approval;

(vii) to arrange and import new varieties of fodder seeds to increase the yield and nutrition of fodder crops and also equipment or machinery for their harvesting and conservation ;

(viii) to take requisite measures to increase consumption of drinking milk and milk products through proper advertisement and other related channels of media ;

(ix) to provide assistance of any kind to enhance the scope of export of dairy products ;

development of new materials, equipment and methods and of improvements in those already in use, the assessment of the advantages of different alternatives and the conduct of experimental establishments and of tests on a commercial scale.

(8) Promoting the training of persons engaged or proposing engagement in the industry and their education in technical or artistic subject to relevant thereto.

(9) Promoting the retaining in alternative occupation of personnel engaged in or retrenched from the industry.

(10) Promoting or undertaking scientific and industrial research, research into matter affecting industrial psychology and research into matters relating to production and to the consumption or use of goods and services supplied by the industry.

(11) Promoting, improvements and standardization of accounting and costing methods and practice.

(12) Promoting or undertaking the collection and formation of statistics.

(13) Investigating possibilities decentralizing stages and processes of production with a view to encouraging the growth of allied small scale and cottage industries.

(14) Promoting the adoption of measures for increasing the productivity of labour including measures for securing safer and better working conditions and the provision and improvement of amenities and incentive for workers.

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(x) to plan and execute programmes of high level education research and training in Dairy Technology and Husbandry ;

(xi) to secure funds from the State Government and other agencies; and

(xii) to exercise the necessary authority in respect of all matters, which are incidental and ancillary to aforesaid for attaining the objectives of the Board.

(15) Advising on any matters relating to the industry (other than remuneration and conditions of employment) as to which the Central Government may request the Development council to advise an undertaking inquiries for the purpose of enabling the Development Council so to advise, and

(16) Undertaking arrangements for making available to the industry information obtained and for advising on matters, with which the Development Councils are concerned in the exercise of any of their functions.

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(54) A perusal of the above provision shows that S.10 enumerates the powers and functions of the Board. Simply put, these relate to formulation of policies, coordination between different departments of the Government, its agencies and milk plants in the joint as well as the private sectors. The Board can undertake improvement of technology and professional standards by undertaking measures for genetic upgradation of milch cattle and importing new varieties of fodder. It can plan and execute programmes of high-level education, research and training in dairy technology and husbandry etc. or establish centers for demonstration in rural areas.

(55) Similarly, the Development Councils, constituted under the 1951 Act, are charged with the responsibility of coordinating production programmes; improving quality and production and reducing costs; suggesting measures for securing fuller utilization of the installed capacity; promoting arrangements for obtaining materials for the industry; discovery and development of new materials, equipment and methods; promoting or undertaking scientific and industrial research and training of personnel etc.

(56) It is no doubt true that there are certain provisions like the constitution of the Board, the resignation by or removal of a member etc, which are different. But such provisions are merely

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ancillary to the main purpose, which relate to the creation of the fund, the powers and functions of the Board and the levy and collection of the Cess. These ancillary provisions are really of no consequence.

(57) It deserves notice that Section 9 of the 1951 Act authorizes the imposition of Cess on scheduled industries in certain cases. It has been further provided that the Central Government may hand over the proceeds of the Cess to the Development Council, which have to be utilized to achieve the objects mentioned in Clauses (a) to (d). These objects include the promotion of scientific and industrial research, of improvements in design and quality and the provision for the training of labour etc. employed in the Scheduled industry.

(58) It was contended that no Cess has been actually levied by the Central Government. It may be so. However, the fact remains that under the 1951 Act the government is competent to impose the Cess as and when it considers it expedient to do so. The fact that none has been imposed, would not mean that the State legislature is competent to enact the law and usurp the power of the Central Government to levy the impugned Cess.

(59) On a comparative reading of the two provisions, it is clear that in pith and substance, both are aimed at improvement in production and marketing by employing suitable equipment and materials. Both also aim at training personnel for running the facilities. It is, thus, clear that the functions of the Board are not in pith and substance any way different from those assigned to the Development Councils. In this situation, the contention of Mr. Sibal that the impugned legislation impinges upon a covered field, is correct.

(60) Thus, it is held that the impugned Act impinges upon the field covered by the 1951 Act. It is without jurisdiction.

*Regarding 3:- Was the state legislature competent to impose the impugned Cess ?*

(61) Mr. Sibal contended that the 'Cess' is beyond the competence of the State Legislature. Learned Counsel for the respondents disputed this.

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(62) It is no doubt true that under Entry 15 of List II, the State Legislature is competent to promulgate a legislation for "preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice." Under this provision, the State legislature can make a law banning cow slaughter. It can also provide for preservation, protection and improvement of stock and training of personnel. Similarly, under Entry 27, provisions for regulating production, supply and distribution of goods can be made. However, neither Entry 15 nor Entry 27 permits the levy of any Cess. Still further, so far as milk plants are concerned, these are undoubtedly an industry. Any legislation relating to industries as may be made by the State Legislature under Entry 24 shall have to conform to a legislation under Entry 52 made by the Parliament. Once the Parliament makes a declaration in terms of Entry 52 that it is expedient in public interest that the control of a particular industry should vest in the Union, the State Legislature is not competent to enact a law with regard to matters covered by the Central Legislation.

(63) The entries are legislative heads. These provide the 'fields' of legislation. These have to be liberally construed. Each entry has to be given the widest scope. Yet, there is a well-recognized limitation. Each Entry does not permit the levy of tax. Taxation is a 'distinct matter.' It cannot be deduced from a general entry as an 'ancillary power.' To illustrate: the power to provide relief to the disabled or for grant of pension does not include the power to levy tax for that purpose. Similarly, the power to provide for preservation of cattle does not entitle the State legislature to levy a Tax for that purpose.

(64) Entries 1 to 44 of list II form one group. These embody the subjects on which the State legislature can legislate. However, it cannot levy a tax while enacting a law relatable to any of the fields covered by these Entries. Similarly, Entries 45 to 63 form another group and provide for the levy of taxes by the State Legislature. Entry 66 empowers the State to levy fees.

(65) We have found that the impugned impost is not a fee. Thus, it is a tax. Are the provisions of the Act referable to any Entry in List II ? There is no entry authorizing the State Legislature to

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impose the impugned levy in List II. Reference has not been made to any taxing Entry in List III. Thus, the impugned levy cannot be sustained. The third question is, accordingly, answered in favour of the petitioners.

**Conclusions :**

(66) In view of the above, it is held that :—

1. There is a well-recognized distinction between 'Tax' and 'Fee'. *Quid pro quo* is still an essential ingredient of a 'Fee.' It has been well recognized since the decision of the Constitution Bench in Shirur Mutt's case. It was reiterated in Kewal Krishan Puri's case. The subsequent decisions have diluted the ratio of decision in Puri's case. But the distinction between 'Tax' and 'Fee' has not been completely obliterated. The payer of fee has to get some special benefit. This test is not satisfied in the present case. Thus, the impugned impost is not a 'Fee' but a 'Tax.'
2. The 'milk plants' are a 'scheduled industry.' These are governed by the provisions of the 1951 Act and the '1992 Control Order.' The Parliament has clearly declared that it is expedient in public interest to vest the control in the Central Government. Keeping in view the declared objective and the provisions of the 1951 Act, it is clear that the State Legislature has invaded the territory occupied by the Parliament. Thus, the impugned impost is *ultra vires*.
3. The State Legislature is not competent to levy the impugned Cess under any of the "Taxing Entries" in Lists II and III of the VIIth Schedule to the Constitution.

(67) Thus, the writ petitions are allowed. The levy is held invalid. The notices for payment are quashed. The parites are, however, left to bear their own costs.