

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 201 OF 2009

M/s. Nav Maharashtra Cement Industries

a partnership firm registered under
the Indian Partnership Act, 1932,
having its office at E-43, M.I.D.C.,
Kupwad Block, Sangli – 416 436

...Petitioner

Versus

1. **The Directorate of Industries,**
State of Maharashtra, New Administrative
Building, Opp. Mantralaya, Mumbai – 400 032
2. **The General Manager,**
District Industries Centre,
Udyog Bhavan, Vishram Baug, Sangli
3. **Western Maharashtra Development
Corporation Ltd,**
Having its office at 2nd Floor, Kubera Chambers,
Dr. Rajendra Prasad Road,
Shivaji Nagar, Pune – 411 005.
4. **The Joint Commissioner of Sales Tax,
Kohapur Division,**
Having his office at Vikrikar Bhavan,
Survey No.873, Room No.213,
Kasba-Bawda Road,
Kolhapur – 416 006.
5. **The Sales Tax Officer Class -I,**
C-864, Sangli, having his office at
Kubera chambers, Vakhar Bhag,
Mahavir Nagar, Sangli
6. **The State of Maharashtra,**

Through the Secretary,
Department of Industries, Mantralaya,
Mumbai -400 032

...Respondents

....

Ms. Nikita Badheka a/w Mr. Parth Badheka i/by Ms. Lata Nagal for the Petitioner.

Mr. Ramesh D. Rane for Respondent No.3.

Mrs. Shruti D. Vyas, 'B' Panel Counsel for the State – Respondent Nos.1 and 4 to 6.

CORAM : G. S. KULKARNI,
JITENDRA JAIN, J.J.

DATE : 21st AUGUST, 2023.

Oral Judgment (Per G. S. Kulkarni, J.)

1. This petition under Article 226 of the Constitution of India prays for the following substantive reliefs :

“a. that this Hon'ble Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ, order or direction under Article 226 of the Constitution of India, thereby:

- i. quashing and setting aside the decision of Respondents Nos. 3 and 6 to cancel the Eligibility Certificate dated 7th December, 1992 (EXHIBIT-C hereto) and the Certificate of Entitlement dated 20th March, 1993 (EXHIBIT-G hereto) issued by Respondents Nos. 3 and 4 respectively in favour of the Petitioner, under the 1988 scheme;
- ii. directing Respondents Nos. 3 and 6 to restore to the Petitioner, the said Eligibility Certificate dated 7th December, 1992 (EXHIBIT-C hereto) and the Certificate of Entitlement dated 20th march, 1993 (EXHIBIT-G hereto) issued by Respondents Nos. 3 and 4 respectively in favour of the Petitioner, under the 1988 scheme;
- iii. quashing and setting aside letter dated 28th January, 2003 issued by Respondent No.3 to the Petitioner, thereby

cancelling the said Eligibility Certificate dated 7th December, 1992 (EXHIBIT-C hereto) and the Certificate of Entitlement dated 20th March, 1993 (EXHIBIT-G hereto) issued by Respondents Nos. 3 and 4 respectively in favour of the Petitioner, under the 1988 scheme;

- iv. quashing and setting aside letter dated 8th July, 2005 issued by Respondent No.3 to the Petitioner thereby cancelling the said Eligibility Certificate dated 7th December, 1992 (EXHIBIT-C hereto) and the Certificate of Entitlement dated 20th March, 1993 (EXHIBIT-G hereto) issued by Respondents Nos. 3 and 4 respectively in favour of the Petitioner, under the 1988 scheme;
 - v. quashing and setting aside the letter dated 23rd May, 2008 issued by Respondent No.3 to the Collector, District Sangli, directing recovery of the Sales Tax Incentives along with interest from the Petitioner (EXHIBIT-SS hereto).
- b. that during the pendency and till final disposal of this Writ Petition, this Hon'ble Court be pleased to stay the effect, implementation and operation of:
- i. letter dated 28th January, 2003 issued by Respondent No.3 to the Petitioner, thereby cancelling to the said Eligibility Certificate dated 7th December, 1992 (EXHIBIT-C hereto) and the Certificate of Entitlement dated 20th March, 1993 (EXHIBIT-G hereto) issued by Respondents Nos.3 and 4 respectively in favour of the Petitioner, under the 1988 scheme;
 - ii. letter dated 8th July, 2005 issued by Respondent No.3 to the Petitioner thereby cancelling the said Eligibility Certificates dated 7th December, 1992 (EXHIBIT-C hereto) and the Certificate of Entitlement dated 20th March, 1993 (EXHIBIT-G hereto) issued by Respondents Nos. 3 and 4 respectively in favour of the Petitioner, under the 1988 scheme;
 - iii. letter dated 23rd May, 2008 issued by Respondent No.3 to the Collector, District Sangli, directing recovery of the Sales Tax Incentives along with interest from the Petitioner (EXHIBIT – SS hereto).
- c. in the alternative and during the pendency and till final disposal of this Writ Petition, this Hon'ble Court be pleased to stay the effect implementation and operation of letter dated 23rd May, 2008 issued by Respondent No.3 to the Collector, District Sangli, directing recovery of the Sales Tax Incentives along with interest from the Petitioner (EXHIBIT-SS hereto);

- d. any other and further reliefs as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case, be granted to the Petitioner;
- e. costs of this Writ Petition be provided for."

2. The short issue, which would fall for consideration is **firstly** whether Respondent No.3-Western Maharashtra Development Corporation Ltd., through its Managing Director, had any authority to cancel the "Eligibility Certificate" and the "Entitlement Certificate" issued to the Petitioner by the Deputy Commissioner of Sales Tax, Kolhapur, Division Kolhapur, under the provisions of Section 41-BA of Bombay Sales Act, 1959; **Secondly** as to whether the impugned order dated 28th January, 2003 passed by Respondent No.3 cancelling the Eligibility Certificate granted to the Petitioner could at all be cancelled *ab initio*.

3. The relevant facts are required to be noted.

4. The Petitioner is a partnership firm registered under the Bombay Sales Tax and Central Sales Tax Act, which was granted registration under the said Acts on 19th March, 1991. It was also registered as a Small Scale Industry (SSI) on 14th January, 1991.

5. The State Government, under Government Resolution dated 30th September, 1988, had notified the Dispersal of Industries Package Scheme

of Incentives. The preamble of the Scheme recorded that in order to achieve dispersal of industries outside Bombay, Thane and Pune industrial belt and to attract the industries to the underdeveloped and developing areas of the State, the Government was providing package of incentives to new units/expansion set-up in the developing region of the State since 1964, under a scheme of incentives first introduced in the year 1964. The scheme was amended from time to time and remained in operation till 30th September, 1988. By such Government Resolution, the scheme was revised so as to bring into force a new scheme, namely the Package Scheme of Incentives, 1988.

6. The Petitioner had applied for benefits under the said scheme and the Petitioner was issued Eligibility Certificate for Sales Tax Incentive on 7th December, 1992. Such certificate was granted on the conditions to be complied by the Petitioner.

7. Consequent to such Eligibility Certificate being granted under the said scheme of the State Government, the Petitioner was issued a “Certificate of Entitlement” by the Deputy Commissioner of Sales Tax, Kolhapur Division, dated 20th March, 1993. It appears from the record that Respondent No.3 had taken up the issue with the Petitioner with regard to the manufacturing of the product, namely, Cement to the effect

that the Petitioner's SSI Unit being required to comply with the ISI norms by having an ISI registration. It is the case of the Petitioner that such issue was taken up at the behest of some anonymous complaints, which were made by some competitors.

8. The Petitioner from the correspondence has pointed out that it was nowhere any condition under the scheme of 'Dispersal of Industries Package Scheme of Incentives', dated 30th September, 1988 nor a requirement for obtaining Eligibility Certificate or the Certificate of Entitlement, that the Petitioner was required to have an ISI registration. However, despite such position being pointed out, Respondent No.3, by the impugned order dated 28th January, 2003, proceeded to cancel *ab initio* the Eligibility Certificate dated 7th December, 1992 granted to the Petitioner. To appreciate the reasons for such cancellation, it would be appropriate to note the relevant contents of the impugned cancellation of the Eligibility Certificate, which reads thus :

"You have been sanctioned various benefits under 1988 Scheme of Incentive for which above referred certificates and sanctions have been issued to you. However, it was observed that your unit was granted SSI registration without obtaining ISI registration, which is a pre-requisite for manufacturing of Cement. Hence, your case was referred to the Govt. of Maharashtra seeking suitable directives from them.

The Govt. has now directed that since the ISI registration was a pre-requisite for manufacture and sale of Cement and since the said ISI registration was obtained after the Eligibility Certificate period was

over, your unit is not eligible for benefits under the incentive Scheme. It has also been directed to recover the entire incentives availed by your unit under the incentive Scheme.

In view of the above mentioned Govt. decision, we hereby inform you that the Eligibility Certificates for Spl. Capital Incentive and Sales Tax Incentive as referred at 1 & 2 above so also sanction letter for Spl. Capital Incentive as referred at 3 above are hereby cancelled *ab-initio*. Since the Spl. Capital Incentive sanctioned to the unit has not been disturbed, there is no question of recovery of the same. It may also be noted that our request vide letter dated No.NMC/SNG/96, dated 3.6.1996 for conversion of SCI into additional Sales Tax benefits has not been approved by this Corporation.

As regards recovery of sales tax benefits and cancellation of the Certificate of Entitlement issued by the Sales Tax Department, we are separately writing to the Dy. Commissioner of Sales Tax, Kolhapur Division, Kolhapur. They have also been requested to initiate recovery proceedings towards the Sales Tax benefits actually availed by you.”

9. In pursuance of the impugned order, the Sales Tax Officer, Class – I, Sangli issued a communication dated 23rd July, 2003 to the Petitioner *inter alia* recording that as the Eligibility Certificate dated 7th December, 1992 issued to the Petitioner was cancelled by Respondent No.3 *ab initio*, it was implied that the Petitioner’s Entitlement Certificate was also cancelled *ab initio* and, therefore, the Petitioner was not entitled to avail any Sales Tax benefit from the beginning, which amounted to Rs.75,85,417/-. The Petitioner was called upon to make arrangement for payment of the sales tax incentive of the said amount within 7 days of the receipt of the said letter. The said communication reads thus:

“With subject referred above, I am to inform your that, your

Eligibility Certificate No.WMDC/PSGI/1988/NMCI/522/SNG/EC/1591 dated 7.12.92, already cancelled vide letter No.WMDC/PSGI/1988/NMCI/522/SNG/6108 dt. 28.1.2003 by WMDC Ltd., Pune ab-initio by which in turn implies that your E.C. is cancelled ab-initio. Therefore, you are not entitled to avail any Sales Tax benefits from beginning which amount to Rs.75,85,417/-.

You are therefore requested to make arrangements for payments of Sales Tax Incentive of Rs.75,85,417/- and produce the Challan to this office within 7 days from the receipt of this letter.

If you have anything to say about this matter you are requested to attend this office on 31.7.2003.”

10. Thereafter, the Respondents initiated recovery proceedings against the Petitioner. It is on such backdrop, the present petition was filed in April-2009. By an order dated 8th April, 2009 passed by a co-ordinate Bench of this Court, the petition was admitted and interim relief was granted in favour of the Petitioner in terms of prayer clause ‘c’ of the petition, namely, of a stay to the effect and implementation in operation of the impugned letter dated 23rd May, 2008 issued by Respondent No.3 to the Collector, District Sangli, directing recovery of the sales tax incentives along with interest from the Petitioner. The said order reads thus:

“1. Rule.

2. It is submitted on behalf of the Petitioners that the Petitioners that the Petitioners were engaged in the manufacture of IRST 40 grade cement requiring for the manufacture railway sleepers. It is further submitted that the said product was not allotted any standard mark by the Bureau of Indian Standards. The contention on behalf of the respondents has been that the Petitioners would be

entitled to be treated as a SSI unit and exemption from sales tax is only in the event of the cement manufactured by them was having an ISI mark. Considering the averments and that has not been factually disputed, there will be interim relief factually disputed, there will be interim relief in terms of prayer clause (c) subject to the Petitioners filing an undertaking before this Court of both the Partners that this will not alienate any of the permanent assets including land and building of the manufacturing unit. Undertaking to be filed within two weeks from today.

Respondents waives service.”

11. It is on the above backdrop, we have heard learned counsel for the parties. Reply affidavit has been filed on behalf of the Sales Tax Department of Shri. Maruti Pandurang Kashid dated 6th March, 2009. There is also a reply affidavit which has been filed on behalf of Respondent No.3 justifying the impugned action.

12. In the reply affidavit filed by Respondent No.3, it is contended that although the Petitioner possessed a SSI registration and was granted Eligibility Certificate also an Entitlement Certificate under the scheme, however, on 18th August, 1996 ‘some person’ made a complaint to the Managing Director of Respondent No.3 that the Petitioner’s unit is producing Cement without ISI mark and for such reason SSI registration certificate could not have been given to the Petitioner’s unit. It is not in dispute that the complaint was an anonymous complaint. It is also stated that such a complaint was made to the Government and, in pursuance

thereto, on 14th January, 1997, the Industries, Energy and Labour Department Under Secretary had asked Respondent No.3 to forward details after consulting the Petitioner in this regard. It is stated that accordingly on 12th March, 1997, the Petitioner had forward the ISI registration certificate dated 29th September, 1996 allotted to it, stating that the Petitioner was marking its product through M/s. Nav Maharashtra Portland Cement Industries, which was a sister concern of the Petitioner. Thereafter, the Managing Director of Respondent No.3 addressed a letter to the Joint Director of Industries raising an issue as to whether the ISI registration and the SSI registration issued to the Petitioner by the authorities was valid. On 28th October, 1997, the Joint Director of Industries, Pune addressed a letter to the Development Commissioner (Industries), Mumbai referring to the facts of the case, and sought clarification on the issue as to whether the ISI registration mark obtained by M/s. Nav Maharashtra Portland Cement Industries can be made applicable to the Petitioner's Unit. By letter dated 22nd April, 1999 of the Development Commissioner addressed to the Joint Director of Industries, Pune, a copy of which was forwarded to the Managing Director of Respondent No.3, recorded that M/s. Nav Maharashtra Portland Cement, ISI mark certification, was applicable only to the manufacturer of the product and such ISI mark could not be made

applicable to any other unit i.e. the Petitioner's unit. It was recorded that as the ISI mark was not independently obtained by the Petitioner's unit, the General Manager, District Industry Center, Sangli should inform the Petitioner to obtain the same, and that the Managing Director of Respondent No.3 should not disburse the sanction benefits to the Petitioner's unit. Consequent thereto on 18th May, 1999 Joint Director of Industries, Pune addressed a letter to the General Manager, District Industry Center, Sangli informing that the Managing Director of Respondent No.3 should not disburse any incentive to the Petitioner's unit under the 1988 scheme, until the Petitioner is licensed by the Bureau of Indian Standard for making product with ISI mark. On 30th March, 2001, the Petitioner informed the Additional Director of Industries that the Petitioner had obtained the BIS license and therefore the Petitioner ought to be allowed to avail the benefit of the Package Scheme of Incentives. This was also informed to Respondent No.3. It is next stated in the reply affidavit that despite the Petitioner obtaining the BIS licence on 4th February, 2002, Respondent No.6 (the State of Maharashtra) informed the Secretary Industries that the case of the Petitioner be put up before the State level Committee. Accordingly Petitioner's case was placed for discussion in the 44th meeting of State level committee held on 25th September, 2002. In such meeting, the committee held that the ISI

registration was a pre-requisite for manufacture and sale of the products, and as the Petitioner had not obtained the ISI certificate, the Petitioner was not eligible for benefit under the Package Scheme of Incentives.

13. An affidavit-in-reply filed on behalf of the State Government is not different from what has been noted by us being the stand of Respondent No.3. The affidavit states that the implementing agencies i.e. Respondent No.3 Western Maharashtra Development Corporation Ltd., having cancelled the Eligibility Certificate *ab initio*, the Petitioner's unit could not obtain the ISI certificate within a stipulated period and accordingly intimation was issued to Respondent Nos. 5 and 6 to initiate recovery proceedings.

14. There is another affidavit filed on behalf of State of Maharashtra of Mr. Appasaheb Pandurang Bhopale. It is for the first time in this affidavit, the State has contended that obtaining ISI mark was a pre-requisite for the commercial production as per Cement (Quality Control) Order 1962, and it is for such reasons only when complaints were received by the State Government, it was realized that the Petitioner was not producing cement complying with the ISI certification mark, and it is in these circumstances, the eligibility certificate issued to the Petitioner was cancelled and proceedings were taken to recover the amount.

15. There is a rejoinder affidavit filed on behalf of the Petitioner of Mr. Pravin Surajmal Lunkad, Partner of the Petitioner, in which the Petitioner has *inter alia* contended that the product IRST 40 grade cement did not have any requirement of obtaining ISI certification and, therefore, the Petitioner could not have applied for ISI certification. The Petitioner has also stated that at no point of time, the SSI authorities insisted that the Petitioner obtains an ISI mark, as also the agreement entered by the Petitioner with Respondent No.3 did not refer to any such requirement of obtaining ISI certification by the Petitioner. The Petitioner has also assailed the minutes of the state level committee, to contend that when there was no legal requirement under the 1988 Scheme to obtain the ISI certification for grant of eligibility. The Petitioner has further contended that the Respondents were fully aware that the Petitioners were manufacturing IRST 40 grade Cement for which no BIS code was allotted. The affidavit further reiterates that the impugned decision is taken without application of mind. It is next contended that the impugned action on the part of the Respondents was illegal and contrary to the scheme, as also to the conditions which were set out in the Eligibility Certificate and Entitlement Certificate, as issued to the Petitioner.

16. On the above conspectus, we have heard learned Counsel for the parties, with their assistance, we have also perused the record.

17. Mrs. Badheka, learned counsel for the Petitioner has drawn our attention to the various conditions set out in the scheme, as also the conditions as contained in the Eligibility Certificate and the Entitlement Certificate, to contend that none of the conditions either under the scheme and the certificate, provided that the Petitioner would be entitled to the benefit under the scheme only in the event the Petitioner is to have valid registration with the BIS. She would thus submit that there was never an explicit requirement in the incorporation of the Petitioner company of compliance of the Cement (Quality Control) Order 1962, as amended on 18th June, 1983, or as any pre-requisite either under the scheme of the certificates in question, issued in favour of the Petitioner. It is submitted that the issue of an alleged non compliance of such purportedly requirements was raised by the Petitioner's competitors, by writing anonymous letters, and on such basis the impugned action was sought to be taken against the Petitioner. She would submit that no ground whatsoever has been set out in the impugned order which would in any manner show that the Petitioner had not complied and/or had

contravened any of the conditions of the scheme on the Petitioner's eligibility as also the Entitlement Certificate. It is also Mrs. Badheka's submission that it was not correct either for Respondent No.3 or the other Respondents to impose conditions contrary to what was prescribed by the State Government under the scheme as categorically incorporated in the Eligibility and the Entitlement Certificates, issued to the Petitioner. It is also her submission that in any event it was not legal and proper for the Respondents to pass an order cancelling the Certificate of Entitlement *ab initio* as this would be contrary to the provisions of Section 41 -C(2) of the Bombay Sales Tax Act, 1959. In support of her contention reliance is placed on the decision of the Division Bench of this Court in the case *Additional Commissioner of Sales Tax, VAT-III Mumbai V/s. B.G. Chitale*¹ decided on 22nd September, 2011. Also reliance is placed on the decision of the Allahabad High Court in the case of *B.M. Cement Private Limited V/s. Commissioner of Trade Tax, U.P., Lucknow And Another., (2009) 20 VST 248 (ALL)*.

18. On the other hand, Mr. Rane learned counsel for Respondent No.3 has justified the impugned action by referring to the reply affidavit the contents of which we have noted hereinabove.

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19. Ms. Vyas, learned counsel on behalf of State Government in opposing the petition would submit that the Petitioner was not possessing registration under the B.I.S. for the purpose of manufacturing the product in question namely Cement and for such reason, the Petitioner was not entitled for the incentives under the scheme. Referring to the reply affidavit she would submit that the Petitioner ought not to be granted any relief as prayed for.

20. The above rival contentions have fallen for our consideration.

21. At the outset, we find that there is much substance in the contention as urged on behalf of the Petitioner that there was no condition under the scheme which would require the Petitioner to obtain registration from the BIS, for manufacturing the product in question, so as to be entitled to the incentives offered by the scheme, which were incentives primarily for dispersal of industries from the Mumbai, Thane and Pune industrial belt to be relocated to the underdeveloped areas in the State of Maharashtra. This was the primary focus of the scheme.

22. Mr. Rane learned counsel for the Respondent No.3 is not in a position to point out any condition under the scheme or the certificates issued to the Petitioner namely the Certificate of Eligibility and Certificate of Entitlement, whereunder registration with the BIS was a pre-requisite

for the Petitioner to avail any benefits under the scheme. In the absence of any explicit inclusion of such criteria, certainly any alien condition could not have been foisted on the Petitioner so as to take away the benefit granted to the Petitioner in issuing the Eligibility Certificate and also the Entitlement Certificate, which was issued to the Petitioner on appropriately scrutinizing the compliance of the pre-conditions, the Petitioner was required to satisfy, in order to avail the benefits under the scheme.

23. We also cannot overlook that the entire action against the Petitioner was initiated on the basis of an anonymous complaint. What is surprising is that such anonymous complaints were taken forward and compliance of the BIS requirement which was alien to the scheme in question was sought to be imposed on the Petitioner. Further this was done oblivious to the assertion made by the Petitioner that the Petitioner was marketing its products through M/s. Nav Maharashtra Portland Cement Industries, which was its sister concern, which fulfilled the ISI norms. This aspect was not at all taken into consideration by the respondents. No document whatsoever issued by the BIS was brought to our notice, that such a position taken by the Petitioner to market its product through a ISI compliant sister concern, was not acceptable in law.

This also for the reason that the State Government and Respondent No.2 did not have any expertise to ascertain the said position taken by the Petitioner, when the petitioner contended that its product was compliant and was being sold as an ISI product through M/s. Nav Maharashtra Portland Cement Industries petitioner's sister concern. This would assume significance in the light of the incentives availed by the Petitioner, as the incentive was only for dispersal of its unit from the industrial areas of Mumbai, Thane and Pune industrial belt into a underdeveloped or developing areas.

24. It is also not in dispute that the Petitioner had subsequently obtained the ISI registration. We have referred to this aspect of the matter for the reason that although this was not one of the conditions either under the scheme or under the Certificate of Eligibility and Certificate of Entitlement, granted to the Petitioner, however even if such a condition was being imposed, the Petitioner had taken all steps to comply with such conditions.

25. We also find substance in the contentions as urged on behalf of the Petitioner that the impugned action taken by the Respondents is *per se* illegal being in the teeth of the provision of Section 41-C of the Bombay Sales Tax Act, in as much as, the Respondents had no authority

whatsoever to cancel the Certificate of Entitlement of the Petitioner *ab initio* as sub-section (2) of Section 41-C provides, that the cancellation can only be prospective. To appreciate such contentions we may refer to the provisions of Section 41-C which reads thus:-

“S. 41 C. Cancellation of Certificate of Entitlement. -

(1) Notwithstanding anything contained in this Act, or in any judgment, decree or order of any Court or Tribunal to the contrary, the Certificate of Entitlement issued in favour of an Eligible Unit by the Commissioner in respect of any Package Scheme of Incentives -

(a) Shall be deemed to have been automatically cancelled on the date on which -

[(i) the cumulative quantum of benefits received by such unit-

(A) being a Small Scale Industries unit governed by the 1979 Package Scheme of Incentives [as calculated from the 1st October 1995, exceeds] the approved gross fixed capital investment of such Unit at the time of grant of the Eligibility Certificate, or

(B) not being an Unit referred to in entry (A) above, exceeds at any time, whether before or after, the date of commencement of Maharashtra Tax Laws (Levy, Amendment and Validation) Act, 1995 (Mah. XVI of 1995), the monetary ceiling as provided in the relevant Package Scheme of Incentives].

(ii) the period for which a Certificate of Entitlement was granted to an Eligible Unit, expires; or

(iii) the Certificate of Registration granted to an Eligible Unit has been cancelled;

(b) Shall be cancelled by the Commissioner, after giving the Eligible Unit an opportunity of being heard, if it is noticed that the grant of Certificate of Entitlement is inconsistent with any of the provisions of this Act, rules or notifications framed or issued under the Act or any of the relevant Package Scheme of Incentives.

(2) On and from the date of such cancellation, such unit shall cease to be eligible to claim any exemption from payment of tax under entry 136 [or as the case may under entry E-3] of the Schedule of the notification issued under section 41 and such unit shall

surrender to the Commissioner, the Certificate of Entitlement, together with all declarations in Form 'BC', within fifteen days from the date of such cancellation."

(emphasis supplied)

26. The Petitioner would be correct in placing reliance on the decision of the Division Bench of this Court in the case of ***Additional Commissioner of Sales Tax, VAT-III Mumbai V/s. B.G. Chitale*** (supra), in which the Court categorically observed clause (b) of Sub-section (1) of Section 41-C, mandated that on and from the date of cancellation such unit shall cease to be eligible to claim any exemption from payment of tax. The Division Bench upheld the orders of the Tribunal which held that the cancellation of the Certificate of Entitlement shall take effect prospectively, from the date of the order that was passed by the Commissioner of Sales Tax. The relevant observations of the Court are required to be noted which reads thus:

“ A certificate of entitlement was granted to the assessee on 26th July 2001 by the Commissioner of Sales Tax for the period 1 August 2001 to 31 July 2010 for several products, among them being (i) standardized milk and (ii) Cow's milk. The certificate of entitlement was granted on the basis of an eligibility certificate dated 9 March 2001 issued by Sicom Limited. Following a notice to show cause dated 20 November 2008, the Joint Commissioner of Sales Tax by his order dated 16 February 2009 deleted ab initio the aforesaid two products from the certificate of entitlement on the ground that the activity of producing standardized milk and cow's milk from raw milk did not constitute a manufacturing activity. The Tribunal in an appeal by the assessee held by its decision dated 17

July 2010 that while the cancellation of the two products from the certificate of entitlement was justified, this should be with prospective effect from the date of the order passed by the Commissioner of Sales tax on 17 February 2009 and not retrospectively. An application was moved by the Revenue before the Tribunal for making a reference under Section 61 of the Bombay Sales Tax Act 1959 which has been dismissed by the impugned order dated 18 November, 2010.

Clause (b) of Sub section 1 of Section 41-C provides inter alia that a certificate of entitlement issued in favour of an eligible unit by the Commissioner in respect of any package scheme of incentives shall be cancelled by the Commissioner after giving the eligible unit an opportunity of being heard, where it is noticed that the grant of the certificate of entitlement is inconsistent with any of the provisions of the Act, rules or notifications framed or issued under the Act or any of the relevant package schemes of incentives. Sub section (2) of Section 41-C stipulates that “on and from the date of such cancellation”, such unit shall cease to be eligible to claim any exemption from payment of tax. Having regard to these provisions, we are of the view that the Tribunal was justified in holding that the cancellation of the certificate of entitlement shall take effect prospectively from the date of the order that was passed by the Commissioner of Sales Tax on 16 February 2009 cancelling the certificate of entitlement. In that view of the matter, no question of law would arise which would require that this Court should direct the Tribunal to make a reference under Section 61. The Application is accordingly dismissed.”

27. Similar view has been taken in the decision of the Allahabad High Court in the case of *B.M. Cement Private Limited V/s. Commissioner of Trade Tax, U.P., Lucknow And Another (supra)*. The issue before Allahabad High Court was to the effect that the assessee therein had made an application for exemption under the notification dated 31st March 1995, for a period of 8 years on 175% of the capital investment. The exemption was denied by the divisional level committee, on the ground that as per the requirement of Section 4(1) of the Cement Control Order,

1995, the manufacturer was required to obtain a licence for use of standard mark and that it shall not produce cement till it obtains the standard mark. Since, the licence for the use of standard mark from the bureau could not be obtained on the date of the first sale, the exemption was denied. Such denial was carried in appeal to the Tribunal. The Tribunal held that the assessee would be entitled for the exemption from the date of the application being moved for obtaining the licence, and directed the divisional level committee to grant eligibility certificate from such date. It was on such facts that the assessee filed a revision application before the High Court *inter alia* contending that there was no requirement under the notification, as a condition precedent for grant of exemption, to obtain the licence for use of the standard mark, from the bureau and, therefore, in the absence of any licence as required, under the control order, exemption could not be denied. The High Court considering various decisions, observed that for producing and selling of the product without obtaining the licence from the bureau may amount to violation of the control order and necessary action may be taken under the control order, however, in the absence of any such condition in the notification granting exemption, the divisional level committee as well as the tribunal had committed, an error of law, in refusing the exemption, on the ground, that the unit could not obtain the standard mark from the

bureau as required under the Cement Control Order, 1995. In the present case, the grounds on which, the Respondents have denied the benefit of the incentive scheme to the Petitioner, are very similar to the grounds on which the assessee before the Allahabad High Court was denied the benefits.

28. We are also surprised that in the present case the sales tax authority has presumed that the Certificate of Entitlement issued to the Petitioner had stood cancelled in view of the impugned communication of Respondent No.3, so as to cancel the Certificate of the Eligibility, issued to the Petitioner. We do not find any formal order issued by the Commissioner of Sales Tax cancelling the registration as per the provisions of Section 41-C. This, in as much as, the power to cancel the Certificate of Entitlement is conferred only with the Commissioner under the said provision. The term Commissioner has been defined under the provisions of Section 2(7) of the Bombay Sales Tax Act to mean a person appointed as the Commissioner of Sales Tax for the purpose of the Act. It appears that the Sales Tax Officer in issuing the communication dated 23rd July, 2003 in regard to the cancellation of Eligibility Certificate, at the behest of Respondent No.3, itself is presumed to be a cancellation of the Entitlement Certificate, granted to the Petitioner. Such assumption on

the part of the Sales Tax Officer was *per se* illegal and in the teeth of Section 41-C of the Act, which conferred such powers only on the Commissioner. In fact there is no such order passed by the Commissioner explicitly cancelling the Certificate of Entitlement of the Petitioner and only on the presumption that the cancellation of the Eligibility Certificate would amount to cancellation of Certificate of Entitlement, the Respondent authorities have proceeded to initiate recovery proceedings against the Petitioner.

29. For the above reasons, looked from any angle, the impugned action taken by the Respondents appears to be illegal, being not only contrary to provisions of the scheme and the conditions set out in the Certificate of Eligibility and the Certificate of Entitlement, but also contrary to provisions of Section 41-C of the Bombay Sales Tax Act.

30. Resultantly the Petition deserves to succeed. The Petition is accordingly allowed in terms of prayer clause (a).

31. Rule is made absolute in the above terms.

32. The Respondents are directed to take further consequential action within one week of receipt of the copy of this order from the Petitioner.

33. No costs.

[JITENDRA JAIN, J.]

[G. S. KULKARNI, J.]