

(1984) 09 PAT CK 0004

In the Patna High Court

Case No : C.W.J.C. No. 3176 of 1983 and 766 of 1984

Dhirendra Kumar Akela and Others

APPELLANT

Vs

Bihar State Agriculture Marketing Board and Others

RESPONDENT

Date of Decision : 04-09-1984

Acts Referred:

Constitution of India, 1950 — Article 233, 234, 235

Citation : (1985) 33 BLJR 199 : (1984) PLJR 974

Hon'ble Judges : S.S. Sandhawalia, C.J.; S. Sarwar Ali, J; B.P. Jha, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

S.S. Sandhawalia, C.J.—Whether, the power to transfer an employee of one Market Committee to another within the State, expressly conferred on the Bihar State Agricultural Marketing Board by Rule 64 (ii)(c) of the Bihar Agricultural Produce Markets Rules, 1975, is ultra vires of the parent Act—has come to be the primarily significant question in this set of three writ petitions, now referred for an authoritative decision by a Full Bench. Equally at issue is that correctness of the earlier Division Bench decision in Krishna Kumar Shrivastava v. The State Agricultural Marketing Board and Ors. 1984 Labour and Industrial Cases 931.

2. The representative matrix of facts may be taken from Dhirendra Kumar Akela v. The Bihar State Agriculture Marketing Board and Ors. Civil Writ Jurisdiction Case No. 884 of 1983. The petitioner therein was appointed as a Typist by the Agricultural Produce Market Committee, Dinapore, on the 21st of April, 1979, and, it is averred on his behalf that thereafter he is continuing to perform his duties satisfactorily. However, by the impugned order dated the 14th January, 1983 (Annexure "1"), the Secretary of the Bihar State Agricultural Marketing Board (hereinafter referred to as the Board), directed the transfer of the petitioner's services from the Dinapore Market Committee to the Arrah Market Committee. The gravamen of the petitioner's case is that he was an employee of the Dinapore Agricultural Produce Market Committee, which is a statutory body,

and, there is no power or authority in the Board to transfer the petitioner's services to a different statutory body, like that of the Arrah Agricultural Produce Market Committee. On these premises the impugned order of transfer is sought to be assailed as wholly illegal and without jurisdiction.

3. In the return filed on behalf of Respondents Nos. 2 and 3, the stand taken is that though under the Bihar Agricultural Produce Markets Act, 1960 (hereinafter called the Act), each Market Committee is a corporate body, yet it is wholly subservient and subordinate to the Board, which is the apex body at State level. It is stated that the very purpose of the establishment of the Board u/s 33A of the Act is to exercise stringent superintendence and control over the Market Committees throughout the State. A reference is made to the various provisions of the Act and the Rules framed thereunder to highlight the fact that the functioning of the Market Committees including the service conditions of their staff and the employees is wholly under the control of the Board and consequently under the express powers conferred by Rule 64 (ii)(c) of the Rules, those employees are transferable from one Market Committee to another.

4. These cases originally came up for hearing before a Division Bench and firm reliance on behalf of the petitioners was placed on *Krishna Kumar Shrivastava v. The Bihar State Agricultural Marketing Board and Ors.* (supra). However, on behalf of the respondent Board a frontal challenge was laid to correctness of the view on the ground that the material provision of Rule 64(ii)(c) had gone unnoticed and the judgment had been rendered per incuriam. In view of the importance of the issue and the merit of the challenge raised, these cases were, therefore, referred for decision by a larger Bench.

5. However, when the matter originally came up before us, Mr. K.D. Chatterjee, learned Counsel for the petitioners, sought to assail the very validity and the vires of Rule 64 (ii)(c) of the Rules, and, since that had not been expressly pleaded in the writ petition, he sought leave to amend the same, which was granted, Supplementary affidavits have now been filed, assailing Rule 64 (ii)(c) of the Rules as being ultra vires the Act, and, as required, the State of Bihar has been impleaded as a party.

6. Since admittedly the whole controversy herein focusses on Rule 64, it is apt to read the relevant part thereof at the very outset, with particular reference to Sub-clause (c) of Clause (ii) thereof:

64. TERMS AND CONDITIONS OF SERVICE OF SECRETARY AND STAFF OF MARKET COMMITTEE-

(i) xx xx xx (ii)(a) The Market Committee may employ such other officer and servants as may be necessary for its proper and efficient: working.

(e) Such officer and servants shall be divided into superior and inferior classes.

(c) The number of posts in each category and terms and conditions of service of staff and servants of the Market Committee maybe determined by the Market

Committee with the approval of the Board and such staff and servant shall function under over all control and superintendence of the Board and shall be transferable from one Committee to other within the State.

(d) Appointment of superior staff shall be made by Market Committee subject to the prior approval of the Board. Any dismissal, removal or reduction in the rank of any staff shall be subject to the approval of the Board

(e) The Market Committee shall send a report of all appointments to the Board within a month.

7. With the inimitable fairness Mr. K. D, Chatterjee conceded that Rule 64(ii)(c) in express terms conferred power oh the Board to transfer an employee of one Market Committee to another, and it, therefore, would be vain on his part to canvass that it does not, in fact do so. learned Counsel further stated that the earlier judgment in Krishna Kumar Srivastava"s case (supra) has altogether missed to notice Rule(ii)(c), and, frankly conceded his inability to support that judgment. The sole challenge, therefore, was directed to the very validity of Rule 64(ii)(c) and herein also Mr. Chatterjee was fair enough to state that be was not attacking the entire provision, but only the penultimate part thereof which confers the power of transfer on the Board in the following words:

and shall be transferable from one Committee to other within the State.

Thus the attack herein spearheaded only to the limited extent of the power to transfer conferred by Sub-clause (c) of Clause (ii) of Rule 64.

8. In focussing his basic submission, Mr. Chatterjee contended that herein the conferred power of transfer, though labelled as such, had been wrongly clothed in this garb and, in fact, involved the transplanting of an employee from one employer to another, and, from the services of one Market Committee to an altogether different Market Committee, which might well involve conditions of service. This, according to him, was not.warranted by the provisions of the Act itself, and, therefore, the relevant part of Rule 64(ii)(c) travelled far beyond the parameters of the Act and was. therefore, ultra vires. For substantiating this stand, our attention was first drawn to Section 17 of the Act, which provides that Market Committees are bodies ; corporate, and, according to the learned Counsel, they were, therefore, autonomous.

9. Some what curiously, a tenuous reliance was also placed on Section 20 (4), which empowers the Market Committees to employ Officers and servants. Reference was then made to Section 33-E (3) of the Act to indicate that the statute empowers the Board to create a common cadre for the employees of the Market Committees, and, it was contended that only when such a common cadre is created, it would be possible to transfer the employees inter se and not otherwise. Major reliance was, however, placed on Section 52, and, in particular Sub-clause (xxix) of Clause (2) thereof, for contending that these provisions confer the power to make rules within the narrow parameters of discipline and

control of the officers and servants of the Committee and, according to the learned Counsel, this would not include the power of transplanting one employee of a Market Committee to the alien soil of altogether a different Market Committee.

10. More specifically Mr. Chatterjee, somewhat ambitiously, first sought to project before us that Sub-section (4) of Section 20 was itself unconstitutional on the ground that it suffers from the vice of excessive delegation. It was contended that this provision, without any guideline or parameters, conferred a blanket power for framing of rules with regard to the conditions of the services of the employees of the Market Committees, and, therefore, amounted to an abdication of legislative function. A number of cases, beginning with the Delhi Laws Act case AIR 1951 S.C. 332. Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others, . Sales tax Officer, Ponkannam v. R.I. Abraham AIR 1967 SC 1823 . Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, . and The State of Punjab and Another Vs. Khan Chand, , were cited on the larger principle that wherever the permissible limits of delegation were transgressed by the Legislature, the provision must be struck down as arbitrary on the ground of the vice of excessive delegation,

11. The submission aforesaid, though presented with erudition, is only to be noticed and rejected in the particular context of Section 20 (4), which is in the following terms:

20. APPOINTMENT AND SALARIES OF OFFICERS AND SERVANTS OF THE MARKET COMMITTEE-

XX XX XX XX (4) Subject to the provisions of Sub-sections (1), (2) and (3) and the rules and bye-laws, the Market Committee may employ also such number of other Officers and servants and pay such Officers and servants such salaries, as the Board may sanction.

Even a plain reading of the above would show that the same is in no way a delegating Section at all. Herein, there seems not even a hint of delegation by the Legislature to any subordinate authority. Even by the remotest analogy, one cannot read anything in this provision which can amount to any conferment of power on the State Government to frame subordinate legislation. Such provision, as would be elaborated later, is contained primarily in Section 52. It is not the respondents' case, and, in fact, not anybody's case, that Rule 64(ii)(c), or for that matter any one of the statutory rules, have been framed u/s 20 (4) of the Act. The categoric and virtually unchallengeable stand of the respondents is that these rules are framed under the wide-ranging powers u/s 52 only. As the heading of Section 20 indicates, the whole provision deals with the power of appointment and salaries of officers and servants of the Market Committees. Sub-section (4) thereof merely places a limitation or a bar on the power of the Market

Committees with regard to the conditions of service of its employees, Whilst conferring the power on the Market Committees to employ also such number of other officers and servants (apart from the Secretary, Engineers and other technical services), the same was hedged in by the limitation that these must be subject to the provisions of Sub-sections (1), (2) and (3), as also to the rules and bye-laws framed under the Act. This limitation is neither exceptional nor in any way invalid, because it is axiomatic that the service conditions have to be subservient to the statutory provisions on the point. It flows inexorably that the scope and purpose of Sub-section (4) of Section 20 is altogether different and alien to any delegation by the Legislature for the purpose of subordinate legislation.

12. Now, once it is held, as it must be, that Sub-section (4) of Section 20 is not at all a provision which, in any way, delegates the legislative power to a subordinate authority, then the whole argument, rested on these premises and that it suffers from the vice of excessive delegation, has to be rejected out of hand. If the very foundation of the alleged assumption of delegation is non-existent, then inevitably, the super-structure of the imaginary vice of excessive delegation must also crumble to the ground. It is, therefore, unnecessary to advert individually to the precedent cited by the learned Counsel, which, with respect, have, therefore, no relevance to the point. There is, and, indeed, there can be, now no dispute to the basic principle that any abdication of the functions of the Legislature and an excessive delegation to a subordinate authority to make laws, without indicating any policy or guidelines, would be unsustainable. However, in a provision, where there is no delegation at all, no room for any inter play of these principles is attracted. Equally, learned Counsel's persistent reliance on the various observations in the Delhi Laws Act case (supra) was vain, because their Lordships themselves later, in *Kathi Raning Rawat Vs. The State of Saurashtra*, . had observed as under:

On the second point, the appellant's learned Counsel claimed that the majority view in *In Re: The Delhi Laws Act, 1912*, the *Ajmer-Merwara (Extension of Laws) Act, 1947* and the *Part C States (Laws) Act, 1950*, , supported his contention. He attempted to make this out by piecing together certain dicta found in the several judgments delivered in that case. While undoubtedly certain definite conclusions were reached by the majority "of the Judges who took part in the decision in regard to the constitutionality of certain specified enactments, the reasoning in each case was different, and it is difficult to any that any particular principle has been laid down by the majority which can be of assistance in the determination of other cases.

13. To conclude on this aspect, the challenge to the constitutionality of Section 20 (4) of the Act must, therefore, be categorically rejected.

14. In fairness to Mr. Chatterjee, one must also notice his somewhat veiled challenge to Section 52 (1) on the same ground of excessive delegation. Though this aspect was not very pointedly presented, yet it was implicit in his

submissions that the wide-ranging power given by Sub-section (1) to frame rules which were not inconsistent with the Act or for carrying out the purposes of this Act was wholly an unguided power and bereft of laying down any policy, and, therefore, amounted to an abdication by the Legislature of its functions.

15. In evaluating the above submission, it must be noticed at the outset that Sub-section (1) of Section 52 is not be viewed in isolation of the other Sub-sections thereof. Whilst this confers a general power on the State Government to make rules within the parameters of the purposes of the Act, Sub-section (2) with meticulous details provides as many as 37 detailed specific items seriatim, empowering the making of the rules with regard thereto, but without prejudice to the generality of the power conferred by Sub-section (1). Yet again, Sub-section (3) mandates previous publication as a pre-condition, and Sub-section (4) the further safeguard that every rule made under the Section has to be laid before each House of the State Legislature, while it is in session for a total of 14 days. This view in the whole mosaic, it seems to be plain that Sub-section (1) is couched in the well-known form and the accepted legislative terminology for the conferment of power on a delegate for the purpose of framing the rules to effectuate the purposes of the Act. It seems now well settled beyond cavil that the Legislatures, over-burdened as they are, cannot be bogged down into every minuscule detail of a subordinate legislation, which by necessity, has to be left to a designated delegated authority. If a policy or a guideline is specified or is implicit by necessary implication, then such delegation is not to be deemed excessive in any way, but, in fact, has become necessary and essential.

16. Again, Sub-section (1) of Section 52 lays down that the rules are to be framed within two parameters. Negatively, these rules are not to run counter to the Act and positively for effectuating the express or implicit purposes of the Act. Therefore, a rule cannot be framed for any other purpose, except those which emerge directly or by necessary implication from the parent statute. This undoubtedly is one of the factors for providing a policy and the guideline for the purpose of the delegation to the subordinate.

17. Yet again, Sub-section (4) provides for the laying of the rules on the table of each House of the Legislature for a total period of not less than 14 days. Therefore, in a way, the Legislature far from abdicating its functions, retained control over the framing of the said rules, which are subject to its sanctification. Sub-section (4) provides that after such laying down, but the Houses may agree in making any modification in the rules or even in the total annulment thereof. It is unnecessary to elaborate the matter because it is now well settled on high authority that the provision for laying the rules on the table of the Legislature is one of the accepted and adequate safeguards against the vice of excessive delegation. See *Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others*, ., *D.S. Garewal Vs. The State of Punjab and Another*, . and *Delhi Cloth and General Mills Co. Ltd. and Others Vs. Union of India (UOI) and Others*, .

18. Lastly, it deserves reiteration that Sub-section (2) of Section 52 specifies the special matters on which rules are to be framed hedged in by the conditions specified in Sub-section (3) of previous publication. The inevitable conclusion herein is that Rule 52 (1) also does not in any way suffer from the vice of excessive delegation.

19. Lowering his sights and becoming somewhat more specific, the last arrow to the bow of the learned Counsel for the petitioners was his contention that the impugned part of Rule 64 (ii)(c), conferring the power of transfer on the Board from one Market Committee to another was beyond the specific scope of Clause (xxix) of Sub-section (2) of Section 52, under which alone it could allegedly be framed. The submission was that this provision only conferred the power to make rule with regard to discipline and control and it was strenuously argued that transfer was not within the ambit of either discipline or control, and, in any case, not the kind of transfer envisaged from one Market Committee to another.

20. Since the aforesaid submission turns specifically on Section 52 (2)(xxix), it is apt to quote the same:

52. POWER TO MAKE RULES.-(1) The -State Government may make rules not inconsistent with this Act, for carrying out the purpose of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the State Government may make rules with respect to all or any of the following matters :

* * * * * (xxix) the discipline, control, punishment, dismissal, discharge, removal of officers and servants of the committee ;

Now, even assuming entirely for arguments sake that Rule 64 (ii)(c) is framed exclusively under the aforesaid clause, it appears to me as clearly within its terms. Specifically herein the power is conferred to frame rules with regard to the discipline, control and punishment of the employees of the Market Committee. It is vain to say that the power to transfer would not be within the wide-ranging terminology of the word "control", when used in the context of an employee. The word "control" in the context of service terminology, would be nothing, if it does not include within its ambit the somewhat innocuous power of shifting the situs of an employee from one place to another for administrative exigencies. On principle, therefore, one must hold that transfer would come well within the scope of the word "control" herein.

21. Herein the learned Advocate General was on firm ground in drawing a meaningful and dual analogy from Articles 233, 234 and 235 of the Constitution. It was pointed out that thereby the appointment of District Judges and subordinate officers in the judicial service of a State is vested in the Governor but the control over the subordinate courts has nevertheless been given to the High Court. It was rightly pointed out that the word "control" in Article 235 has been consistently construed to include within it the power of the High Court to

have disciplinary jurisdiction and transfer the judicial officers from one place to another even to the exclusion of the Governor, who is the appointing authority. A reference in this connection may be made to the cases of *The State of West Bengal Vs. Nripendra Nath Bagchi*, *State of Assam Vs. Ranga Mahammad and Others*, *N. Srivasan v. State of Kerala* AIR 1968 Ker. 158 (D. B.) at p. 164 *Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others*, and recently in *Corporation of the City of Nagpur, Civil Lines, Nagpur and another Vs. Ramchandra and others*, .. It seems to be plain from this catena of cases that the final court has how unhesitatingly held that the word "control" carries within its wide sweep the power to transfer an employer from one place to another. In face of this binding precedent it seems to be somewhat vain now to contend that this power would lie beyond the jurisdiction of the controlling authority.

22. At this very stage one may also deal with the somewhat tenuous submission that because the appointing authority of an employee is its Market Committee therefore the Board inflexibly cannot have the power to transfer such an employee. The aforementioned decisions are also a warrant for the clear proposition that the power of transfer need not be coterminous with the power of appointment and where it is expressly so conferred it may be vested in an authority other than the appointing authority. As noticed already, Articles 233 and 234 vest the power of appointment of the District Judges and the Subordinate Judges in the Governor, Nevertheless, by virtue of the control vested in the High Court by Article 235 the power of transfer lies with the High Court and not with the appointing authority, namely, the Governor. For identical reasons the mere fact that the appointing authority was the Market Committee would pose no bar to the power of the Board to transfer such employees when the statutory rule expressly confers such a power within the parameters of superintendence, discipline and control vested in the Board by parent Act itself.

23. In view of the firm finding arrived at above that the power to transfer is within the ambit of "control", it is unnecessary to examine the alternative submission that the same would be equally within the ambit of "discipline" as embodied in Section 52 (2)(xxix). in fairness to the respondents it must be noticed that it was contended plausibly that the word "discipline" in a broad context may also include the shifting of an employee from one place to another but, as already noticed, it is unnecessary to conclusively adjudicate on this alternative aspect. It must, therefore, be held that even assuming that Rule 64 (ii)(o) is framed wholly under Clause (xxix) of Sub-section (2) of Section 52 the same is squarely within its sweep and it in no way transgresses the rule making power thereunder.

24. Even putting the case of the writ petitioners at the highest pedestal and assuming entirely for argument sake that Rule 64 (ii)(o) is not covered by Section 52 (2)(xxix), it still seems to be plain that the same would be squarely within the ambit of the general rule making power u/s 52(1). This expressly empowers the framing of rules for carrying out the purposes of the Act. As is

expressly noticed, the provisions of Sub-section (2) do not in any way make any inroad into the generality of this power. Now the larger scheme of the Act after the creation of the Board originally by Ordinance way back in 1974 and now by Chapter IVA of the Act would leave no manner of doubt that it was constituted to stringently superintend and control the workings of the Market Committees under it, Inevitably therefrom flows the power to equally control and superintend the functionaries and employees of the said Market Committees as well. What deserves highlighting herein are the provisions of Section 33 A (1), which are in the terms following:

For the purposes of exercising superintendence and control over Market Committees, and for exercising such other powers and performing such functions as are conferred or entrusted under this Act, the State Government shall, by notification in the official Gazette, establish a Board called the Bihar Agricultural Marketing Board.

It is plain from its language that the very purposes of the creation of the Board is the superintendence and control over Market Committees, Mr. Basudeva Prasad, the learned Counsel for the respondent Board, therefore, highlighted the larger fact that under the Act the Board has now been put at the apex of entire structure with the Market Committees virtually as its constituent units operating under its superintendence, control and directions issued. Tersely the submission plausibly was that ever since the creation of the Board the whole organisational structure has now become unitary in essence though perhaps federal in form. The Managing Committees by virtue of the various provisions, delineated hereinafter, are now wholly subservient to the Board. Reference in this context was made to Section 17 of the Act itself (on which much reliance was placed by teamed counsel for the writ petitioners) to point out that though the Market Committees were enjoined to be bodies corporate they were in no way to function as either autonomous or independent bodies. Section 17 itself places these bodies as subject to Rules, Bye-laws and the provisions of this Act. Now a bird's eye view of the provisions of the Act, Rules and Bye-laws, to which the Market Committees are subservient, would make it manifest that far from being autonomous or independent bodies these are low stringently subordinated to the apex body, namely, the Board. The succeeding Section 1H with regard to the power and duties of the Market Committee subjects them to such directions as the Board may from time to time issue. Similarly Section 20 (1) denudes the Market Committees from appointing their principal executive, namely, the Secretary, and vests that power either in the State Government or of such terms and conditions as may be prescribed by the Rules. Again with regard to the appointment of Engineers and other technical service the power of appointment is not in the Market Committee but in the Board or the State Government. As already stands noticed, Sub-section (4) of Section 20 subjects the power of appointment by the Market Committees themselves to Sub-sections (1), (2) and (3) and also to Rules and Bye-laws made under the Act. Again Sub-section (5) renders the service conditions mentioned therein subject to the approval of the

State Government or the Board Section 20 leaves no manner of doubt that even with regard to the employees of the Market Committees the stringent control of both their superior and inferior officers is vested either in the Board, or, in the alternative, in the State Government. Not only that, all disciplinary action in the nature of discharge, removal or dismissal by the Market Committee is subject to appeal to the Managing Director of the Board by virtue of Section 26. The financial control over the Market Committee with regard to the Power to borrow is again made subservient to the sanction of the Board by Sub-section (3) of Section 28. u/s 33E(3) it is vested in the discretion of the Board to constitute a common cadre of officers and other servants for all Market Committees as it may deem fit. Later Section 33(J)(i)(ii) confers the power on the Board to give directions to Market Committees in general or any Market Committee in particular. The power of inspection of the Market Committee is vested in the Board which may be exercised by the Managing Director or even by officer authorised by him by general or special orders. Deviating from the seriatim order of the Sections, it deserves notice that even as regards the power to make by-laws by the Market Committees for their own working, the same is again subjected to the previous sanction of the Board or any officer specially empowered in this behalf. Lastly there is the overall revisional power u/s 38 empowering the Managing Director of the Board, at any time, to call for and examine the proceedings of any Market Committee and after complying with the procedural requirements to pass such orders as he thinks fit and in the interregnum to stay the order or decision of the Market Committee. It is unnecessary to advert to the statutory rules in this context. The aforesaid provisions make manifest beyond cavil all the pervasive control of the Board over the Market Committees which include their functionaries and employees generally, and as has been noticed in the context of certain provisions specifically as well. It would follow inexorably from the above that the larger and the broader purpose of the Act which emerges from all these provisions is the stringent power of superintendence, control and discipline vested in the Board over the Market Committees and their employees. Against this larger vista can it possibly be said that a rule expressly conferring the power of transfer of the employees of the Market Committee by the Board would go beyond the avowed purpose of the Act investing superintendence, control and discipline of the Market Committees in the hands of the Board ? To my mind the answer is plain that such a power would squarely be within the parameters of the larger purposes of the parent Act. Therefore, in the alternative, Rule 64 (ii)(c) would be equally within the framework of the generality of the power conferred by Section 52(1) for the framing of the rules.

25. Perhaps at this very stage it is apt to dispel to somewhat baseless apprehensions that the conditions of service in one Market Committee were radically different or onerous from the other. The learned Counsel for the respondent Board was on firm ground in contending that in view of the powers conferred on the Board the service conditions of the employees of the Market

Committees now have a broad uniformity if not virtual identity. Consequently the apprehension of any irreparable loss by transfer is rather ill-founded. Any individual hardship can of course be attended but to say that on such finical ground the very statutory power to transfer expressly conferred, and plainly salutary for administrative exigencies, would become ultra vires seems to me as wholly untenable,

26. To sum upon this aspect, it must be held that Rule 64(ii)(c) is in no way ultra vires of the parent Act. The answer to the question posed at the very outset is rendered in the negative.

27. In fairness to the learned Counsel for the petitioners, reference must be made to the somewhat hypertechnical submission that Rule 64(ii)(c) did not specify the authority who could pass the order of transfer from one Committee to another. This has only to be noticed and rejected. A plain reading of the rule and its penultimate part would leave no manner of doubt that specific reference is made to the overall control and superintendence of the Board and thereafter the power to transfer from one Committee to another within the State is conferred on the Board itself. Even otherwise in the view of the structural organisation under the Act with the Board as the apex body, there remains no manner of doubt that this power of transfer by express conferment or necessary implication is vested in the Board itself.

28. Adverting now to the Division Bench judgment in Krishna Kumar Srivastava's case (supra), it deserves highlighting that it did not even remotely consider the focal point of Rule 64(ii)(c) therein. As has been noticed already, the learned Counsel for the writ petitioners Mr. K. D. Chatterji was straight away fair enough to concede that the aforesaid rule is directly attracted to the situation of transfer and in the event of its validity there was little else to urge against such a power. He had frankly stated his inability to support the view in Krishna Kumar Srivastava's case. However, the learned Counsel for the respondent Board forcefully assailed the ratio thereof on the ground that the same was rendered per incuriam and since notice had not been taken of rule 64(ii)(c), which is the core of the case here, the said judgment could not possibly hold the field in its context.

29. In all fairness it must be noticed that in Krishna Kumar Srivastava's case the writ petitioner had been promoted to the post of an accountant of the Market Committee and the case squarely set up on behalf of the respondent Board was that the post of accountant had been placed in a common cadre by virtue of Section 33E(3) and he was, therefore, transferable on that ground. Consequently the matter was considered only within the narrow field of Section 33E and on the point whether the common cadre had in fact been created or the writ petitioner came squarely within its ambit. It was in this light that it was held that the respondent Board had failed to establish that the writ petitioner was appointed in the cadre which was constituted therein by Annexure D, and also on the ground that the writ petitioner had not himself opted to remain within the same which

violation was given to him by the proviso to Sub-section (4) of Section 33B. Viewed in this aspect the case of Krishna Kumar Srivastava is in a way distinguishable.

30. However, Krishna Kumar Srivastava's case was strenuously pressed by Mr. Narayan Singh, the learned -counsel for one of the writ petitioners, for urging the proposition that until and unless a common cadre is created, there m no power in the Board to transfer one employee of the Market Committee to another. It was the submission that Rule 64(ii)(c) is to be read as subservient to the provision with regard to the creation of common cadre and unless this pre-condition is satisfied no occasion for the exercise of power of transfer can arise.

31. The aforesaid submission appears to me as plainly untenable. There is no manner of doubt that if a common cadre is created then the power of transfer would be implicit in its creation. Consequently no independent express conferment of power would arise. However, Rule 64(ii)(c) in terms confers this power with a wide generality irrespective of the creation of the common cadre, Consequently the provisions with regard to common cadre and those within the Rule 64(ii)(c) occupy two distinct and separate fields. In the case of common cadre u/s 33E(3) the power to transfer would flow from the said Section itself with regard to the posts placed in such cadre, However, dehors the common cadre, in the other field, where there is no such cadre, Rule 64(ii)(c) is expressly intended to operate. The two fields are thus distinct and the provisions are to be separately applicable to each situation.

32. Again it must be noticed that the power conferred u/s 33E(3) is discretionary and not mandatory The Board may or may not constitute a common cadre and when it does so it may act as it may deem fit. There is no obligation to create a common cadre and it is entirely in the discretion of the Board to do so or not. Therefore, if the common cadre is not created or the discretion is not exercised, could it be said that despite the avowed purposes of the Act to vest the control in the Board and consequently the power to transfer therein yet the same would not be permissible ? I do not think so. Rule 64(ii)(c) in the form it is couched and the kind of control which it indicates, confers a general power for the transfer of employees and is not to be cut down or whittled on the pre-condition of the existence of a common cadre, It is equally to be noticed that even the creation of the common cadre is not compulsory and the proviso to Sub-section (4) of Section 33E gives the option to an employee to choose whether he will join the common cadre or to remain out of it by giving notice in writing to the State Government. If the view canvassed by Mr. narayan Singh were to be accepted, then despite Rule 64(ii)(c) and even the creation of common cadre an employee may still render himself immune to transfer by opting out of the same. Again it has to be noticed that at best the common cadre is visualised only for one or a few classes of employees common to all Committees whilst others would remain out of it. As stands noticed earlier, the Bench itself only dealt with Section 33E(3) and the counsel for the Board was somewhat remiss in either not relying on Rule

64(ii)(c) or to frontally focuss attention thereon. Consequently Krishna Kumar Srivastava's case took no cognizance of a differett field with regard to cadres which are not common or where the discretion to create a common cadre had not at all been exercised. In that field Rule 64(ii)(c) is pointedly applicable and would squarely operate and indeed was so intended.

33. With the greatest respect if Krishna Kumar Srivastava's case is projected as a warrant for the proposition that there is no power in the Board to transfer an employee from one Market Committee to another unless a common cadre is created and the employee is within the same then it does not lay down the law correctly with regard to Rule 64(ii)(c) and the same has to be overruled.

34. In the light of the above the basic challenge to the order of transfer on behalf of writ petitioner Dhirendra Kumar Akela has to be rejected and the writ petition being C. W. J. C. No. 884 of 1983 is dismissed but without any order as to costs.

35. No distinguishing feature could be puited out with regard to Brahmadeo Prasad v. The Bihar State Agriculture Marketing Board and OrS.C.W.J.C. No. 766 of 1984 which must also fail for identical reasons and is hereby dismissed but without any order as to costs.

36. learned Counsel for the writ petitioner in C. W. J. C. No. 3176 o 1983 had faintly attempted to draw a distinction which seems to me as one not making any difference. It was sought to be pointed out that there was initial reluctance on the part of the transferee committee to accept the service of the writ petitioner in the Wake of the order of transfer on the ground of some alleged economic position of the Market Committee. In ray view this is a matter extraneous to the issue. The power to transfer is not made dependant on the volition of either the Market Committee where the employee is serving or the Market Committee where he is directed to serve. If, as has been held, the Board has the power to transfer under Rule 64(ii)(c), the same is in no way whittled down or affected by any such considerations. This writ petition must also fail and is hereby dismissed but without any order as to costs.