

(1969) 09 PAT CK 0003
In the Patna High Court
Case No : Title Suit No. 1 of 1969

Harinagar Sugar Mills Limited		APPELLANT
	Vs	
State of Bihar and Others		RESPONDENT

Date of Decision : 18-09-1969

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 228

Citation : (1969) 09 PAT CK 0003

Hon'ble Judges : U.N. Sinha, J;Kanhaiyaji, J

Bench : Division Bench

Advocate : Basudeva Prasad, Sudhir Chandra Ghosh, Harilal Agarwal, Ramautar Prasad and Sudharani Jaiswal, for the Appellant; Lal Narain Sinha, Advocate General, Lakshman Saran Sinha and A.H. Matiur Rahman for Defendant No. 1, for the Respondent

Judgement

U.N. Sinha, J.—This title suit was filed by the plaintiff on the 13th August, 1966 in the Court of the Subordinate Judge, Motihari, in the district of Champaran, where it has been numbered as Title Suit No. 157 of 1966. By order passed on the 6th January 1969 in C.W.J.C. No. 748 of 1968. Under Article 228 of the Constitution of India, the suit was withdrawn to this Court for disposal and it has been re-numbered as Title Suit No. 1 of 1969. The main allegations of the plaintiff, as they now stand after amendment of the plaint, have been mentioned in Paragraphs 2, 3, 4, 5(B), 5(C), 5(D), 5(E) and 5(F) of the plaint and they are quoted below:--

2. That for the realisation of cane cess for the cane season 1962-63 to 1964-65 and 1965-66 the defendant no. 3 and 4 have made requisitions to defendant no. 2 who is a Certificate Officer at Bettiah for recovering the same under Bihar Public Demands Recovery Act, 1914.

3. That the said amounts have been levied under the provisions of Bihar Sugar Factories Control Act, 1937 and the Rules framed thereunder.

4. That the said Act and the Rules framed thereunder has (Sic) been declared to be invalid with effect from 30th June, 1955 by Mr. Justice Untwalia and Mr. Justice K.K. Dutta of the Hon"ble High Court of Patna in Cr.W.J.C. No. 11 and 31 of 1966 by judgment dated 4.7.1966 and in another case of Sugauli Sugar Works Ltd., on a subsequent date by another Bench of the said High Court consisting of the Chief Justice and Mr. Justice K.K. Dutta.

... ..

5(B) That the Bihar Ordinance No. 3 of 1968 and Bihar Ordinance No. 6 of 1968 and Bihar Ordinance No. 13 of 1968 were issued without any authority of law and they having not been made an Act of the Legislature even though State Legislature reassembled each time shortly after the issue of Ordinances each time and at present there is no Ordinance or Act in force nor there was any law on the subject in force on the day the Certificate Officer in each case and in cases referred to in Schedule A of the plaint signed the certificates and these certificates are contrary to provisions of the Bihar Public Demand Act, 1914 and Rules framed thereunder.

5(C) That in any view of the matter the defendants are not entitled to recover any cane cess, entry tax or purchase tax from the plaintiff.

5(D) That cess is not "tax" within the meaning of Entry No. 52 of List II and it has never been treated as such.

5(E) That Section 35 and Section 50 of Bihar Ordinance No. 3, 6 and 13 of 1968 are ultra vires of the Constitution of India.

5(F) That the provisions of these Ordinances imposing cess and tax are hit by Articles 14 and 19 of the Constitution of India and are void [The judgment of Cr.W.J.C. No. 11 and 31 of 1966 has been reported in (1) 1968 PLJR 17.9 The reference to the case (2) Sugauli Sugar Works Ltd., is M.J.C. No. 1344, of 1964 decided on the 20th July, 1966].

2. Alleging that the Certificate Officer, Bettiah, defendant no. 2, was acting without jurisdiction in proceeding with certain certificate cases, the plaintiff has asked for the following reliefs:--

(A) That the defendants have got in a malafide manner without authority of law in utter disregard of Constitution provisions issued one ordinance on 12.1.69 but it has not yet been published in a manner prescribed by law in the Official Gazette and attempts are afoot to ante date the Gazette publication according to information received.

(AA) That the Ordinance is beyond the legislative competence of the Governor and it is non-existent in the eyes of law.

(AAA) That the Ordinance is malafide and as such void and non-existent in the eyes of law.

(AAAA) That this Ordinance could not have retrospective operation in any view of the case.

(AAAAA) That the Ordinance being for nullifying the judgment of the competent court without legislative competence is void and non-existent.

(AAAAAA) That the Ordinance is discriminatory, offending Art. 14 of the Constitution.

(AAAAAAA) That the Ordinance is void being against Arts. 19 and 31 of the Constitution.

The plaintiff has asked for an order of injunction upon the defendants restraining them from proceeding with the certificate cases mentioned in Schedule A of the plaint and also for restraining them from taking action with respect to the cane season of 1966-67 and onwards. Schedule A of the plaint mentions the following cases:--

1. Certificate case no. 4 of 1964-65
2. Certificate case no. 3 of 1964-65
3. Certificate case no. 8 of 1964-65
4. Certificate case no. 2 of 1965-66
5. Certificate case no. 4 of 1965-66
6. Certificate case no. 6 of 1965-66
7. Certificate case no. 9 of 1965-66
8. Certificate case no. 11 of 1965-66
9. Certificate case no. 1 of 1966-67
10. Certificate case no. 6 of 1966-67
11. Certificate case no. 7 of 1966-67
12. Certificate case no. 11 of 1966-67

before the Certificate Officer, Bettiah.

[The allegation made by the plaintiff in Paragraph 5 of the plaint regarding attachment of a Car bearing number BRE 1140 does not arise for consideration as it is stated that the car has already been released. The allegations made in Paragraph 5(A) of the plaint about Revenue Miscellaneous Cases No. 13, 14 and 15 of 1964-65 do not arise for further consideration as the plaintiff does not press this matter in view of the facts and circumstances mentioned in our order dated the 21st July, 1969, dealing with Exhibits A and A(1)].

3. The original written statement filed on behalf of defendants nos. 1 to 4 had raised a number of points, but what remains for adjudication are to be found in

Paragraphs 7, 8, and 12. These paragraphs run as follows.

Paragraph 7. "That the statement made in Paragraph 4 of the plaint is not correct and the interpretation put on the High Court Judgment referred to in the said paragraph is also not correct. The Hon"ble High Court in the aforesaid judgment has held that Bihar Sugar Factories Control Act, 1937 is severable in its several parts. The true effect of the decision is that only that part of the Act aforesaid which relates to the production, supply and distribution of sugarcane falling under entry 33 of list 3 of the Constitution of India, has become void. In the case aforesaid neither the validity of Section 29 of the Bihar Sugar Factories Control Act, 1937 was canvassed nor any decision was given on the validity of the said Section 29. It is submitted that Section 29 of the Bihar Sugar Factories Control Act 1937 which deals with imposition of cane cess, is constitutionally valid and has not become void".

Paragraph 8. "That the Sugar-care Cess (Validation) Act, 1961 validates Bihar Sugar Factories Control Act, 1937. It is further submitted that, in any event, provisions of the said Validation Act in so far as they relate to State of Bihar, came into force on 31.12.61. In view of this Validating Act also the Certificate Officer was perfectly competent to continue the certificate proceedings and to take all possible steps for the realisation of the certificate amount".

Paragraph 12. "That the statement made in Paragraph 8 of the plaint is not correct. The plaintiffs are liable for cane cess, interest, penalty and fine. The demand for these items being a public demand, the same can be recovered from the plaintiff under the provisions of Public Demands Recovery Act."

[The reference made in Paragraph 8 of the written statement regarding validation of Bihar Sugar Factories Control Act, 1937 by Sugarcane Cess (Validation) Act, 1961 has been given up by learned counsel for the contesting defendant.]

An additional written statement had been filed by the State of Bihar (defendant no. 1) in the Court of the Subordinate Judge, Motihari, in which this defendant had controverted the plaintiff's allegations, which are now to be found in relief no. (A) to (AAAAAAA) of the plaint. In other words, the State of Bihar was relying on the Ordinance originally impugned by the plaintiff, namely Bihar Ordinance No. III of 1968, which had come into force in January, 1968. When the plaintiff was permitted to amend the plaint, after the suit was transferred to this Court, the State of Bihar (defendant no. 1) filed an additional written statement in which this defendant contended that Bihar Ordinance No. III, IV and XIII of 1968 had been promulgated validly and their provisions were "constitutionally valid" as long as they had lasted. The other allegations are to be found in Paragraphs 2, 3, 4, 5 and 6 of this additional written statement which are quoted below:--

That this defendant is entitled in law to realise the cane cess which is itself entry tax or purchase tax from the plaintiff and the notification issued is retrospective and legal and valid in law and the contentions raised in Paragraphs 5A to 5F of the plaint are not tenable in law and are fit to be rejected.

3. That the cane cess is tax within the meaning of Entry No. 52 of List II of Schedule No. VII of the Constitution of India and Entry No. 49 of the List II of Schedule No. VII of the Government of India Act, 1935 and the same goes to the Consolidated Fund of the State of Bihar and has already been treated as such and the contentions raised in Paragraph 5(D) of the plaint are unsound in law and are fit to be rejected.

4. That the contention of the plaintiff raised in Paragraph no. 5(F) of the plaint to the effect that Sections 35 and 50 of the Bihar Ordinance Nos. 3, 6, and 13 of 1968 are ultra vires of the Constitution of India is entirely wrong in law and fit to be rejected.

5. That it is wrong to say that there was no law in force on the day when the certificates in dispute were signed by the Certificate Officer and it is equally wrong to say that these certificates are contrary to the provisions of the Bihar Public Demands Act, 1914 or the Rules framed thereunder.

6. That Section 29 of the Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937) was enacted under Entry No. 49 of List II of the Seventh Schedule of the Government of India Act, 1935 and the Bihar Act XVII of 1963, the Bihar Sugar Factories Control (Amendment) Act, 1963 was enacted under Entry No. 52 of List II of Schedule VII of the Constitution of India and the cess was tax and the cess realised went to the consolidated fund of the State of Bihar and the said provisions are distinct and separate from the rest of the Act which were made for the purpose of regulating the trade, commerce, production and supply of sugarcane.

4. On the allegations of the parties, the following issues were settled on the 14th March, 1969 after recasting:

1. Has the plaintiff any cause of action for this suit?
2. Is this suit, as framed, maintainable?
3. Has this Court jurisdiction to entertain this suit?
4. Is the suit bad for want of notice u/s 80 of the Code of Civil Procedure?
5. Are the Bihar Sugar Factories Control Act (Act VII of 1937) and the Rules framed thereunder as also the subsequent Bihar Ordinance no. 3 of 1968, 6 of 1968 and 13 of 1968 illegal, ultra vires and void?

(This issue was recast by order passed on the 28th July, 1969. This issue as it stands now has been reproduced below)

6. Has the Ordinance no. 3 of 1968 got any retrospective effect?

(This issue was also recast by order passed on the 28th July, 1969. This issue as it stands now has been reproduced below)

7. Is the cess claimed by the defendant no. 1 from the plaintiff a tax?

8. Are the impositions and the certificate proceedings mentioned in the plaint, ultra vires, void and illegal on the grounds set out in the plaint?

9. Is the plaintiff entitled to grant of a permanent injunction restraining the defendants from executing the certificate proceedings mentioned in Schedule A of the plaint or to a mandatory injunction against defendant no. 2, directing return of the attached car to the plaintiff?

10. To what other reliefs, if any, is the plaintiff entitled?

During the hearing of the suit in this Court, issues no. 5 and 6 had to be recast on the 28th July, 1969 in view of the argument advanced by the learned counsel for the parties. These issues now read as follows:--

Issue no. 6 "Are the Bihar Sugar Factories Control Act (Act VII of 1937) and the Rules framed thereunder as also the subsequent Bihar Ordinances No. III of 1968, VI of 1968, XIII of 1958, IV of 1969 and VI of 1969 illegal, ultra vires and void"?

Issue no. 6

Did the abovementioned five Bihar Ordinances or any of them have any retrospective effect?

5. At the time of the hearing of the suit it was contested on behalf of the State of Bihar, defendant no. 1 only.

FINDINGS

6. In order to appreciate the contentions raised by the parties, a history of the course of legislation on the control of Bihar Sugar Factories will have to be given at this stage. The Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937) had been enacted in 1937. The Act had received the assent of the Governor and had been published in the Bihar Gazette Extraordinary of the 24th December, 1937. Sub-Section (3) of Section 1 of the Act had laid down that the Act should come into force at once and should remain in force until the 30th June 1944. Sub-section (3) of Section 1 of this Act suffered several amendments from time to time and ultimately, by Bihar Sugar Factories Control (Amendment) Act, 1949 (Bihar Act VI of 1950) the life of the Act was extended to 30th June 1955. Thereafter, by Bihar Sugar Factories Control (Amendment) Act, 1955 Sub-section (3) of Section 1 of the original Act was further amended by deleting the words and figures "and shall remain in force until the 30th June, 1955" in that Sub-section, Bihar Act VII of 1955 had received the assent of the Governor on the 30th March, 1955 but it came into force on the 20th April, 1955 when the assent was first published in the Bihar Gazette. The relevant section of Bihar Act VII of 1937 is Section 29 and that section is quoted below as it had been originally published in the Gazette.

(29)(1) The Governor may, after consulting the Board, by notification, impose a tax not exceeding six pies a maund on the sale of sugarcane, and may, by

notification, exempt from such tax sales in any area, or any classes of such sales, to be specified in the notification.

(2) The Governor may, by notification, impose a cess not exceeding six pies a maund on the entry of sugarcane into a local area, specified in such notification, for consumption, use or sale therein.

Provided that such cess shall not be imposed on the entry into any such area of any sugarcane in respect of the sale of which a tax imposed under Sub-section (1) is payable.

(3) The Provincial Government shall make rules specifying the authority empowered to collect the tax or cess and the person from whom, and the manner in which, the tax or cess shall be collected.

The section suffered a number of amendments until it stood as follows in the year 1955:--

29(1) The Governor may, after consulting the Board, by notification, impose a tax not exceeding six pies a maund on the sale of sugarcane, and may, by notification, exempt from such tax sales in any area, or any class or classes of such sales, to be specified in the notification.

(2) The Governor may, by notification, impose a cess not exceeding thirty-six pies a maund on the entry of sugarcane into a local area, specified in such notification, for consumption, use or sale therein:

Provided that such cess shall not be imposed on the entry into any such area of any sugarcane in respect of the sale of which a tax imposed under Sub-section (1) is payable:

Provided further that the State Government may, by notification, reduce or remit in whole or in part such cess in respect of sugarcane, intended to be used or used in a factory for any purpose specified in such notification.

(3) The State Government shall make rules specifying the authority empowered to collect the tax or cess and the person from whom, and the manner in which, the tax or cess shall be collected.

Our attention has not been drawn to any other amendment of this section until Bihar Act XVII of 1963 was brought on the statute book. This amending Act had received the assent of the Governor on the 17th October, 1963 and the assent was first published in Bihar Gazette Extraordinary on the 19th October 1963, Bihar Act XVII of 1963 is quoted below in full:--

Be it enacted by the Legislature of the State of Bihar in the Fourteenth Year of the Republic of India as follows:-

1. Short title:--This Act may be called the Bihar Sugar Factories Control (Amendment) Act, 1963--

2. Substitution of new sections for Section 29 of Bihar Act VII of 1937:--For Section 29 of the Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937), the following sections shall be substituted and shall be deemed to have been substituted with effect from the 1st day of Jan., 1962, namely,--

29 Cess and tax on cane--The State Government may, by notification, impose--

(a) a cess not exceeding fifty one naye paise per quintal on the entry of sugarcane into a local area, specified in such notification, for consumption, use or sale therein;

(b) a tax not exceeding fifty-one naye paise per quintal on the purchase of sugarcane by or on behalf of the occupier of a factory:

Provided that such tax shall not be payable in respect of sugarcane for which a cess imposed under Clause (a) is payable.

29A. Reduction or remission of cess and exemption from payment of tax:--Notwithstanding anything contained in Section 29, where, regard being had to the special facts and circumstances of any factory, the State Government considers that the imposition of such cess or such tax shall be inequitable or will involve hardship, it may, by notification;

(a) reduce or remit, in whole or in part, such cess in respect of sugarcane intended to be used in such factory for any purpose specified in the notification;

(b) exempt from such tax purchases in any area or areas or any class or classes of purchases specified in the notification

3. Repeal and saving:--(1) The Bihar Sugar Factories Control (Amendment) Ordinance 1963 (Bihar Ordinance No. III of 1963), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken in exercise of the powers conferred by or under the said Ordinance shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the day on which such thing was done or such action was taken.

7. Under Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937) certain rules were framed, called Bihar Sugar Factories Control Rules, 1938. They had come into force on the 15th June, 1938. Sri Basudeva Prasad has referred to Rule 45-A of the Rules, which was as follows before it was amended in 1961:--

Rule 46 A:--Collection of Cess--(1) The occupier of every factory shall maintain a correct daily account in Form XXIII of the sugarcane entering the local area comprised in the factory.

(2) Within a fortnight of the close of each month the occupier shall pay into the treasury the amount due as cess on the quantity of sugarcane which has entered the local area during the month in question.

(2-A) The occupier shall also pay into the treasury such amount as may be due on account of any increase in cess notified by the State Government from time to time on the quantity of sugarcane which has entered the local area during the crushing season, within a fortnight of such notification.

(3) Within a fortnight of the close of each month or within a fortnight of the notification of any increase in cess, the occupier shall submit to the Collector a return in Form XXIV or XXIV-A, as the case may be, showing the quantity of sugarcane that has entered the local area during the month or during the crushing season in question and the amount of cess credited by him into the treasury on account of that quantity of sugarcane, together with the treasury chalan or receipt to show that the amount of the cess due has been duly credited into the treasury.

(4) The Collector shall, on receipt of the return in Form XXIV or XXIV-A, verify that the amount of the cess has been correctly calculated and that the full amount thereof has been credited into the treasury.

(5) All sums payable in accordance with Sub-rule (2) or Sub-rule (3) shall be recoverable by the Collector as a public demand.

(6) If the occupier of a factory without good and sufficient cause, the onus of providing which shall be upon him, (a) fails to credit into the treasury on the due date the full amount payable on account of the cess, or (b) credits an amount less than the correct amount, or (c) fails to keep a correct daily account in Form XXIII, or (d) fails to submit on the due date the monthly return in Form XXIV or XXIV-A or (e) fails to send the Collector with the monthly return the treasury chalan or receipt showing that the amount of cess has been duly credited into the treasury, he shall be punishable with fine which may extend to two thousand rupees.

The Governor of Bihar in exercise of the powers conferred by Section 30 of Bihar Act VII of 1937 directed the following amendments in Rule 46 A--of the Rules, namely:--

Amendments.

In Rule 46 A of the said Rules,--

(1) to Sub-rule (2) the following provisos shall be added, namely:--

Provided that where the State Government is satisfied, on giving due consideration to an application made in his behalf by the occupier of a factory, that the occupier is unable, for reasons beyond his control, to make payments in the manner laid down above, it may by order in writing, direct that only half the amount due shall be so paid and the total of the balance amount due, as on the 31st day of May, shall be paid in five equal monthly instalments by the 15th day of each of the successive five months.

Provided further that where the occupier of a factory fails to pay such amount in

the manner specified above, he shall pay in addition to the principal amount due, interest at the rate of 6% per annum from the date of default and shall also pay penalties at the following rates:--

(1) 1% per annum of the principal due for each of the first and second months of default.

(2) 4% per annum of the principal due for each of the third and fourth months of default.

(3) 6% per annum of the principal due for each of the fifth and sixth months of default.

(4) Such higher percentage per annum of the principal due as may be imposed by the State Government for default of more than six months.

Note:--A default for fifteen days or more shall count for one full month and for less than fifteen days shall be ignored.

(ii) In Sub-rule (5), for the figure and brackets "(3)" the figure and brackets "(2A)" shall be substituted.

8. The learned Advocate General has, for his contentions, referred to two notifications dated the 21st October, 1963, passed under Sub-sections (a) and (b) respectively of Section 29 of Bihar Act VII of 1937, as it then stood. The notifications read thus--

Government of Bihar. Department of Co-operation and Sugarcane, (Sugarcane) Notification Patna, the 21st October, 1963.

No. BIII--048/620-2534. In exercise of the powers conferred by Clause (a) of Section 29 of the Bihar Sugar Factories Control Act, 1937, the Governor of Bihar is pleased to impose a cess at the rate of fifty-one paise per quintal of sugarcane on the entry thereof into the local areas specified below for consumption, use or sale therein:--

Name of the local areas

... ..

... ..

13. Bilaspur Gram Panchayat Raj, P.S. Ramnagar; District Champaran.

... ..

... ..

2. This notification shall be deemed to have come into force with effect from this 1st January, 1962.

Sd. R.P. Sinha.

Under Secretary to Government Notification.

Patna, the 21st October, '63.

No. BIII-048/620-2535. In exercise of the powers conferred by Clause (b) of Section 29 of the Bihar Sugar Factories Control Act, 1937, the Governor of Bihar is pleased to impose a tax not exceeding fifty-one naye paise per quintal of sugarcane on the purchase thereof by or on behalf of the occupiers of the factories mentioned below:--

Provided that such tax shall not be payable in respect of sugarcane for which cess imposed under Clause (a) of the said section is payable.

Name of the Factories

... ..

... ..

13. Harinagar Sugar Mills Ltd., P.O. Harinagar, District Champaran.

2. This notification shall be deemed to have come into force with effect from 1st January, 1962.

By order of the Governor of Bihar.

Sd. R.P. Sinha

Under Secretary to Govt.

9. The validity of Bihar Act VII of 1937 has been under consideration by this Court in more than one case, and in the case of (1) A.K. Jain and others V. The Government of India in the Department of Food and Agriculture and others, (Cr.W.J.C. Nos. 11 and 31 of 1966, decided on the 4th July 1966), reported in 1968, PLJR 179, it was held by this Court that Bihar Act VII of 1937 and the rules framed thereunder had come to an end on the 30th June, 1955. The reason given by this Court was that on the subject covered by Bihar Act VII of 1937, Essential Commodities Act, 1955 (Central Act No. 10 of 1955) had been enacted by the Parliament, coming into force on the 1st April, 1955. The judgment of this Court was before the Supreme Court on appeal and during the course of the argument of this case, the appeal was decided by the Supreme Court on the 25th July, 1969, in (3) Criminal Appeal No. 189 of 1966 (A.K. Jain and others V. Union of India and others). The appeal has failed in the Supreme Court. Further reference to this decision will be made in due course. The decision of the High Court in the case of (1) A.K. Jain and others V. Government of India in the Department of Food and Agriculture and others (1968 PLJR 179) was followed by this Court in the case of (2) Sugauli Sugar Works Private V. Co-operative Development and Cane Marketing Union (M.J.C. 1344 of 1964, decided on the 20th July, 1966). The validity of Bihar Act VII of 1937 after the 30th June, 1955 was again dealt with by this Court in the case of (4) The Belsand Sugar Co. Ltd. Vs. Thakur Girja Nandan Singh, , and reference was made to the two earlier

decisions of this Court mentioned above. The Division Bench of this Court in Belsund Sugar Company's case followed the earlier decision to the effect that Bihar Act VII of 1937 and the Rules framed thereunder ceased to be operative after the 30th June, 1955.

10. Apparently, to meet this situation, an ordinance was promulgated on the 11th January, 1968 (Bihar Ordinance No. III of 1968) as the Legislature of the State was not in session. As a matter of fact, due to the fall of the Government more than once in 1968 and 1969, five ordinances followed and reference will have to be made to the relevant provisions in five Bihar Ordinances, which were Ordinances No. III of 1968, VI of 1968, XIII of 1968, IV of 1959 and VI of 1969. The relevant provisions in Ordinance No. III of 1968 were Sections 35 and 50, which ran as follows:--

Section 35--Tax on sugarcane (1) The State Government may, by notification, impose

(a) a tax not exceeding 67 paise per quintal on entry of sugarcane into a local area, specified in such notification, for consumption or use of or sale to a factory situated therein;

(b) a tax not exceeding 67 paise per quintal on the purchase of sugarcane-by or on behalf of the occupier of a factory;

Provided that the tax under Clause (b) shall not be payable by the occupier of a factory in respect of sugarcane for which a tax imposed under Clause (a) is payable by him.

(2) Notwithstanding anything contained in Sub-section (1), where regard being had to the special facts and circumstances of any factory, the State Government consider that the imposition of such tax shall be inequitable or involve hardship, it may by notification:--

(a) reduce or remit, in whole or in part, such tax in respect of sugarcane intended to be used in such a factory for any purpose specified in the notification;

(b) exempt from such tax purchases in any area or areas or any class or classes of purchase specified in the notification.

(3) The tax payable under Sub-section (1) shall be paid by the occupier of the factory to the Collector of district concerned in such manner as may be possible and the amount of tax due shall bear interest at the rate of six per cent per annum and shall be recoverable as a public demand.

(4) There shall be levied and collected, in such manner as may be prescribed, a tax on the purchase of sugarcane by the owner of a unit at such rate, not exceeding 50 paise per quintal of sugarcane, as may be notified in the official Gazette.

Provided that the tax under this sub-section shall be payable on the quantity of

sugarcane actually purchased, or, at the option of the owner of the unit, on the quantity of sugarcane assessed in the manner, prescribed.

Section 50 Repeal saving and validation:--(1) The Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1957) (hereinafter referred to as the said Act), is hereby repealed.

(2) Notwithstanding any judgment of any court to the contrary or any such repeal, any action taken, order passed, proceedings commenced, dispute decided or referred to arbitrator, tax imposed or levied, right accrued or liability incurred under the said Act before the commencement of this Ordinance shall be deemed to be as effectual and valid in law as if this Ordinance were in force on the date on which such action, order, proceeding, dispute, tax, right or liability was taken, passed, commenced, decided or referred, imposed or levied, accrued or incurred.

This Ordinance had been promulgated in January, 1968. This Ordinance was repealed and the relevant provisions were incorporated in Sections 25 and 50 of Ordinance No. VI of 1968, which ran as follows:--

Section 36. "Tax on Sugarcane"--(1) The State Government may, by notification, impose:--

(a) a tax not exceeding 67 paise per quintal on entry of sugarcane into a local area specified in such notification, for consumption or use of or sale to a factory situated therein,

(b) a tax not exceeding 67 paise per quintal on the purchase of sugarcane by or on behalf of the occupier of a factory:

Provided that the tax under Clause (b) shall not be payable by the occupier of a factory in respect of sugarcane for which a tax imposed under Clause (a) is payable by him-

Provided further that any tax imposed by the State Government in respect of the crushing year 1967-68 under the provisions of the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1968 (Bihar Ordinance No. 3 of 1968) shall be deemed to have been effectively imposed from the date of enforcement of that Ordinance.

(2) Notwithstanding anything contained in Sub-section (1), where regard being had to the special facts and circumstances of any factory, the State Government consider that the imposition of such tax shall be inequitable or involve hardship, it may, by notification.

(a) reduce or remit, in whole or in part, such tax in respect of sugarcane intended to be used in such a factory for any purpose specified in the notification,

(b) exempt from such tax purchases in any area or areas or any class or classes of purchase specified in the notification.

(3) The tax payable under Sub-section (1) shall be paid by the occupier of the

factory to the Collector of the district concerned in such a manner as may be prescribed and the amount of tax shall bear interest at the rate of six per centum per annum and shall be recoverable as a public demand.

(4) There shall be levied and collected, in such manner as may be prescribed, a tax on the purchase of sugarcane by the owner of a unit such rate not exceeding 50 paise per quintal of sugarcane, as may be notified in the official Gazette.

Provided that the tax under this Sub-section shall be payable on the quantity of sugarcane actually purchased or, at the option of the owner of the unit on the quantity of sugarcane assumed in the manner prescribed.

Section 50 Repeal, saving and validation. (1) The Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937) hereinafter referred to as the said Act), is hereby repealed.

(2) Notwithstanding any judgment of any court to the contrary or any such repeal, any action taken, order passed, proceedings commenced, dispute decided or referred to arbitrators, tax imposed or levied, right accrued or liability incurred under the said Act before the commencement of this Ordinance shall be deemed to be as effectual and valid in law as if this ordinance were in force on the date on which such action, order, proceeding, dispute, tax right or liability was taken, passed, commenced, decided or referred, imposed or levied, accrued incurred.

(3) The Bihar Sugarcane (Regulation of Supply and Purchase) Second Ordinance 1958 (Bihar Ordinance no, VI of 1968) is hereby repealed.

This ordinance had been promulgated on the 28th February, 1968. Again, the second Ordinance having been repealed by Ordinance no. XIII of 1958, the relevant provisions were incorporated in Sections 35 and 50 of the latter Ordinance, which ran as follows:--

Section 49. Tax on sugarcane:--(1) The State Government may, by notification, impose (a) a tax not exceeding 67 paise per quintal on entry of sugarcane into a local area, specified in such notification, for consumption or use of or sale to a factory situated therein.

(b) a tax not exceeding 67 paise per quintal on the purchase of sugarcane by or on behalf of the occupier of a factory:

Provided that the tax under Clause (b) shall not be payable by the occupier of a factory in respect of sugarcane for which a tax imposed under Clause (a) is payable by him;

Provided further that any tax imposed by the State Government in respect of the crushing year 1957-68 under the provisions of the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1968 (Bihar Ordinance No. 3 of 1968) shall be deemed to have been effectively imposed from the date of enforcement of that Ordinance.

(2) Notwithstanding anything contained in Sub-section (1) where regard being had to the special facts and circumstances of any factory the State Government consider that the imposition of such tax shall be inequitable or involve hardship it may, in whole or in part, (a) reduce or remit, in whole or in part, such tax in respect of sugarcane intended to be used in such a factory for any purpose specified in the notification;

(b) exempt from such tax purchases in any area or areas or any class or classes of purchases specified in the notification.

(3) The tax payable under Sub-section (1) shall be paid by the occupier of the factory to the Collector of the district concerned in such manner as may be prescribed and the amount of tax due shall bear interest at the rate of six per centum per annum and shall be recoverable as a public demand.

(4) There shall be levied and collected, in such manner as may be prescribed, a tax on the purchase of sugarcane by the owner of a unit at such rate not exceeding 50 paise per quintal of sugarcane, as may be notified in the Official Gazette;

Provided that the tax under this Sub-section shall be payable on the quantity of sugarcane actually purchased or, at the option of the owner of the unit, on the quantity of sugarcane assumed in the manner prescribed.

Section 50. Repeal, saving and validation--(1) The Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937), (Hereinafter referred to as the said Act) is hereby repealed.

(2) Notwithstanding any judgment of any court to the contrary or any such repeal, any action taken, order passed, proceedings commenced, dispute decided or referred to arbitrator, tax imposed or levied, right accrued or liability incurred under the said Act before the commencement of this Ordinance shall be deemed to be as effectual and valid in law as if this Ordinance were in force on the date on which such action, order, proceeding, dispute tax, right or liability was taken passed, commenced, decided or referred, imposed or levied, accrued or incurred.

(3) The Bihar Sugarcane (Regulation of Supply and Purchase) Second Ordinance, 1968 (Bihar Ordinance No. VI of 1968) is hereby repealed.

This Ordinance had been promulgated on the 24th April, 1968. After the repeal of the third Ordinance the corresponding provisions were incorporated in Sections 49 and 68 of Bihar Ordinance IV of 1969, which ran thus:--

Section 49 Tax on sugarcane.--(1) The State Government may by notification, impose.

(a) a tax not exceeding 67 paise per quintal on entry of sugarcane into a local area specified in such notification, for consumption or use of or sale to a factory situated therein,

(b) a tax not exceeding 67 paise per quintal on the purchase of sugarcane by or on behalf of the occupier of a factory provided that the tax under Clause (b) shall not be payable by the occupier of a factory in respect of sugarcane for which a tax imposed under Clause (a) is payable by him.

(2) Notwithstanding anything contained in Sub-section (1) the State Government may, by notification,

(a) reduce or remit, in whole or in part, such tax in respect of cane used in any such factory for the purpose of research, seed distribution, crushing of diseased cane or intake of excessive crop,

(b) exempt for prescribed period from such tax any new factory or a factory unable to run without State aid.

(3) The tax payable under Sub-section (1) shall be paid by the occupier of the factory to the Collector of the district concerned in such manner as may be prescribed and the amount of tax due shall bear interest at the rate specified in Section 51 and shall be recoverable as a public demand.

(4) There shall be levied and collected, in such manner as may be prescribed, a tax on the purchase of sugarcane by the owner of a unit at such rate not exceeding 50 paise per quintal of sugarcane, as may be notified in the Official Gazette.

Provided that the tax under this Sub-section shall be payable on the quantity of sugarcane actually purchased or, at the option of the owner of the unit on the quantity of sugarcane assumed in the manner prescribed.

(5) The owner of the unit shall make payment of the tax payable under Sub-section (4) to the Collector in the prescribed manner and interest at the rate of 7% per cent per annum shall be charged on the amount due. The amount payable shall be realisable together with interest as public demand.

(6) Subject to the claim of the Central Government in respect of any tax or duty of excise the claim of the State Government in respect of the tax imposed under Sub-section (1) shall be the first charge on the sugar produced in the crushing year concerned.

(7) Until the tax imposed under Sub-section (1) is paid at the rate per quintal of sugar notified by the State Government and the certificate of payment is obtained from the cane officer concerned, the occupier of any factory or any person acting on his behalf or any other person shall not remove sugar from the factory.

(8) There shall be paid to the Board and the Council as grant in the manner prescribed, such proportions of the amount realised under Sub-section (3) in respect of every crushing year as the State Government may, from time to time, determine in this behalf to enable the Board and the Councils to meet the cost of such scheme of development as may be undertaken by them with approval of the

State Government:--

Provided that one-fifth of the amount payable under this Sub-section shall be paid to the Board and the rest to the Councils in proportion to the quantities of cane crushed by the factories concerned.

Section 68, Repeal and Saving.--(1) The Bihar Sugar Factories (Control) Act, 1937 (Bihar Act VII of 1937) and the Bihar Sugarcane (Regulation of Supply and Purchase) Third Ordinance 1968 (Bihar Ordinance XIII of 1968) are here-by repealed.

(2). Anything done or any action (including any rule made or notification issued with prospective or retrospective effect, order passed, proceeding commenced, dispute decided or referred to arbitration, right accrued or liability incurred) under the Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937) or the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance 1968 (Bihar Ordinance No. III of 1968) or the Bihar Sugarcane (Regulation of Supply and Purchase) Second Ordinance 1968 (Bihar Ordinance No. VI of 1968) or the Bihar Sugarcane (Regulation of Supply and Purchase) Third Ordinance, 1968 (Bihar Ordinance No. XIII of 1968), before the commencement of this ordinance, shall, notwithstanding the repeal thereof, be deemed to have been done or taken under this Ordinance as if the provisions of this Ordinance (other than those contained in Section 52) were in force at all material times when such thing was done or action was taken.

This Ordinance had been promulgated on the 2nd May, 1969. Lastly, Ordinance No. IV of 1969 was repealed by Ordinance No. VI of 1969, which came into effect on the 20th July, 1969, and the relevant provisions are to be found in Sections 49, 66 and 68 of this Ordinance, which run thus--

Section 49. Tax on Sugarcane (1) The State Government may, by notification, impose--

(a) a tax not exceeding 67 paise per quintal on entry of sugarcane into a local area specified in such notification, for consumption or use of or sale to a factory situated therein;

(b) a tax not exceeding 67 paise per quintal on the purchase of sugarcane by or on behalf of the occupier of a factory;

Provided that the tax under Clause (b) shall not be payable by the occupier of a factory in respect of sugarcane for which a tax imposed Under Clause (a) is payable by him.

(2) Notwithstanding anything contained in Sub-section (2) the State Government may by notification:--

(a) reduce or remit, in whole or in part, such tax in respect of cane used in any such factory for the purpose of research, seed-distribution, crushing of diseased cane or intake of excessive crop,

(b) exempt for prescribed period from such tax any new factory or a factory unable to run without State aid.

(3) The tax payable under Sub-section (1) shall be paid by the occupier of the factory to the Collector of the district concerned in such manner as may be prescribed and the amount of arrears of such tax shall bear interest at the rate specified in section 51 and shall, together with interest, be recoverable as a public demand or an arrear of land revenue.

(4) There shall be levied and collected, in such manner as may be prescribed, a tax on the purchase of sugarcane by the owner of a unit at such rate not exceeding 50 paise per quintal of sugarcane, as may be notified in the Official Gazette:

Provided that the tax under this Sub-section shall be payable on the quantity of sugarcane actually purchased or at the option of the owner of the unit on the quantity of sugarcane assumed in the manner prescribed.

(5) The owner of the unit shall make payment of the tax payable under Sub-section (4) to the Collector in prescribed manner and interest at the rate of 7% per cent per annum shall be charged on the amount due. The amount payable shall be realised together with interest as public demand.

(6) Subject to the claim of the Central Government in respect of any tax or duty of excise, the claim of the State Government in respect of the tax imposed under Sub-section (1) shall be the first charge on the sugar produced in the crushing year concerned.

(7) Until the tax imposed under Sub-section (1) is paid at the rate of per quintal of sugar notified by the State Government and the certificate of payment is obtained from the Cane Officer concerned, the occupier of any factory or any person acting on his behalf or any other person shall not remove sugar from the factory.

(8) There shall be paid to the Board and the Council as grant in the manner prescribed, such proportions of the amount realised under Sub-section (3) in respect of every crushing year as the State Government may, from time to time, determine in this behalf to enable the Board and the Councils to meet the cost of such scheme of development as may be undertaken by them with approval of the State Government:

Provided that one-fifth of the amount payable under this Sub-section shall be paid to the Board and the rest to the councils in proportion to the quantities of cane crushed by the factories concerned.

Section 66 Validation of imposition and collection of cesses and taxes under certain laws during a certain period--(1) Notwithstanding any judgment, decree or order of any court all cesses and taxes imposed, assessed or collected or purporting to have been imposed, assessed or collected under any State law,

before 8th July, 1969 shall be deemed to have been validly imposed, assessed, collected in accordance with law as if this ordinance has been in force at all material times when such cess or tax was imposed, assessed or collected and accordingly--

(a) no suit or other proceeding shall be maintained or continued in any court for the refund of any cess or tax paid under any State law;

(b) no court shall enforce a decree or order directing the refund of any cess or tax paid under any State law; and

(c) any cess or tax imposed or assessed under any State law before 8th July, 1969 but not collected before that date may be recovered (after assessment of the cess or tax, where necessary) in the manner provided under that State law.

(2) For the removal of doubts it is hereby declared that nothing in Sub-section (1) shall be construed as preventing any person--

(a) from questioning in accordance with the provisions of this Ordinance and the rules made thereunder, the assessment of any cess or tax for any period, or

(b) from claiming refund of any cess or tax paid by him in excess of the amount due from him under any State law and the rules made thereunder.

Explanation--For the purposes of this section, State law means--

(a) the Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937);

(b) the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance 1968 (Bihar Ordinance No. III of 1968).

(c) the Bihar Sugarcane (Regulation of Supply and Purchase) Second Ordinance, 1968 (Bihar Ordinance No. VI of 1968).

(d) the Bihar Sugarcane (Regulation of Supply and Purchase) Third Ordinance 1968 (Bihar Ordinance No. XIII of 1968); and

(e) the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1969 (Bihar Ordinance No. IV of 1969).

Section 68. Repeal and Saving--(1) The Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937) and the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1969 (Bihar Ordinance No. IV of 1969) are hereby repealed.

(2) Anything done or any action taken (including any rule made or notification issued with prospective or retrospective effect, order passed, proceeding commenced, dispute decided or referred to arbitration, right accrued or liability incurred) under the Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937) or the Bihar Sugarcane (Regulation of Supply and Purchase) Second Ordinance 1968 (Bihar Ordinance No. VI of 1968 (or the Bihar Sugarcane

(Regulation of Supply and Purchase) Third Ordinance, 1968 (Bihar Ordinance No. XIII of 1968) or the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance 1969 (Bihar Ordinance No. IV of 1969) before the commencement of this Ordinance shall notwithstanding the repeal thereof, be deemed to have been done or taken under this Ordinance as if the provisions of this Ordinance (other than those contained in Section 52) were in force at all material times when such thing was done or action was taken.

11. After giving the above mentioned history of the legislation and the course of litigation, I now deal with the issues involved in the case.

Issue no. 2 and 3:--These issues have not been pressed by defendant no. 1, and, therefore, they are decided in plaintiff's favour.

Issue no. 4:--The learned Advocate-General stated in court that issue no. 4 would also not be pressed and, therefore, this issue is also decided in plaintiff's favour.

Issue no. 5 and 6:--The main contentions of law fall within these issues. Sections 49, 66 and 68 of Bihar ordinance No. VI of 1969 have been quoted above, and if these provisions of law, incorporated in the latest Ordinance, are valid, then it is clear that the plaintiff will not be entitled to any relief in this suit. Basing his arguments on these three sections, the learned Advocate General has contended that Ordinance No. VI of 1959 must be projected backwards to cover the period of assessment challenged in this suit and all the proceedings continuing before the appropriate authorities must be taken to be valid proceedings. In order to support the validity of Ordinance No. VI of 1969, the learned Advocate-General has referred to the preamble of this Ordinance, which runs as follows:--

An Ordinance

To Regulate the Production, Supply and Distribution of Sugarcane Intended for use in Sugar Factories and Khandsari Sugar Manufacturing Units and Taxation of Sugarcane and Matters Incidental thereto.

Whereas a proclamation, dated the 4th July, 1969 under Article 356 of the Constitution has been issued by the Vice-President acting as President of India;

And whereas the Governor of Bihar is satisfied that circumstances exist which render it necessary for him to take immediate action to make law relating to regulation of production, supply and distribution of sugarcane required for use in sugar factories and Khandsari manufacturing units and taxation of sugarcane and matters incidental thereto;

Now therefore, in exercise of the powers conferred by Clause (1) of Article 213 of the Constitution of India, read with Government of India, Ministry of Home Affairs Order No. G.S.R. 1601, dated the 4th July, 1969, the Governor is pleased to promulgate the following Ordinances. The proclamation dated the 4th July 1969 was published in the Bihar Gazette Extraordinary of even date. According to

this proclamation, numbered as G.S.R. 1600, the operations of the following provisions of the Constitution in relation to the State of Bihar were suspended, namely, the proviso to Clause (1) and the proviso to Clause (3) of Article 213 amongst others. It was also mentioned in the proclamation that any reference in the Constitution to the Governor shall in relation to the State of Bihar be considered as a reference to the President and any reference in the proclamation to the legislature of the Bihar State or House thereof shall, in so far as it relates to the functions and powers thereof, be construed, unless the context otherwise requires, as a reference to Parliament, and in particular, the reference in Article 213 to the Governor and to the legislature of the State or the Houses thereof shall be construed as reference to the President and to the Parliament or to the Houses thereof respectively. G.S.R. 1601 was also notified in the same issue of Bihar Gazette Extraordinary and it reads as follows:--

ORDER

G.S.R. 1601:--In pursuance of Sub-clause (1) of Clause (c) of the Proclamation issued on this the 4th day of July, 1969 by me under Article 336 of the Constitution of India, I hereby direct that all the functions of the Government of the State of Bihar and all the powers vested in or exercisable by the Governor of the State under the Constitution or under any law in force in that State, which have been assumed by the Vice-President acting as President by virtue of Clause (a) of the said Proclamation shall subject to the Superintendence, direction and control of the Vice-President acting as President be exercisable also by the Governor of the said State.

V.V. Giri Vice-President acting as President of India

New Delhi,

The 4th July, 1969

12. Sri Basudeva Prasad, appearing for the plaintiff; has challenged the validity of this Ordinance (Ordinance No. VI of 1969) on the ground that the suspension of the proviso to Clause (1) and the proviso to Clause (3) of Article 213 of the Constitution by the President of India in the promulgation dated the 4th July, 1969 was against the provision of Article 356(1)(c) of the Constitution. It is contended that in case of failure of constitutional machinery in the State the President can suspend in whole or in part operation of any provision of this Constitution relating to any body or authority in the State, and that under this provision incorporated in Article 356(1)(c), the operation of the two proviso of Article 213, mentioned above, could not have been suspended by the President. According to the learned counsel. Clause (c) of the proviso to Article 213(1) refers to the President and the proviso to Article 213(3) refers to the Parliament and neither of these two authorities was a body or authority in the State as envisaged by Article 356(1)(c). In my opinion these contentions of Sri Basudeva Prasad are not valid. The proviso to Article 213(1) refers to the action of the Governor and the proviso to Article 213(3) refers to the Legislature of a State

and both of them are bodies or authorities in the State within the meaning of Article 356(1)(c) of the Constitution. Then Sri Basudeva Prasad has contended that as the proclamation of the President has not suspended Article 304, the restriction on the freedom of trade of the plaintiff could not have been imposed by Ordinance No. VI of 1969 without previous sanction of the President having been obtained. On this ground it was contended that Section 66 of Ordinance No. VI of 1969 should be struck down. There does not appear to be any validity in this contention. Article 304 of the Constitution refers to the action of the Legislature of a State and Article 213 envisages a situation when the Legislature of this State is not in session. So it is difficult to appreciate Sri Basudeva Prasad's argument. Sri Basudeva Prasad has then gone back to Ordinance No. IV of 1969 and has argued that this Ordinance contravenes Article 354, read with Article 373 of the Constitution. In other words, the learned counsel has contended that Ordinance No. IV of 1969 dealt with matters under Entry No. 33 of List III (Concurrent List) of the seventh Schedule of the Constitution and it contains provisions repugnant to the Essential Commodities Act (Central Act No. 10 of 1955) and the assent of the President was necessary before this Ordinance could prevail in the State of Bihar. There is no validity in this contention either, as is clear from the preamble of Ordinance No. IV of 1969. It is specifically mentioned therein that the instruction of the President had been obtained under the proviso to Clause (1) of Article 213 of the Constitution. This instruction given by the President is a complete answer to what Sri Basudeva Prasad has contended in this context.

13. Apart from the matters mentioned above, the principal point raised by the learned counsel for the parties was the legislative competence for the promulgation of the five Ordinances enumerated above. For this purpose it will be necessary to quote the relevant entries from the Government of India Act, 1935 and the Constitution of India. When the Original Bihar Sugar Factories Control Act, 1937 (Bihar Act VII of 1937) was enacted, the relevant entries in List II (Provincial Legislative List) of the Seventh Schedule of the Government of India Act, 1935 were entries No. 48 and 49 which reads as follows:--

8. Taxes on the sale of goods and on advertisements

49. Cesses on the entry of goods into a local area for consumption, use or sale therein.

The corresponding provision in List II (State list) of the Seventh Schedule of the Constitution of India are Entries No. 54 and 52 respectively. These entries run as follows:--

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92 A of List I.

(As it stands now after amendment in 1956)

52. Taxes on the entry of goods into a local area for consumption, use or sale

therein.

Referring to Section 49 of Ordinance No. VI of 1969, it will appear that the Legislative competence for enacting Section 49(1)(a) is to be found in Entry No. 52 and the Legislative competence for enacting Section 49(1)(b) is to be found in Entry No. 54. The legislative competence of Section 29(2) of the Original Bihar Sugar Factories Control Act, 1937, quoted above was in Entry No. 49 of List II of the Seventh Schedule of the Government of India Act, 1935 [As indicated above, by Bihar Act XVII of 1963, the provision for imposing cess on entry was incorporated in Section 29(a) of Bihar Act VII of 1937].

What Sri Basudeva Prasad has argued in this context may be summarised below. He has referred to Section 66 of Ordinance No. VI of 1969, where it states that all cesses imposed, assessed or collected, or purporting to have been imposed, assessed or collected under any State Law, before 8th July, 1969 shall be deemed to have been validly imposed, assessed or collected in accordance with law, as if this Ordinance has been in force at all material times when such cess or tax was imposed, assessed or collected, and has argued that u/s 49 of Ordinance No. VI of 1969, tax may be imposed on the entry of sugarcane into a local area, prospectively, but cesses illegally imposed under any law previous to this ordinance could not have been validated, as these cesses imposed cannot be called tax on entry. In this context the learned counsel has referred to the evidence of the two witness who have been examined on commission on behalf of the plaintiff. They are Dr. S. Mahmood (P.W. 1) and Sri Kedar Pandey (P.W. 2). Sri Basudeva Prasad has argued that as the cess levied under Bihar Act VII of 1937 was meant for development of local areas only, the imposition was not a tax and therefore, the impugned impositions cannot be validated by Section 49 read with Section 66 of Ordinance No. VI of 1969. I do not think that there is any validity in this contention, as the imposition of cess under Bihar Act VII of 1937 on entry of goods was really in the nature of a tax.

The imposition was described as cess on the entry of goods in view of Entry No. 49 of List II of the Seventh Schedule of the Government of India Act, 1935. The same imposition is now called tax on the entry of goods, under Entry No. 52 of List II of the Seventh Schedule of the Constitution of India. Even if any portion of the imposition levied u/s 29 of Bihar Act VII of 1937 was meant for or was in fact used for development of any particular areas, the nature of the imposition did not lose its real character of tax. The nature of the imposition under Entry No. 49 of List II of the Seventh Schedule of the Government of India Act, 1935 was referred to by the Federal Court, in the case of (5) AIR 1947 14 (Federal Court) . Their Lordships were comparing the legislative competence under Entry No. 49 of List II and the legislative competence under Entry No. 58 of List I (Federal Legislative List) of the Government of India Act, 1935, Entry No. 58 of List I ran as follows:--

Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights.

Their Lordships stated thus:

There appears to us a definite distinction between the type of taxes referred to as terminal taxes in Entry No. 58 of List I of Sch. 7 and the type of taxes referred to as cesses on the entry of goods into a local area in Entry No. 49 of List II. The former taxes must be (a) terminal (b) confined to goods and passengers carried by railway or air. They must be chargeable at a rail or air terminus and be referable to services (whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation. The essential features of the cesses referred to in Entry No. 49 of List II are on the other hand simply (a) the entry of goods into a definite local area and (b) the requirement that the goods should enter for the purpose of consumption, use or sale therein. It is to be noted that there is no limitation on the manner by which the goods to be subjected to such cesses may enter. There is no ground for suggesting that the entry of goods by rail or air is any less contemplated than entry by water way or road. It was argued by the appellant's counsel that because by Entry No. 20 of List I Federal railways and the regulations of railways and so forth is included in the Central Government Legislative list and by List II the Provincial Government is mainly given the powers of legislation over roads and internal waterways and transport thereon (Entry No. 18), it should, therefore, be deduced that all taxation on rail and air borne goods must be imposed, if at all, under the powers conferred by Entry No. 58 of List I and that powers of taxation conferred by Entry No. 49 of List II must be confined to goods that enter by road or internal waterway only, we cannot accept this argument. It is not, in our judgment, justified by the wording of the various entries in the two lists and would impose a limitation on local taxation under Entry No. 49, List II, which would often work most inequitably in practice between those importing goods by roads or waterways and these who could import by rail or air. In our judgment there is no limitation to be implied in Entry No. 49, List II in regard to the manner in which goods may be transported into a local area. It follows that as far as rail borne goods are concerned the same goods may well be subjected to taxation under Entry No. 58 of List I as well as to local taxation under Entry No. 49 of List II. The grounds of taxation under the two entries are, as indicated above radically different, and there is no case for suggesting that taxation under the one entry limits or interferes in anyway with taxation under the other.

Thus, it is clear that no such distinction was made by their Lordships as is contended for on behalf of the plaintiff in this case. Whether the imposition was called terminal tax under Entry No. 58 of List I or whether the imposition was called cess under Entry No. 49 of List II, the nature of the imposition was considered by their Lordships to be tax. In the case of (6) *Ram Krishna Ramnath Agarwal of Kamptee Vs. Secretary, Municipal Committee, Kamptee*, their Lordships of the Supreme Court stated that excise duty is tax on manufactured goods and octroi duty is tax levied on entry of goods into a particular area. Therefore, there is no distinction in the nature of imposition between tax on entry of sugarcane envisaged by Section 49(1)(a) of Bihar Ordinance No. VI of

1969 and cess on entry of sugarcane envisaged by Section 29 of Bihar Act VII of 1937. That no difference in the nature of imposition was meant by changing the word "cesses" in Entry No. 49 of List II of the Seventh Schedule of the Government of India Act, 1935 to "taxes" in Entry No. 52 of List II of the Seventh Schedule of the Constitution of India was further clarified by their Lordships of the Supreme Court in the case of (7) Diamond Sugar Mills Ltd. and Another Vs. The State of Uttar Pradesh and Another, , where their Lordships state thus:--

Turning now to the previous legislative history we find that in the Government of India Act, 1935, Entry 49 of the legislative list (List II of the Seventh Schedule) was in the same words as Entry 52 of the Constitution except that instead of the words "taxes" as in Entry 52 of List II of the Constitution Entry 49 List II of the Government of India Act, 1935 used the word "cess".

In my opinion, the contention raised by Sri Basudeva Prasad regarding difference between cess on entry of sugarcane and tax on entry of sugarcane into a local area must also be negated on a later decision of their Lordships of the Supreme Court in the case of (8) Jaora Sugar Mills (P) Ltd. Vs. State of Madhya Pradesh and Others, . As a result of the decision of their Lordship of the Supreme Court in (7) Diamond Sugar Mills Case, U.P. Sugarcane Cess Validation Act, 1961 was passed by the Central Legislature which received the assent of the President. This Central Act was passed to validate imposition and collection of cesses which had been successfully challenged before the Supreme Court earlier. Section 3(1) of the Central Act (Central Act IV of 1961) stated that notwithstanding any judgment decree or order of any court, all cesses imposed, assessed or collected or purporting to have been imposed, assessed or collected under any such Act shall be deemed to have been validly imposed, assessed or collected in accordance with law. Their Lordships stated that Parliament had legislative competence to deal with the subject matter in question, having regard to Article 248 read with Entry No. 97 of List I of the Seventh Schedule of the Constitution of India. Their Lordships held that Parliament had intended to make a law in regard to the levy of cess and its legislative competence was not open to doubt in view of Article 248 of the Constitution read with Entry No. 97 of List I of the Seventh Schedule.

Entry No. 97 of List I of the Seventh Schedule of the Constitution reads thus:--

Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists.

Article 248 of the Constitution provides as follows:--

- (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
- (2) Such power shall include the power of making any law imposing a tax not mentioned in either of those lists.

Thus, there does not appear to be any distinction in the nature of imposition between entry tax mentioned in Section 49(1)(b) of Bihar Ordinance No. VI of 1969 and entry cess mentioned in Section 29(a) of Bihar Act VII of 1937. Some argument was advanced by Sri Basudeva Prasad contending that the cesses imposed under Bihar Act VII of 1937 were not put in the Consolidated Fund of the State and, therefore, the imposition could not be called a tax. First, it is difficult to hold that merely because the impositions are called cesses, it will lead to the conclusion that they did not go into the Consolidated Fund of the State. In (8) Jaora Sugar Mills (P) Ltd. Vs. State of Madhya Pradesh and Others, , the Supreme Court had mentioned at page 422 that Sri Pathak had argued that cesses imposed by Central Act IV of 1961, under consideration in that case, were not likely to go to the Consolidated Fund of India and that the recoveries which had already been made by the respective States had gone into their respective Consolidated Funds. Therefore, the expression "Cess" is not really the criterion as to where the imposition would go. The learned Advocate-General has referred to the case of (9) Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality, , which was a case under Bombay Municipal Boroughs Act. He has argued that the Supreme Court was dealing with an imposition called octroi on animals or goods or both, for consumption, use or sale within the octroi limits, and the Supreme Court referred to the imposition as a tax. The learned Advocate-General also contested the statement of the learned counsel for the plaintiff that the cesses imposed under Bihar Act VII of 1937 had not gone into the Consolidated Fund of the State. In my opinion the argument of learned counsel for the plaintiff on this aspect of the matter must be negated and the argument of the learned Advocate-General accepted as valid. In substance, the argument advanced by Sri Basudeva Prasad for a conclusion that Section 66 of Bihar Ordinance No. VI of 1969 could not have validated the cesses imposed, assessed or collected before the 8th July, 1969 cannot be accepted.

14. Learned counsel for the contending parties have referred to Section 29 of Bihar Act VII of 1937 and Sri Basudeva Prasad has referred to Rule 46 A of the Bihar Sugar Factories Control Rules, 1938 (quoted above). In challenging the validity of Rule 46A, Sri Basudeva Prasad has relied upon a decision of the Supreme Court in the case of (7) Diamond Sugar Mills Ltd. and Another Vs. The State of Uttar Pradesh and Another, . In rebutting this contention raised on behalf of the plaintiff the learned Advocate-General has relied on the notifications dated the 21st October, 1963 imposing cess on the entry of sugarcane into various local areas (quoted above). It may be mentioned at this stage that u/s 68 of Ordinance No. VI of 1969, rules made and notifications issued with prospective or retrospective effect under Bihar Act VII of 1937 will be deemed to be continuing notwithstanding the repeal of Bihar Act VII of 1937. In my opinion, it is not at all necessary to go into the validity of Rule 46A, as the notification dated the 21st October 1963, effective from the 1st January, 1962, imposing cess on the entry of sugarcane into local areas will be deemed to be still valid, saving the imposition of the impugned cess. According to the affidavit filed by

the State of Bihar on the 30th July, 1969, the factory of the plaintiff company falls within Bilaspur Gram Panchayat, mentioned in the notification. Therefore, in my opinion, the imposition and assessment of cess, which is the subject matter of challenge in this Court, must be taken to be valid u/s 66 of Ordinance No. VI of 1969, projecting it backwards to the time of various impositions and assessments. Arguments were advanced by the learned counsel for the parties on the effect of the three judgments of this court, namely, in the case of (1) A.K. Jain and others V. the Government of India in the Department of Food and Agriculture and others, reported in 1968 PLJR 179, in (2) Sugauli Sugar Works Private V. Cooperative Development & Cane Marketing Union (M.J.C. 1344 of 1964, decided on the 20th July, 1966) and in the case of (4) The Belsand Sugar Co. Ltd. Vs. Thakur Girja Nandan Singh, and on the recent Supreme Court Judgment in (3) Criminal Appeal No. 189 of 1966 (A.K. Jain and others V. Union of India and others), decided on the 25th July, 1969, arising out of the case reported in 1968 PLJR 179. According to Sri Basudeva Prasad, the whole of Bihar Act VII of 1937 ceased to be operative on the 30th June, 1955, whereas the learned Advocate General has urged, on the unreported decision of the Supreme Court in (3) Criminal Appeal No. 189 of 1969 (A.K. Jain and others V. Union of India and others), decided on the 25th July 1969, that the case reported in 1968 PLJR 179 had not decided that the whole of Bihar Act VII of 1937 had come to an end on the 30th June, 1955 and that this is clear from the argument advanced by the parties before the Supreme Court. In my opinion, it is not at all necessary to decide the point in view of the fact that the impugned imposition had been made after the retrospective notification had been published on the 21st October, 1963, imposing cess on the entry of sugarcane into certain local areas and the first judgment of this Court had been given on the 4th July, 1966 and Ordinance No. VI of 1969 is now projected backwards, filling up the period from the 30th June, 1955 upto the time when Ordinance No. VI of 1969 was promulgated.

15. Sri Basudeva Prasad has challenged the Ordinances of the year 1968 and of the year 1969 on the ground that they are vitiated on the principle of fraud on power. It is contended that Ordinance after Ordinance was promulgated from January, 1968 to July, 1969 validating the impugned impositions although Bihar Act VII of 1937 had ceased to be effective after the 30th June, 1955. It is contended that the four Ordinance upto Ordinance No. IV of 1969 were never given statutory recognition and, therefore, these Ordinances were not bonafide application of the power of the Governor under Article 213 of the Constitution. An Affidavit has been filed on behalf of the plaintiff giving the dates when the Legislative was in session between the 18th January, 1968 and the 26th June, 1969. This affidavit was filed on the 24th February, 1969 and the statements made in it have not been controverted on behalf of the plaintiff. These dates do not substantiate the argument of Sri Basudava Prasad that the first four Ordinances can be swept away on the principle of fraud on power. Moreover the Governor was satisfied that circumstances had existed necessitating passing of the Ordinances. Satisfaction of the Governor mentioned in the Ordinance cannot

be a justiciable matter. Article 213 of the Constitution corresponds, more or less, to Section 88(1) of the Government of India Act 1935, and in dealing with the latter section the Federal Court had stated in the case of (10) Lakhi Narain Das and others V. Province of Bihar, reported in AIR 1950 F.C. 59, that it is the Governor and the Governor alone who had got to satisfy himself as to the existence of circumstance necessitating promulgation of an Ordinance and the existence of such necessity is not a justiciable matter which the Courts can be called upon to determine by applying an objective test. Moreover, as stated above, instruction of the President had been obtained under the proviso to Clause (1) of Article 213 of the Constitution for the promulgation of Ordinance No. IV of 1969. In conclusion, I must hold that the impugned impositions and assessments must be taken to be valid under the last Ordinance, namely Bihar Ordinance No. VI of 1969, even if it be held, that, Bihar Act VII of 1937 had ceased to be in force after the 30th June, 1955. Therefore it is held, under Issue no. 5, that Ordinances No. III of 1968, VI of 1968, XIII of 1968, IV of 1969 and VI of 1969 were not and are not illegal, ultra vires and void. Under the same issue it must be held that even if Bihar Act VII of 1937 became ineffective after the 30th June, 1955, no relief can be given to the plaintiff on this conclusion. Issue no. 6 must be answered against the plaintiff, that is to say, the I concerned sections of the Ordinance did validate the impugned proceedings by retrospective operation.

Issue no. 7:--The cesses claimed by defendant no. 1 from the plaintiff in the impugned proceedings are claimed as cess on sugarcane upon entry into a particular local area, and it is not the case of defendant no. 1 that the impositions on the plaintiff are tax of any other nature. The nature of the impositions and assessments has been fully discussed above.

Issue no. 8:--For the impositions and the certificate proceedings, the plaintiff has brought on the record Exhibits 1 series and 2 series and the facts indicated by these documents are not in dispute, but for the reasons given above, this issue must be answered against the plaintiff. The impositions and the certificate proceedings mentioned in the plaint, are not ultra vires, void and illegal on the ground set out in the plaint. Exhibits 3 and 4 do not prove anything further in plaintiff's favour. They are certain communications issued from the Government in 1964 regarding maintenance of accounts for the deposits.

Issue no. 9:--The second part of Issue no. 9 regarding the attached car no longer arises for consideration and the plaintiff is not entitled to the grant of a permanent injunction restraining the defendants from executing the certificate proceedings mentioned in Schedule A of the plaint.

Issue no. 1 and 10:--Under these two issues it must be held that the plaintiff is not entitled to any relief at all.

The plaintiff's suit is, therefore, dismissed with costs, which is assessed at a consolidated amount of Rs. 500/-. The costs will be payable to defendant no. 1

only.

Kanhaiyaji, J.

I agree