

(1994) 01 PAT CK 0022
In the Patna High Court
Case No : C.W.J.C. No. 12851 of 1992

H.M.P. Sugar Ltd.

APPELLANT

Vs

State of Bihar and Others
 Hari Nagar Sugar Mills Ltd.
Vs Ramnagar/Bagaha Agricultural Produce Market Committee
and Another

RESPONDENT

Date of Decision : 20-01-1994

Acts Referred:

Citation : (1994) 01 PAT CK 0022

Judgement

B.C. Basak, C.J.—In these series of cases, the constitutional validity of the following Ordinances and Acts, and certain notifications and notifications issued and/ or action taken thereunder, have been challenged:

(a) Bihar Agricultural Produce Markets (Amendment) Ordinance, 1992, (Bihar Ordinance No. 19 of 1992) (hereinafter referred to as "the 1992 ordinance") and the Bihar Agricultural Produce Markets (Amendment) Act, 1992 (Act 16 of 1992) (hereinafter referred to as "1st Amending Act"), which replaces the 1992 Ordinance whereby a new section, namely, Section 33M, has been inserted in the parent Act, viz., the Bihar Agricultural Produce Markets Act, 1960 (hereinafter referred to as "the main Act" or "1960 Act")

(b) The Bihar Agricultural Produce Markets (Second Amendment) Ordinance 1992, (Bihar Ordinance No. 25 of 1992) and Bihar Ordinance No. 3 of 1993 (hereinafter referred to as "the Amending Ordinance or "the Validating Ordinance"), which were replaced by the Bihar Agricultural Produce Markets (Second Amendment) Act, 1993 (Act 4 of 1993) (hereinafter referred to as "the Amending Act" or "the validating Act")

2. The questions involved in these cases mainly arise out of a judgment delivered by a Division Bench of this Court on 30th March 1992 (of which one of us was a party), in the case of Delhi Cloth and General Mills Co. Ltd. and Others Vs. The Agricultural Produce Market Committee and Others (hereinafter referred to as the Delhi Cloth Mill's case.) Though the Division Bench upheld the validity of the

imposition of market fee under the main 1960 Act, however, in the contention of the Petitioners in some of those cases, to the effect that in respect of "sugar" no market fee was payable, was accepted by the Court for the reasons stated therein.

Facts

3. The facts relevant in the present case are as follows:

3.1. On 6th of August 1960 the assent of the Governor was given to The Bihar Agricultural Produce Market Act, 1960 (Act XVI of 1960). We ought to point out that several provisions of the said Act were amended from time to time including amendments made in Sections 2(1)(a), 2(1)(h), 3(1), 4(2), 5(2), 15 and 27 of the said Act by Amending Act 60 of 1982. The relevant provisions of the said Act as they stood before the Amending/Validating Act/Ordinances challenged in those proceedings were introduced, with their English translations, (when it is not in English) are as follows:

2. (1) In this Act, unless there is anything repugnant in the subject or context

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Agricultural "Produce" means all produce whether processed or non-processed, manufactured or not, of agriculture, horticulture, plantation, animal husbandry, forest, sericulture, pisciculture and includes live-stocks or poultry etc. as specified in schedule.

(h) "market" means a market established under this Act for the market area and includes, a principal market yard and sub-market yard or yards, if any;

(i) "market area" means any area declared to be a market area u/s 4;

(o) "principal market yard" means any enclosure, building or locality within the market area declared to be a principal market yard u/s 5;

3. Notification of intention of exercising control over purchases, sale, storage and processing of agricultural produce in specified area.-(1) Notwithstanding anything to the contrary contained in any other Act for the time being in force, the State Government may, be notification, declare its intention of regulating the purchase, sale, storage and processing of such agricultural produce and in such area, as may be specified in the notification.

(2) A notification under Sub-section (1) shall state that any objection or suggestion which may be received by the State Government within a period of not less than two months to be specified in the notification, shall be considered by the State Government.

4. Declaration of market area. --(1) After the expiry of the period specified in the

notification issued u/s 3 and after considering such objection and suggestions as may be received before such expiry and after holding such enquiry as it may consider necessary, the State Government may by notifications, declare the area specified in the notification u/s 3 or any portion thereof to be a market area for the purposes of this Act, in respect of all or any of the kinds of agricultural produce specified in the notification u/s 3.

(2) on and after the date of publication of the notification under Sub-section (1), or such later date as may be specified therein, no municipality or other local authority, or other person, notwithstanding anything contained in any law for the time being in force, shall, within the market area, or within a distance thereof to be notified in the official Gazette in this behalf, set up, establish, or continue, or allow to be set up, established or continued, any place for the purchase, sale, storage or processing of any agricultural produce so notified, except in accordance with the provisions of this Act, the rules and bye-laws.

(3) Subject to the provisions of Section 3, the State Government may at any time, by notification exclude from a market area any area or any agricultural produce specified therein or include in any market area any area on agricultural produce included in a notification issued under sub- Section (1)

(4) Nothing in this Act shall apply to a trader whose daily or annual turnover does not exceed such amount as may be prescribed.

5. Declaration of market yards. -- (1) For each market area there shall be one principal market yard and there may also be one or more sub-market yard or yards as may be necessary.

(2) The State Government may, by notification, declare --

For agricultural produce or any specific agricultural produce, the State Government may, by notification, declare any premises, building or place as principal market yard and other premises, buildings or places of such area as one or other sub-market yards, which may be necessary for the said market area.

6. Establishment of the Market Committee.-- For every market area the State Government shall, by notification, establish a Market Committee.

15. Sale of agricultural produce. --(1) For every market area the State Government shall, by notification, establish a Market Committee.

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(1) No person shall install and sell agricultural produce specified in notifications issued under Sub-section (1) of Section 4, except in the quantity prescribed in this behalf for retail sale or personal consumption, at any place other than the concerned principal market yard or sub-market yard or yards established within the market area.

(2) Notwithstanding anything contained in any law sale and purchase of such agricultural produce, except the produce of such categories and descriptions to which exemption has been granted by the Board, shall be done by the system of open auction or tender.

(1) No individual Will hold or sell, excepting the prescribed quantity for retail sale or personal consumption at a place other than the affiliated market yard or sub-market yard established within the Agricultural Market Area indicated in the notification issued under Sub-section (1) of Section 4.

(2) Notwithstanding anything contained in any law, in such areas sale, and purchase of such agricultural produce, excepting such classes and descriptions exempted by the Board, shall be done by open auction or through the procedure of tender.

27. Power to levy fee.--?1? fdlh cktkj {ks= esa izR;sd 100 #- ds d`f"k&inkFkZ ds ?;&fo?; ij cktkj lfefr ,d #i;s dh nj ls cktkj Qhl yxk;sxh vkSj mldh olwyh djsxh A

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(1) In any market area the Market Committee shall levy and realise market fee at the rate of one rupee on sale and purchase of agricultural produce worth Rs. 100/ - each.

Example. --In any market area market fee shall be levied on both paddy as well as on rice prepared from it.

Explanation. -- All the notified agricultural produce going out of the market area shall be deemed to have been purchased and sold in such area unless it is not proved contrary to it.

But, for the purpose of processing or export, when any agricultural produce brought in any market area within 21 days from the date of its arrival, as the case may be, it shall be presumed that such produce has been sold or purchased within the market area, unless any such processed agricultural produce is not exported from there and it is not proved otherwise, fee shall be leviable under this Section as if it has been sold and purchased in this manner.

(2) The chargeable market fee shall be payable by the buyer in the prescribed manner under Sub-section (1).

(3) Fee chargeable under Sub-section (1) on any notified agricultural produce, shall not be levied more than once, in one notified market area.

Section. 39- Power to amend the Schedule. -- The State Government may, by notification, add to, amend or cancel any of the items of agricultural produce specified in the Schedule.

Section 42 Power to exempt specified persons, articles or trades from provisions of the Act.--The State Government may, by notification and subject to such conditions and restrictions as it may consider fit to impose, exempt any class of persons, any commodity, trade or class of trades from all or any of the provisions of this Act.

3.2. At all relevant time and until the period hereinafter specified, "sugar" was one of the items of "agricultural produce" included in the schedule,

3.3. In exercise of power conferred by Section 42 of the 1960 Act by notification No. S.O. 550 dated 23.3.1976 published in the official Gazette of 22nd of March, 1976, all sugar mills were exempted from the provisions of Section 15 of the 1960 Act with regard to their sale and purchase of Agricultural Produce notified u/s 4(1) of the 1900 Act.

3.4. In exercise of power conferred by Section 39 of the 1960 Act by notification No. S.O. 730 dated 2.5.1977, which was published in the official Gazette on 2.5.1977 the Schedule to the said 1960 Act was amended by omitting "sugar" and certain other items of agricultural produce. By Anr. notification No. 857 dated 21.5.1977 the previous notification No. 730 dated 2.5.1977 was sought to be rescinded/cancelled. These two notifications were the subject matter of the said judgment of the Division Bench of this Court to which I shall refer to in details later.

3.5. Admittedly, since the inception of the 1960 Act, the State Government issued various notifications u/s 39 adding and deleting various items of agricultural produce from the schedule of the Act. Some of the items which were deleted are as follows: Rice and bran by S.O. 55 dated 1.4.1976, about 16 items

by S.O. 1056 dated 14.7.1981, milk (only liquid milk) by S.O.1002 dated 21.8.1984, and S.O. 9600 dated 23.7.1986.

3.6. By the Bihar Ordinance No. 8 of 1988 published in the official Gazette dated 23.2.1988 Section 27 of the 1960 Act was amended by substituting words "at the rate of rupees one and fifty paise" in place of the words "at the rate of one Rupee". However, it should be pointed out that after the said Ordinance lapsed, it was not replaced by any other Ordinance or Act.

3.7. Several writ petitions were filed challenging the legislative competency and otherwise the constitutional validity of the 1960 Act, particularly the imposition of market fee u/s 27 thereof and various actions taken under the same. By a judgment dated 30.3.1992, a Division Bench of this Court (of which one of us was a party) disposed of the said writ petitions -- Delhi cloth Mills case. By the said judgment, the constitutional validity of the said Act, and particularly the imposition of market fee u/s 27 was upheld. It was held, inter alia, that such imposition was a fee and not tax. However, it was held that no market fee could be imposed in respect of sugar.) The Validation Amendment Acts challenged herein are purported to be pursuant to such judgment. The relevant portions of the said judgment, so far as it relates to sugar, are set out herein below:

An additional point was raised in C.W.J.C. No. 3020 of 1985 and in C.W.J.C. No. 5974/88 so far as sugar is concerned. It was submitted as follows. As the law stands today, no market fee can be levied on the sale or purchase of sugar, sugar was originally listed in the schedule to the State Act as an "agriculture produce" and was also covered by the relevant notification issued u/s 3 and 4 of the State Act. Under these circumstances the levy of market fee on the sale/purchase of sugar was justified. The situation was changed by the notification dated 2.5.1977 issued u/s 39 of the Act, whereby the schedule to the State Act was amended by omitting "sugar" as an item of agriculture produce. Shortly thereafter Anr. notification was issued on 21.5.1977 which purported to rescind/cancel the aforesaid notification dated 2.5.1977. The subsequent notification dated 21.5.1977 was not in exercise of the powers conferred u/s 39 of the State Act, and it did not seek to add "sugar" again as one of the items of agricultural produce included in the schedule. It only sought to cancel/rescind the earlier notification issued on 2.5.1977. Accordingly, there could not be any levy of sugar after 2.5.77 until sugar is properly included in the schedule by a notification issued u/s 39 of the Act which has not yet been done. Alternatively, it was submitted that even if it could be contended that the 21.5.1977 notification amounted to inclusion of sugar as an agriculture produce afresh, no fresh notification under Sections 3 and 4 of the State Act in relation to sugar having been issued after the subsequent notification dated 21.5.1977, there could not be any levy of sugar until that is done. It was submitted that the notification dated 2.5.1977 having excluded sugar from the list of agricultural produce within the meaning of the State Act, as a result of which sugar ceased to be an agricultural produce with effect from 2.5.1977, the earlier notification issued u/s

3 and 4 of the State Act, so far as "sugar" is concerned, also ceased to exist. Even assuming that the subsequent notification dated 21.5.1977 had the effect of re-introducing sugar as an item of agricultural produce by no stretch, of imagination it could be treated as revival of the earlier notifications, issued under Sections 3 and 4 of the Act in relation to sugar while sugar was an agricultural produce. It was argued that notwithstanding that any particular commodity was an item of agriculture produce within the meaning of the Act, it will not attract levy of any market fee unless notification, as envisaged u/s 3 and 4 of the Act, in respect of that commodity was issued. It was submitted that the admitted position being that no fresh notification under Sections 3 and 4 of the State Act having been issued in relation to sugar, after issuance of the subsequent notification dated 21.5.1977, even if the subsequent notification could be treated to have had the effect of reintroducing sugar as an item of agricultural produce, without such fresh notification under Sections 3 and 4 of the Act thereafter, no such levy on sugar could be made. (Para 52)

On behalf of the Respondents reference was made to Section 24 of the Bihar and Orissa General Clauses Act (hereinafter referred to as "G.C. Act"), which is as follows :

Section. 24 Where, by any Bihar and Orissa Act (or Bihar Act) a power to make or issue notifications, orders, scheme, rules, by-laws or forms is conferred, then that power includes a power exercisable in the like manner and subject to the like sanction and conditions (if any) to add to, amend, vary or rescind any notifications, orders, schemes, rules, by-laws or forms so made or issued.

It was submitted that the State Government in exercise of this power had issued notification dated 21.5.1977 cancelling the earlier notification. The effect according to him, was that the earlier notification became non-existent, that is, as if it had never seen the light of the day. It was submitted that the notification dated 21.5.1977 restored the status quo ante as existing on 1.5.1977 and, thus, sugar continued to be an item of agriculture produce within the meaning of the State Act. It was further contended that the notification issued earlier under Sections 3 and 4 continued to exist after cancellation of notification dated 2.5.77 by subsequent notification dated 21.5.1977 and that, it was not necessary that once again the processes of Section 3 and 4 of the State Act should be gone through. According to him, the requirements of Sections 3 and 4 were one time requirement and once the powers were exercised and notification were issued under Sections 3 and 4 the deletion and subsequent introduction of a particular commodity did not require that the procedure laid down under Sections 3 and 4 were to be followed again In support of the same it was contended that as a matter of fact, even after the cancellation of notification dated 2.5.1977, all traders had been realising market fee and the fee was being paid to the Market Committee. Our attention was drawn in this connection to the counter affidavit filed on behalf of the Respondents. In this connection reliance was placed on two resolutions of the State Government in aid of his submission that what was

actually intended had not been faithfully carried out in the notification dated 2.5.1977 and for that reason alone that notification should be deemed to be inoperative and not cancelling the declaration of the State Government as the same was without any authority of law. (Para 53)

I am of the opinion that the contention made on behalf of the Petitioners is sound and that there is practically no answer to the same on behalf of the Respondents. Section 24 of G.C. Act even if applicable does not support their contention regarding the effect of cancellation of the 2.5.77 notification by the notification 21.5.1977. Even if the 21.5.1977 notification attracted Section 24 of the G.C. Act, it did not revive the situation completely as sought to be argued on behalf of the Respondents. Sugar having been excluded by the notification dated 2.5.1977 as an item of "agriculture produce" from the schedule of the Act, the cancellation of the notification of 2.5.1977 did not have the effect of re-introducing "Sugar" as one of the item of agriculture produce. This is particularly so in view of the provisions of Section 39 of the State Act. Having regard to Section 39 of the State Act, Section 24 of the G.C. Act was not applicable and even if applicable, it did not have the desired effect of introducing "Sugar" as one of the schedule commodities once again in view of 21.5.77 notification. Such intention could only be achieved by making a notification u/s 39 of the State Act and not by rescinding the earlier notification. Accordingly, in our opinion since 2.5.77, sugar not being an "agricultural produce" no levy could be imposed in respect of the same since 2.5.77. (Para 54)

In any view of the matter, I am of the opinion that even if the notification dated 21.5.77 could be treated as re-introduction of sugar as an agriculture produce within the meaning of the State Act, that by itself without anything further, did not permit levy of fee on sugar. The scheme of the State Act makes it clear that merely being an item of agriculture produce within the meaning of the said Act does not authorise realisation of market fee in respect of the same. A commodity may be an item of agriculture produce within the meaning of the Act but no market fee can be realised on the sale or purchase of this commodity, until and unless there are appropriate notification under Sections 3 and 4 of the Act in respect of the same. It is not in dispute that originally sugar was listed as an item of agriculture produce in the Schedule. It is also admitted that originally there were notifications issued u/s 3 and 4 of the Act in respect of sugar. Accordingly, originally levy could be imposed on sugar. However, such notifications under Sections 3 and 4, in so far as sugar was concerned, ceased to have any effect and the same came to an end, when sugar ceased to be an item of agriculture produce by virtue of the 2.5.1977 notification. As a result of the notification dated 2.5.1977, not only that Sugar ceased to be an item of agriculture produce within the meaning of the State Act but the notification issued under Sections 3 and 4 of the State Act, so far as sugar was concerned, ceased to exist. Therefore, even if some time later sugar could again be sought to be treated as an "agriculture produce" by virtue of the notification dated 21.5.1977, no market fee could be realised solely, on that basis as there was no

fresh notification under Sections 3 and 4 of the State Act to that effect. This being the position the mere fact that market fee on sugar was actually paid by the Petitioners and collected by the authorities is not of much relevance. In this connection, reference may be made to Section 4(3) of the State Act, which authorises the State Government to issue a notification to exclude in any market area any agricultural produce included in a notification issued under Sub-section (1) of Section 4. No such notification was issued either. I am not, also in a position to accept the contention that the notification dated 2.5.1977 was of no effect for the reasons stated. A notification properly issued could not be nullified by such alleged intention as propounded, by such purported resolution. (Para 55)

Accordingly. I hold that since issue of notification dated 2.5.1977, no levy could be imposed under the said, Act on "sugar". (para 56).

3.8. On 4th May, 1992, Bihar State Agricultural Marketing Board (hereinafter referred to as "the Board") filed SLP (Civil) No. 9529 of 1992 in the Supreme Court against the aforesaid judgment of this Court in the Delhi Cloth Mills case. It appears that the said SLP has not yet been admitted and that there is no stay order granted by the Supreme Court in respect of the said judgment of the Division Bench of this Court.

3.9. In exercise of powers conferred by Section 39 of the 1960 Act, on the 12th of May, 1992, the State Government issued Memo No. 3027 again adding "sugar" in the Schedule, of the 1960 Act. This is obviously in view of the judgment in the Delhi Cloth Mills case referred to above.

3.10. Thereafter, on the same day, that is, 12th of May, 1992, in exercise of power conferred by Section 3 of the 1960 Act, the State Government issued Anr. order bearing No. 3028, which was published in the official Gazette on 23.5.92 declaring the intention of the State Government to regulate the purchase, sale, storage and processing of the agricultural produce mentioned in column 4 in market committees mentioned in column 2 of which market area was mentioned in column 3. By the said notification, and in view of Sub-section (2) of Section 3 of the 1960 Act, objections and suggestions were invited for consideration of the State Government.

3.11. By the Bihar Agricultural Produce, Markets (Amendment) Ordinance, 1992 (being Ordinance No. 19 of 1992) which was replaced later on by Bihar Agricultural Produce Markets (Amendment) Act, 1992 (Act 16 of 1992), which received the assent of the Governor on 17th of August, 1992. By the said Ordinance and the Act a new Chapter, being Chapter IV B, was inserted in the said Act which provided as follows: This amendment, inter alia, has been challenged in these proceedings.

Chapter IV B

Contribution in the State Fund by the Committee: 33-M. Every Market Committee shall out of its fund contribute to the State Government fund such

percentage of its income derived from licence fees and market fees as may be prescribed by Rules from time to time by the State Government.

3.12. On the 31st August, 1992, the State Government issued and published a notification bearing No. S.O.229 u/s 4 in continuation of the notification No. 3028 dated 12th May, 1992, issued u/s 3.

3.13. On the 13th of October, 1992, the Bihar Agricultural Produce Markets (Second Amendment) Ordinance, 1992 (Ordinance No. 25 of 1992) was promulgated.

3.14. On the 22nd of October, 1992, a supplementary affidavit was filed by the Marketing Board in the SLP before the Supreme Court enclosing a copy of the ordinance No. 25 of 1992.

3.15. By virtue of insertion of the new Chapter IVB containing the new Section 33-M as stated hereinabove, by notification No. GSR 40 dated 30.11.92, a new Sub-rule (iii) was inserted in Rule 68 in the Rules framed which provides as follows:

(iii) Every Market Committee shall, out of its fund, which is received as Market fee and licence fee, pay as contribution to the State Government the following percentage of its total income as specified below:

(a) If the Annual income of a Market Committee is upto ten lakh or above but below twenty five lakhs. Ten per cent.

(b) If the Annual income of a Market Committee is upto twenty-five lakhs or above but below fifty lakhs. Fifteen per cent

(c) If the Annual income of a Market Committee is upto fifty lakhs or above. Twenty, per cent.

3.16. There was Anr. ordinance being Bihar Ordinance No. 3 of 1993 in replacement of the Ordinance No. 25 of 1992 referred to above.

3.17. On 27th April, 1993, the State Legislature enacted the impugned Validating/ Amending Act bearing No. 4 of 1993, repealing the Ordinance No. 3 of 1993 to this effect. The said impugned Amending Validating Act provides as follows:

(The Bihar Act 4 of 1993)

The Bihar Agricultural Produce Markets

(Amendment) Act, 1993.

(An Act

To amend the Bihar Agricultural Produce Markets Act, 1960.

Be it enacted by the Legislature of the State of Bihar in the forty-fourth year of the Republic of India as follows:

1. Short title, extent and commencement. -- (i) This Act may be called The Bihar Agricultural Produce Markets (Amendment) Act, 1993.

(ii) It shall extend to the whole of the State of Bihar.

(iii) It shall be deemed to have come into force with effect from the 6th of August, 1960.

2. Insertion of new section after Section 4 of Bihar Act XVI of 1960-After Section 4 of the Bihar Agricultural Produce Markets Act, 1960 (Bihar Act XVI of 1960) the following sections shall be inserted and shall always be deemed to have been inserted, namely:

4-A. Sections 3 and 4 not to apply to Section 39.-- (1) The provisions of Sections 3 and 4 shall not apply to the exercise of powers by the State Government u/s 39 to amend the schedule by addition of any item of agricultural produce not specified therein

(2) The State shall not order the deletion of any item in exercise of its power u/s 39 without giving an opportunity for hearing to the affected parties.

4-B. Validating of Market fee levied and collected. -- Notwithstanding any judgment, decree or order of any Court to the contrary, any market fee levied and collected shall be deemed to be valid as if such "levy and collection was made under the provisions of this Act as amended by this Act and notification No. 730 dated 2nd May, 1977 shall be deemed never to have been issued and no suit or other legal proceedings shall be maintained or continued in any court, for the refund of the fee collected under the provisions of this Act and no Court shall entertain any proceedings challenging the fee recovered or the continued levy and recovery of the fee merely on the ground that liability has ceased on the issuing of the notification No. 730 dated 2nd May, 1977.

3. Repeal and Savings. -- (1) Bihar Agricultural Produce Markets (Amendment) Ordinance, 1993 (Bihar Ordinance No. 3, 1993) is hereby repealed.

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

4. Arguments.

4.1. Arguments on behalf of the Petitioners.

4.1.1. Argument of Mr. Gopal Subrramaniam

4.1.1.1. The main arguments on behalf of the Petitioners in these cases were advanced by Mr. Gopal Subramaniam who had also submitted written arguments. Other learned Advocates appearing on behalf of Petitioner/Appellant have broadly adopted the arguments of Mr. Subramaniam and have also submitted separate written arguments. The arguments advanced by Mr. Subramaniam are

given is details. He has submitted that the following broad points arises in these cases.

1. Is the Bihar Agricultural Produce Markets (Amendment) Act, 1993 (Bihar Act 4 of 1993) valid?

2. Has there been an adequate compliance of the directions given by this Hon"ble Court in 1992 (Vol. 2) PLJR 253, vide judgment dated 30th of March, 1992?

Is the Notification dated 31st of August, 1992 a valid notifications u/s 4 of the Bihar Agricultural Produce Markets Act 1960?

3. Are the provisions of Section 33-M as inserted by the Bihar Agricultural Produce Markets (Amendment) Act, 1992 valid?

Is Rule 68(iii) as inserted by Notification No. 4 dated 30th of November, 1992 valid? If valid, the effect thereof?

4. Do the provisions of the Bihar Agricultural Produce Markets (Amendment) Act, 1993 stand along side and are capable of a consistent and coherent interpretation with the remaining provisions of the principal Act?

5. Can there be a valid imposition of Market fee in view of the exemption contained in the Notification dated 22nd March, 1970 exempting all the sugar mills from the provisions of Section 15?

Note: Issue Nos. 1 and 4 are interlinked. Therefore, they are being taken up together.

4.1.1.2. Regarding point Nos. 1 and 4 be made the following submissions:

The 1960 Act was enacted by the State Legislature for the purpose of providing "better regulation of buying and selling of agricultural produce", and "the establishment of markets for agricultural produce in the State of Bihar" and for matters connected therewith. The Scheme of the Act discloses clear intentions to be achieved by a logical and systematic compliance of machinery and procedure as described in the Act. The purpose of the Act is to regulate agricultural produce in specified areas. Thereby middlemen are eliminated and the agriculturist come face to face with the producers and thus exploitation is avoided. The Act seeks to achieve a measure of regulatory control and seeks to impose restrictions upon the right to carry on trade and business both of agriculturists and as well as buyers and sellers in the trade. The scheme of the definitions contained in Section 2 of the Act would show that Agricultural produce as defined in the Schedule is liable to be regulated, which is the first condition which must be satisfied before complying with the various controls, mechanisms and statutory provisions including impositions of market fee under the provisions of the Act. (b) The definitions also indicate that the agricultural produce must be treated in a market area which in turn would comprise of a principal market-yard and sub-yard. (c) The Act seeks to regulate transactions in so far as the transactions

purported to take place in the market yard or market area.:

4.1.1.3. Section 2(1)(a), after amendment by Act 60 of 1982 reads thus:

In. this Act, unless there is anything repugnant in the subject or context:

(a) Agricultural produce means all produce whether processed or non- processed, manufactured or not, of agriculture, horticulture, plantation, animal husbandry, Forest, Sericulture, Pisciculture and includes live stock or poultry as specified in the Schedule.

It is an exhaustive definition or list of agricultural produce which must be found in the Schedule. The reason why Clause(a) provides for additional words, such as "processed", or non "processed" or "manufactured" etc. is for the purpose of giving a wide interpretation to the items which are contained in the Schedule and in order to bring those items within the ambit of "agricultural produce". The conditions precedent for the purpose of rendering the provisions of the Act applicable upon such produce is that it must be first of all "agricultural produce". Unless and until an item is specified agricultural produce, i.e., as specified in the schedule to the Act it cannot be subject matter of any follow-up or concomitant steps under the Act.

4.1.1.4 The definitions of "markets" u/s 2(h) "Market area" u/s 2(i), "market committee" u/s 2(j),. "Principal market yard" u/s 2(o) and "sub-market yard" within the meaning of Section 2(1) indicate that there must be a market area in the first instance which is an area as declared u/s 4. Thereafter there would be composition of a principal market yard and sub-market yard. The market committee is established in respect of a market area. Further, the principal market yards and sub-market yards would be in relation to the market area. Thus all these definitions contemplate that there must be a valid declaration of a market area u/s 4 before there can be a subsequent regulatory control.

4.1.1.5. Sections 3 and 4 of the Act form the basis of the Act. They contemplate the mechanism for bringing into existence both market area and also the agricultural produce which shall be regulated in such market area. The main purpose of the Act which runs through the entire scheme of the Act and can be called as a golden thread is regulation of agricultural produce in a market yard. This is a twin requirement which must be satisfied for the purpose of enabling a valid imposition of market fee. It is submitted that Sections 3 and 4 are not redundant provisions, but on the contrary they are the provisions which set into motion the process of imposition of restriction upon the fundamental right to trade and carry on business in agricultural produce. Any notification which is issued under Sub-section (1) of Section 3 must pertain to both agricultural produce as well at an area. It is thus combination of agricultural produce and area which is the basis of the Act. Reference is also made to Sub-section (2) of Section 3 in this connection. It is submitted that these provisions are mandatory, not because of the use of the word "shall" alone but upon proper construction of the said provisions in the context of an imposition of a restriction on the

fundamental right to carry on trade or business. The premises of these imposition and restrictions on the fundamental right to trade and carry on business must be interpreted to mean that it is a statutory safeguard conferring valuable right on persons to make objections and a further valuable right that they be considered. These conditions are meant to be considered by the State Government and such a consideration is a part of the statutory scheme before a notification can be brought into existence u/s 4 Sub-section (1). Section 4 of the Act provides that there must be a consideration of the objections and suggestions as may be received before expiry of the stipulated period. It further provides that even an enquiry may be held if necessary and thereafter a discretion is given to the State Government to declare the area specified u/s 3 of the Act as a market area for the purpose of the Act, in respect of Agricultural produce, as specified in the notification. It is significant to note that what may be declared as a market area under Sub-section (1) of Section 4 must necessarily pertain to the declaration as evinced prior to the receipt of objection, that is in the preliminary notification issued u/s 3(1). It was submitted that Section 4(1) follows Section 3 not only in view of the order of the arrangement of the provisions of the Act but in the scheme of the statute. It is clear that on a proper construction of Sub-section (1) of Section 4 that the State Government will issue a notification declaring the area to be a market area and that too in respect of all or any of the kinds of agricultural produce specified the notification u/s 3. It is, therefore, submitted that the twin requirement of inclusion of agriculture produce on the one hand and its regulation in a particular area called, the market area, is the main intention of the Act and unless and until the same is brought about and enforced, there cannot be any subsequent regulatory control, nor can there be valid imposition of market fee. A notification Which is issued under Sub-section (1) of Section 4 is a cardinal step which is to be taken pursuant to the provisions of the Act in order to enable effective implementation of the scheme of the Act. It is clear upon a perusal of Sub-section (2) of Section 4 of the Act that it is only after such a notification is issued under Sub-section (1) that various statutory injunctions and bars which are contained in the Act will take full and complete effect. There is an injunction which is placed by Sub-section (2) of Section 4. It is upon a lawful declaration issued under Sub-section (1) of Section 4 that there can be an effective injunction under Sub-section (2) of Section 4. Sub-sections (3) and (4) clearly indicate that the notification which is issued under Sub-section 3(1) and thereafter finally issued under Sub-section (1) of Section 4 is paramount and periodical exclusion or inclusion of any area of produce can take place as long as it pertains to the area and produce issued under Sub-section (1) of Section 4. A declaration can be issued only after considering the objections and suggestions and after holding an appropriate enquiry in the matter. Section 5 provides that for each market area there shall be one principal market yard and there shall also be one or more sub-market yard or yards. Thus the existence of a market yard whether it be a principal market yard or sub-market yard can come into being only after a market area is declared under Sub-section (1) of Section 4. Therefore, the specification of a declaration" under Sub-section (1) of

Section 4 is absolutely essential without which the remaining steps under the Act cannot be valid. Section 6 reinforces the scheme outlined above and for every "market area" the State Government could establish a market Committee.

4.1.1.6 It is significant to note that even Section 15 refers to a notification specified under Sub-section (1) of Section 4. Thus, unless and until there is a valid notification or a declaration u/s (1) of Section 4, there cannot be an enforcement of the injunction contained in Section 15 of the Act.

4.1.1.7 Section 27 contemplates that the Market Committee shall levy and collect market fees on agricultural produce brought or sold in the market at the specified rate. This re-inforces the interpretation that the golden thread that agricultural produce in an area being notified is subject to transactional control and levy runs through the scheme of the provisions of the Act. This contemplates that there will be a specified market area both for Market Committee as well as for Market Board in order to enable them to discharge the statutory functions. Section 39 confers power upon the State Government to amend a Schedule. The State Government may by notification add to, amend or cancel any of the items of agricultural produce specified in the Schedule. This power is conferred upon the State Government for the purpose of adding, amending or cancelling any of the items of agricultural produce. This is the first step which is to be taken by the State Government so that a valid levy shall take place.

4.1.1.8 Incidentally he has submitted before us that in the instant case a notification has been issued on 22nd of March 1976 exempting all the sugar mills from the provisions of Section 15 of the Act. As a result of this there is absolutely no requirement upon the various sugar companies, namely the Petitioners, to bring their produce within the market yard for the purpose of transacting business. Further, as a result, the notification is a complete exemption u/s 15 as a result of which the sale does not have to take place in the manner of an open tender or auction. In fact in relation to such sales the Government has stipulated the price which should be paid to the agriculturists by the sugar mills. The exemption relates not only to sugar but relates to sugar cane and molasses as well.

4.1.1.9. From a perusal of the provisions of the Act and upon being harmoniously construed there can be no manner of doubt that three conditions are established for the effective working of the Act:

a) An item must be specified agricultural produce. It is submitted that for any person upon whom a fee before is going to be imposed for the purpose of trading in an agricultural produce it is absolutely essential that he must even know in the first instance that this is an "agricultural produce" as contemplated in Section 2(1)(a) of the Act to be able to prepare himself for the impost of a fee. Hence the placement of the item in the schedule whether originally or by subsequent addition is necessary before the Act is made applicable.

b) The Second step which is arrived at as a result of analysis of the provisions of

the Act is that there must be an exercise as contemplated by Sections 3 and 4 of the Act which should be undertaken. The effect of this exercise is that there must be a declaration of an intention, a notification u/s 3(1) of the Act, and subsequently there must be a declaration which is issued u/s 4 after following the procedure of inviting objections and suggestions. The requirement of inviting objections and suggestions is absolutely necessary before all the remaining steps can take place. There can be no dispensation of these statutory provisions without exposing the Act to invalidity. Therefore, it is only upon an issuance of a notification under Sub-Section (2) of Section 4 of the Act of a valid imposition of market fee in relation to trading in agricultural produce in specified market area can take place. Unless and until Sections 3 and 4 are complied with no market area can come into existence Section 3 and 4 of the Act read with Rule 39 are the constitution of one integrated scheme.

4.1.1.10 The power u/s 4 of the Act, which is the power to be exercised, after objections are invited and are considered, is a power which should be exercised reasonably. In this connection, reference was made to *Lakhan Lal and Others etc. Vs. The State of Bihar and Others etc.*, wherein, it was held as follows:

It may be conceded that the power u/s 4(1) should be exercised reasonably.

It was further held by the Hon'ble Supreme Court upon a construction of the various statutory provisions, namely, Section 3, 4 and 6 and Rules 59 and 61 and also Section 18 of the Act as follows:

A market as defined in Section 2(h) is established for a market area by following, the procedure. The State Government is sued a direction u/s 15(1) read with Rule 59(1) to the market committee to establish a market for the market area. On receipt of this direction, the market committee decides under Rules 59(2) to establish a market by fixing the boundaries of the market proper and the principal market yard and sub-market yard, if any. Thereafter, the Government issues the necessary notification u/s 5(2) declaring the market proper and the market yards. These three steps form one integrated process and on the issue of the notification u/s 5(2) the market is finally established.

Reliance is placed in this connection to paragraphs 3, 4, 5 and 6 of the judgment.

4.1.1.11. After a notification is published u/s 4(1) of the Act then the various Statutory injunctions will apply, namely that no other person can trade in that area and all activities must be regulated only by the Market Committee which will ensure that there is a proper trading activity of specified agricultural produce in specified market yard. u/s 27 of the Act there can be a valid imposition only if these conditions are fulfilled. If these conditions are not fulfilled there cannot be a valid imposition and any levy of market fee by such imposition contrary to the Scheme which is mentioned hereinabove will be patently illegal and in disregard to the provisions of the Act.

4.1.1.12 In the present case by a notification dated 2nd May, 1977, namely

notification No. 738 dated 2nd May, 1977 Sugar and some other items were deleted from the Schedule. On 21.5.77 the notification dated 2nd May, 1977 was cancelled by the State Government. That was done by notification No. 857 of even date.

This Court in its judgment dated 30th March, 1992 upheld that so far as the notification dated 21st May, 1977 was concerned although it cancelled the earlier notification dated 2nd May, 1977, but the same did not tantamount to an automatic revival of sugar being an item in the Schedule. This needed a positive act which ought to have been the issue of a separate notification adding sugar to the Schedule on 21st May, 1977 if it had to be a valid exercise of power u/s 39 of the Act. This Court further held that even assuming for a moment that the effect of the notification dated 21st May, 1977 was to add the item of sugar in the schedule, yet that did not authorise automatic imposition of market fee u/s 27 of the Act. It was necessary to comply with Sections 3 and 4 of the Act afresh.

4.1.1.13. On 13th October, 1992 an Ordinance under Article. 213(1) of the Constitution was promulgated, namely the Bihar Agricultural Produce Markets (second Amendment) Ordinance 1992 (hereinafter referred to as 1992 Ordinance). This Ordinance was later on repealed and a new Ordinance was promulgated, that is Ordinance No. 3 of 1993 (hereinafter referred to as 1993 Ordinance). The 1993 Ordinance was repealed and the State Legislature enacted the 1993 Act amending the Act. This Act came into force on 27th April 1993. In this connection he has referred to the statement of Objects and Reasons accompanying the Bihar Agricultural Produce Market (Amendment) Bill, 1993 which expressly refers to the judgment of this Court dated 30th March, 1992 and seeks to override the judgment of this Court. It is mentioned therein that by this Amendment the deleted Agricultural and Market Produce will be reintroduced, so market fee can be realised on deleted agricultural produce according to law and collected market fee can be legalised since 2nd May, 1977."

4.1.1.14 The impugned Act has to be first interpreted and upon the interpretation thereof its validity should be tested. Two cardinal principles have to be borne in mind while interpreting the impugned enactment. The first is that this is to be interpreted alongside the principal enactment, and secondly all the Sections of the impugned enactment must also be given their full effect to judge the interplay of these provisions. It was submitted that the provisions of the impugned enactment have to be viewed in the light of the amending Act being a validating law. A validating law validates previous actions of Section which have been struck down as illegal. Thereafter, the Act also removes the basis of the defect which is pointed out in the judicial decision of a Court. In the facts and circumstances of the present case, the impugned enactment is not. a validating law although it purports to be one. This is because this Court directed proper compliance of the law in its judgment. A direction that proper compliance of the law must take place does not tantamount to a defect in the law. Such a defect cannot be cured retrospectively. What was directed by the Court was a positive

action of complying With the law; the statute although seeks to over-ride the judgment of this Court dated. March 30, 1992, yet does not have the necessary attributes of a legal and valid law. In the instant case what the Legislature has sought to do is to reverse a judicial decision by displacing a foundational fact. A foundational fact cannot be washed away or obliterated by the Legislature. All that can be done is that its basis may be changed. In the present case, the Notification dated May 2, 1977 was a foundational fact. Thereafter, this Notification was cancelled by a subsequent Notification dated May 21, 1977. That too was a foundational fact. These two foundational facts cannot be washed away by law when these were valid exercise of power u/s 39 of the Act. In any event, the Notification dated May 2, 1977 should have been validly in existence for the impugned enactment to declare as nonest or illegal by implication. The notification dated May 21, 1977 cancelled the notification of May 2, 1977 and hence Section 4B cannot insert an absurd legal fiction. Keeping the above two principles in mind it is submitted that Section 2 of the impugned enactment seeks to give retrospective effect to Sections 4-A and 4-B of the Act. Sections 4-A and 4-B of the Act are sought to inserted by the impugned enactment and being given retrospective effect from 6th August, 1960.

4.1.1.15 A perusal of Sections 4-A and 4-B would mean that they follow Section 3 and 4. Sub-Section (1) of Section 4-A contemplates that in the first instance that the provisions of Sections 3 and 4 will not apply to the exercise of powers by the State Government u/s 39 while making an addition to the Schedule. This means that in relation to those items which were already present in the original Schedule on 6th August, 1960, the procedure u/s 3 and 4 would be followed. However, in the event of an addition to the Schedule of any new item of agricultural produce the same will not attract Section 3 and 4 which is patently absurd. It is bad because it is discriminatory. A uniform procedure is expected to be followed by the statute when it deals with all items in relation to the Schedule. There cannot be two separate procedures between, the items which existed on 6th August, 1960 and those which are sought to be added subsequently. This part of Section 4-A(1) in so far as it prescribes that Sections 3 and 4 will not apply to the exercise of powers by the State Government u/s 3 of the Act to amend the Schedule by addition is patently irrational, arbitrary, without any intelligible basis whatsoever and causes invidious discrimination.

4.1.1.16 Section 4-A(1), on a perusal of the scheme set out hereinabove, destroys the. scheme of the Act. As a result of Sections 4-A and 4-B being present. Sections 3 and 4 are virtually redundant by the presence of Section 4-A. This would further mean that the exercise of powers u/s 3 and 4 will never take place and all that which is needed for the purpose of imposing market fee is. the presence of a Schedule. To impose a fee with reference to a Schedule without description of a market area, without following the procedure under the Act is (latently absurd, illogical and clearly arbitrary, irrational and thus the imposition of the fee would have absolutely no basis at all. It must not be forgotten that the imposition of the fee relates to available given regulatory measures which are

provided under the mechanism of the Act; certain procedures were meant, to be followed in as much as objections have to be invited in relation to specification of agricultural produce. It is not necessary that every agricultural produce has to be regulated under the provisions of the Act. There may be some agricultural produce which may not warrant such regulation in specified area. This may be because the item may be regulated with reference to other legislative/statutory provisions. For instance sugarcane is already being" regulated by other regulatory provisions namely Bihar Sugarcane? (Regulation and Supply) Act, 1981. Therefore, it is submitted that what is contemplated in Section 3 and 4 is that before a reasonable restriction is imposed upon the business of if citizen, he must have a fair opportunity of being heard. Thus the scheme of the Act is that there must be a notification under Section

4.1.1.17 It may be noticed that Sub-section (1) of Section 4 A refers to the provision of Sections 3 and 4 in their entirety. It does not refer only to "natural justice" or "opportunity of being heard" or "consideration of objections". The entire scheme of Sections 3 and 4 is adverted to. This would mean that first notification u/s 3, invitation of objections, holding of enquiry and thereafter, issuing a final declaration under. Sub-Section (1) of Section 4 are all excluded in their application to specified agricultural produce and so what is left of the Act. It is further submitted that if Section 3 and 4 are excluded then how can regulation at all take place of any produce and if regulation does not take place can a fee or levy take place u/s 27 of the Act. It is submitted that it is this basic scheme of the Act which is totally destroyed by Section 4-A (1). In this view of the matter Section 4-A destroys the scheme of the Act which would mean the Market Committee has no market area and shall have any market area in future to be specified. The same is clearly ultra vires Article 19(1)(g), unsaved by Article 19(6) and in any event violative of Article 14 of the Constitution.

4.1.1.18 It was submitted that there are two stages before a levy takes place as has already been set out hereinbefore. The first stage is that the item must be added in the schedule u/s 39 of the Act. The second stage is that it has to be made subject to the process of Section 3 and 4 before the levy can take place. There can be no question of not applying Sections 3 and 4 to items specified u/s 39. Agricultural produce is defined in Section 2(1)(a). This definition means specified agricultural produce. Specified Agricultural Produce means agricultural produce contained in the Schedule. It may not be necessary that every agricultural produce would have to be regulated in every market area. This may depend upon the fact/situation of each particular case, it may depend upon the need of such regulation, necessity of such regulation, facilities available for such regulation and where regulation will be desirable in an appropriate case. That being so it is necessary that the exercise which is undertaken under Sections 3 and 4 is not an empty exercise. It is a mandatory exercise which has been prescribed to be followed by the State Government for ensuring that transactions relating to sale and purchase of specified agricultural produce take place within the control of the Market Committee. It may be that in relation to an item of

agricultural produce the same may not be subject to the same degree of control in every market area. This needs individual attention which is precisely the individual decision after application of mind in relation to various items of agricultural produce. To say that Sections 3 and 4 will not apply to an item which is added in the Schedule is to make a mockery of this entire Act virtually for all practical purposes. Sub-section (1) of Section 4A has destroyed the entire fabric of the Act completely. Such an interpretation would render it those. It would render the entire Act meaningless and ultra vires. It would render the Market Committee meaningless. It would render the market arrangement meaningless. It would only mean that money can be collected with reference to a Schedule. That clearly goes against the scheme of the Constitution, and therefore it is submitted that Sub-section (1) of Section 4 A has to be struck down in order to save the remaining provisions of the Act. It is submitted that it is an imperative necessity to strike down the said provisions of the impugned Act, because unless they are struck down the entire Act is liable to be struck down.

4.1.1.19 Sub-section (2) of Section 4A provides that the State shall not order the deletion of any item in exercise of its power u/s 39 without giving an opportunity for hearing to the affected parties. This subsection is also violative of Article 14 of the Constitution. It is submitted that giving of an opportunity for hearing to the affected parties by deletion it would mean Market Committee mostly and not giving an opportunity for hearing to those who would be benefited by such deletion, is clearly violative of Article 14, is not based upon any intelligible differentia. It is further submitted that although prior to the impugned enactment Section 39 did not invoke or require the application of the principles of natural justice yet for the first time by Sub-section (2) an attempt has been made to make the principles of natural justice applicable before deletion takes place.

4.1.1.20 Section 4A (1) and (2) read together clearly result in injustice and therefore violative of Article 14 of the Constitution, violative of Article 19(1)(g) of the Constitution, and are not saved by Article 19(6) of the Constitution. It is submitted that the only safeguard which a citizen has u/s 3(2) read with Section 4(1), that safeguard (merely because it is not usually observed) does not render it an ineffective provision capable of being dispensed with. It is a very valuable safeguard which is conferred on a citizen for the purpose of being able to advance his objection which entitles him to be heard and considered and which results in issuance of proper decisions. It that view of the matter it is Submitted that Section 4A (1) and (2) read together are ultra vires for the following reasons:

- (a) They are inherently discriminatory.
- (b) They whittle down regulations of natural justice and statutory observance of application of mind.
- (c) They create two disparate classes -- on the one hand the citizen and on the other hand the Market Committee.

(d) The provisions put together destroy the fabric of the Act.

(e) The provision put together and read together render, the entire Act meaningless.

4.1.1.21 Section 4B- of the Act cannot stand by itself. It must be read in conjunction with Section 4A having been placed together. It is not merely because they have been physically placed one after Anr. that they have got to be read together. It is a principle of statutory construction that all provisions of an Act must be read together.

4.1.1.22 Section 4(b) has the following parts:

(a) Notwithstanding any judgment, decree or order of any Court to the contrary any market fee levied and collected shall be deemed to be valid as if such levy and collection was made under the provisions of this Act, as amended by this Act, (emphasis supplied).

(b) The Notification dated 2nd May 1977 shall be deemed never to have been issued.

(c) No suit or other, legal proceedings shall be maintained or continued in any court for the refund of the fee collected under the provisions of this Act.

(d) The continued levy or recovery of the fee will be made.

It was submitted that the first part of Section 4-B, clearly-shows that the levy and collection would be deemed to be valid because it is made under the provisions of the Amending Act, that is the impugned enactment. Thus necessarily recourse has to be had to Section 4-A to interpret this part, that is the first part of Section 4B.

4.1.1.23 The Legislature has enacted the impugned enactment with retrospective effect to say that the Market Committee should have been heard before an item was deleted from the Schedule and because the Market Committee was not heard before deleting of "Sugar" on 2.5.1977, therefore the notification dated 2nd May, 1977 was illegal and shall be deemed to have been never issued. The words in Section 4-B "Notification No. 730 dated 2nd May, 1977 shall be deemed never to have been issued" clearly contemplate unmistakably that the Notification of 2nd May 1977 was illegal and should not have been acted upon and it was illegal because of a retrospective condition in law that no item could be deleted without hearing the affected party. It is submitted that the fiction contained, in Section 4-B depends upon the validation in the first part of Section 4-B which in turn flows from 4A. There cannot be an independent reference to Section 4-B to the exclusion of Section 4-A.

4.1.1.24 It was submitted that the Second part of Section 4-B (vide para 6.3. supra), i.e. the legal fiction is not necessarily a valid fiction in law. Legal fiction is a device for the purpose of imagining a state of affairs. What has been done legally on 2nd May 1977 cannot by retrospective operation of law be declared

illegal or assumed to be illegal. If that be so then citizen would be in perpetual peril and danger, of all legal and lawful action being invalidated subsequently. If a man conducts business or is acting under a valid dispensation of law then it cannot be retroactively declared illegal. What is illegal in the past may be declared (subject to it being "reasonable" and "legitimate") legal, but what is legal cannot be declared illegal.

4.1.1.25 It was submitted that there was no valid authority of law under which market fee should have been levied from 2nd May 1977. The periods may be divided into 2 parts --one is the period from 2nd May 1977 to 27th April 1993; the second period is the subsequent period beyond 27th April 1993. In relation to first period it is submitted that there has been no valid levy for the period 2nd May 1977 to 27th April 1993. This means that from 2nd May 1977 it is absolutely clear that there was no valid imposition, that is by means of suitable addition of Sugar in the Schedule in Section 39 in the first instance, and the notification u/s 4 of the Act in the specified area. In these circumstances there can be absolutely no basis to levy or claim a fee for the period 2nd May 1977 to 27th April, 1993.

For the period beyond 27th April, 1993 it is submitted that Sections 4A and 4B are ultra vires for the future and no levy can take place merely because an item is specified in the schedule.

4.1.1.26 The impugned Act, it is submitted, is bad both in its retrospective operation and in its prospective operation. It is submitted that Parliament has power to legislate prospectively and retrospectively. It is further submitted that the power of Parliament to legislate retrospectively is full and plenary. The power of the State Legislature to make laws retrospectively must be both in the Hold of legislative competence and must also conform to the test of Part-III of the Constitution. In the instant case the retrospective operation of the impugned enactment is therefore bad and illegal. It is submitted further that in so far as future operation is concerned that with effect from 27th April 1993 the Act will seek to impose a fee without a notification u/s 4 and without following the procedure as contemplated in Sections 3 and 4 of the Act. This is totally illegal, ultra vires and violative of Articles 19(1)(g) and 14 of the Constitution. On the second broad point he has submitted as follows: It is submitted that a SLP under Article 136 of the Constitution of India was filed against the judgment and order of this Hon"ble Court dated 31st March 1992 reported in 1992 (2) PLJR 253. In that SLP there is no interim stay in favour of the Marketing. Board and that SLP is pending final disposal by the Supreme Court of India.

4.1.1.27 On or about 12 May 1992 the State Government issued a Memo bearing No. 2027 u/s 39 and added sugar in the Schedule. This was a positive step as contemplated by the judgment of this Hon"ble Court dated 30th March 1992. This was published in the Gazette on 23rd May 1992.

4.1.1.28 On 12th May 1992 likewise the State Government issued Anr. Notification namely No. 3028 u/s 4 declaring its intention of regulating the

purchase, sale, storage and processing of all items mentioned in the Schedule and accordingly invited objections and suggestions in respect of all items mentioned in the Schedule including sugar, thus purporting to comply with the judgment of this Hon"ble. Court by issuing the notification u/s 3 and purporting to follow the procedure as laid down by this Hon"ble Court. This notification was also published in the Official Gazette on 23rd May 1992.

1.1.1.29 On 28th August 1992 a notification u/s 4(1) was issued declaring the market area as well as the produce to be traded in that area. This included sugar. This notification was issued in purported exercise of powers conferred u/s 4(1) of the Act.

4.1.1.30 The notification on 31st August 1992 was issued u/s 4 of the Act. If it has been issued u/s 4 of the Act then the Validity of this notification must be construed with reference to Section 3 and 4 of the Act and cannot be construed with reference to the provisions of the impugned enactment.

4.1.1.31 The Notification dated 31st August, 1992 is bad, and illegal since the objections which were filed by the Petitioners were not considered. In this regard in the Writ Petition No. 4766 of-1993 Govind Sugar Mills Ltd. v. State of Bihar it, has been averred, in paragraphs 14, 15, 16, 17 and 18 that no such consideration of objections took place. In C.W.J.C. No. 13065 of 1992 averments relating to lack of consideration of objection u/s 3(2) read with Section 4(1) of the Act are set down hereinbelow:

That it is stated that the State Government issued Anr. Notification No. 857 dated 21.05.1977 in purported exercise of power conferred u/s 39 of the Act repealing earlier Notification bearing No. S.O.730 dated 02.05.1977. A true copy of Notification, No. S.O. 730 dated 02.05.1977. S.O. No. 57 dated 21.05.1977 are annexed herewith and marked as Annexures "1" and "2" respectively forming part of this Writ Petition.

That it is specifically stated that various facts and law was raised in the objection to be considered at the time of disposal of the said objection, It was specifically prayed that the objector may be given personal hearing so that he may be able to convince the authority about the correctness of the objection. It was also prayed that authority should pass a reasoned order. But, unfortunately no opportunity was given to the Petitioner to be heard in the matter nor even any reason has been assigned or communicated to the Petitioner while disposing the application nor even the Petitioner was conveyed the fact that who is the authority who has disposed of the matter. Everything has been done ex-parte behind the back of the Petitioner. Several oilier sugar factories and persons dealing in the matter also filed objections and requested personal hearing but, no opportunity was afforded to them also. Even Bihar Sugar Mills Association had also filed objection requesting the personal hearing but they also were not heard in the matter nor any opportunity was afforded and, therefore, calling for objection u/s 3(2) of the Act remained an empty formality. Neither the matter

has been considered nor the reason has been assigned while disposing the proceeding,

4.1.1.32 That to the knowledge of the Petitioner in fact, the objection has not been disposed of by the State Government. Some officers of that State Government have mechanically rejected the objections. The officers of the State Government are not the State Government, who are not authorised to pass order. A true copy of Gazette notification dated 31st August, 1992 which made sugar applicable in terms of the notification No. 3028 is annexed herewith and marked as Annexure-6 which forms a part of this writ petition."

In the affidavit-in-opposition filed by Dilip Kumar Choudhary Esq., Law Officer of Bihar State Agricultural Marketing Board there No plea that the objections were considered at all u/s 3(2) read with Section 4(1) of the Act. It is admitted position on the pleadings that the objections raised by the Petitioners were not considered, (see paragraph 12, 13, 14 and 15 of the affidavit of Dilip Kumar Choudhary on behalf of the Board. In that view of the matter the notification dated 31st August, 1992 is bad, illegal and liable to be struck down. On the third broad point he has submitted as follows: In this connection he has also drawn our attention to Rule 68(iii) inserted on 30th November, 1992, It was submitted that diversion of funds to be employed and to be used for the purpose of this Act to the State Government and for the use of the State Government on account of financial stringencies ultra vires, illegal and alteration of the character of the imposition of levy from a fee to that of a tax. The imposition of the levy in these circumstances cannot be related to the provisions of this and if at all a valid imposition of a tax has to be made by the State Government it must explore appropriate constitutional avenues to impose such tax in future. Section 33-M constitutes colourable legislation.

4.1.1.33 On the fifth broad point he has submitted that by a notification dated 22nd March, 1976 issued u/s 42 of the provisions of the Act the Petitioner sugar mills have been exempted from the provisions of Section 15 in relation to sale and purchase of agricultural produce. The result of this notification is that all sugar mills have been exempted from the provisions of Section 15 of the Bihar Agricultural Produce Markets Act 1960. The result of such exemption is that the control which is sought to be prescribed statutorily u/s 15 in relation to sale in a market area, the sale by open auction or tender is dispensed with. The result of such dispensation is that there is no basis of regulation by the Market Committee in so far as the Petitioners and the sale of their produce are concerned. The result of this is the very substratum of imposition of fee for the purpose of regulating trading activity in order to compete imposition is absent. Therefore there could be no imposition of market fee in relation to the Petitioners by virtue of the notification dated 22nd March, 1976, as it removes the basis of levy completely.

4.1.1.34 It was submitted without prejudice to the aforementioned submission that in view of the notification granting exemption from Section 15 the

Petitioners should all the more effectively be heard u/s 3(2) read with Section 4(1) of the Act. Since they have been exempted u/s 15 they can legitimately advance objections or suggestions that they should not be subject to a fee u/s 3(2) read with Section 4(1) of the Act, Thus the Petitioners are persons who are substantially interested and have legitimate points of view to be expressed during the course of objections and are entitled to consideration as enjoined by Section 3(2) read with Section 4(1) of the Act.

4.1.1.35 Summation: It is submitted that the impugned Act and its operation in the light of the interpretation given by the Patna High Court in Tomco's case reported in 1986 PLJR 172 renders, the entire Act meaningless. The impugned amendment seeks to do away with Sections 3 and 4 virtually. All that is left as a result of the amendment is the Schedule and the power u/s 39 of the Act to amend the Schedule. That Schedule becomes irrelevant as a result of the observations of the Patna High Court in Tomco's case which presently is the obtaining position in law. It is Anr. matter that the Board may disregard the judgment of the High Court in Tomco's case and may adhere to the specifications of the agricultural produce in the schedule, but that is irrelevant for the purpose of interpreting the provisions of the impugned Act. The procedure u/s 3 and 4 are done away by the impugned Act. The schedule goes because of Tomco's judgment. Nothing is left in the Act. It is submitted that it is imperative that the provisions of the impugned Act are struck down in order to render the principal Act a workable legislative instrument.

4.1.2 Argument of Mr. Raja Ram Agrawal

4.1.2.1 Mr. Raja Ram Agrawal, learned Senior Advocate, appearing on behalf of the Petitioners in C.W.J.C. 6912 of 1993 (M/S Anil Kumar Gupta and Ors.) and C.W.J.C. 13352 of 1992 (Champaran Sugar Company Ltd.) has made the following submissions. He has drawn our attention to the definition clause of the Act and states that though Sections 2(a), 2(b), 2(w), 2(y), 2(z) and 2(zz) define the words specified therein, in their plain and literal meaning they may have a very wide connotation but they have to be restricted to the context, scope as disclosed by the statement of Aims and Objects of the Act and the purpose thereof, and, therefore, have to be given a limited and restricted meaning in accordance with the intention of the Act, so as to exclude the industrial products produced by the industry. To gather Parliament's intention reliance can be placed on the basic facts, e.g., statement of objects and reasons. He has relied on the decision in this connection. He has also relied on the Statement of Objects and Reasons, Parliamentary Debate of the Act. In this connection he has relied on various decisions. He has also relied on the debates of the Legislative Assembly on the Bill relating to the Act. Referring to the history of sugar and sugarcane legislations he has referred to the following:

Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, and various Acts.

He has also referred to various Orders issued from time to time by the Central Government which also define "producer" and "Gur" etc. When they refer to producer or sugar factory, they always refer to production of sugar by means of vacuum pan process.

In view of the above various legislative enactments of the State of Bihar, as well as the Central Government, it is well established and all over recognised that sugar industry, the factory manufacturing sugar by vacuum pan process is an industry and its product, namely, sugar produced by it is an industrial product (and not an agricultural produce), as against open pan process such sugar industry is an organised industry in the medium and large scale sectors. They are treated as an important industry and not as a part of agriculture nor sugar manufactured by vacuum pan process is ever treated as agricultural produce.

When in the definition of the agricultural produce or in schedule a reference is made to processing or manufacture of sugar as such, looking to the context, purpose and object of the Act, even in its extended meaning it intended to regulate the markets for village collage and small industries which are carried on by the farmers/ cultivators or village artisans as an allied occupation in addition to agriculture. The Act never intended to cover the organised sector industries as such, as the evils sought to be eradicated never existed in the organised industries or in respect of their products.

It was submitted by Mr. Agrawal that in view of the decision in State of Tamil Nadu Vs. Kodaikanal Motor Union (P) Ltd., , a Court will be justified in departing from the plain meaning of the word and giving a restricted or limited meaning. In this connection he drew our attention to paragraph 17 of the Report. While relying on K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, , he has drawn our attention to para 20 of State of Tamil Nadu case at page 1989, towards bottom. He has thereafter referred to the maxim *Generalia speciali bus non derogant* (special will exclude general) and in this context relied on various decisions. He has referred to Sections 15 of the Act and submitted that it also imposes a provisions on the sale and purchase except in the market yard and some market yards. As seen above, the main purpose and intention of Bihar Act is to regulate the supply, production, weight, price which (of the sugarcane as well as of sugar) are regulated under various States and Central Government Orders and Acts. It is wholly impossible to carry on the wholesale trade in sugar by auction as envisaged by Section 15. This also. shows that the Bihar Act was not intended to apply to the accepted organised industry and its products as such where no safeguards of the interest of either the agriculturist or the traders required to be done in view of other statutory provisions. Consequently it follows that the organised industry as such and its products were not intended to be covered within the scope of Bihar Act, 1960. So far as molasses is concerned, it is only a by-product in the manufacture of sugar by vacuum pan process. It is not an agricultural produce as such. It is regulated by Bihar Molasses Control Act. 1947. Hence, the molasses can also not be regulated under Bihar Act, 1960.

4.1.2.2 With respect to insertion of Section 33-M in the Act, he has submitted that the same alters the true nature of the character of the fee. In this context he has referred to the statement of objects and reasons relating to the above Act, and the notification dated 20th November, 1992, published in the Gazette Extraordinary dated 30th November, 1992 (page 67 Vol. II) wherein a new Sub-rule as 68(iii) has been inserted. He has submitted that it is well settled that no fee can be raised for general purposes of the State otherwise it will amount to tax. (See *Indian Mica Micanite Industries Vs. The State of Bihar and Others*,); *Sri Krishna Das v. Town Area Committee Sri Krishna Das Vs. Town Area Committee, Chirgaon*,). It was submitted that Section 33M has now an integral part of the scheme relating to imposition of fees. It: has altered the earlier scheme of fee as such and cannot be separated.

4.1.2.3 He has next submitted that no rate of fee (sic) as earlier rate substituted by Ordinance No. 8 of 1988, which had lapsed. Hence no rate is prescribed. As the earlier rate has been substituted by lapse of Ordinance, the old rate is not revived. In the absence of any rate no fee can be imposed. In this context reliance was placed on the decisions in *Govind Saran Ganga Saran Vs. Commissioner of Sales Tax and Others*, and *T. Venkatta Reddy v. Andhra Pradesh* (1085) 3 SCC 198 (paras 19 and 20).

4.1.2.4 On the question of validity of Sections 4-A and 4-B of Bihar Act 4 of 1993, he has adopted the submissions of Mr. Subramaniam and added as follows: Section 4-A(1) proceed on a wrong or mistaken assumption that in the judgment of this Court, Sections 3 and 4 ought to have been applied to deletion/addition to schedule u/s 39 which is not so in fact. Reference was made in this connection to *Delhi Cloth and General Mills Co. Ltd. v. APMC* paras 54 and 55 (supra) and *Hari Pd. v. A.D. Divelkar* AIR 1957 SC 121 at page 131 (para 18 - 2nd column bottom).

4.1.2.5 On the question of discrimination he has submitted as follows: Section 4-A(2) makes a hostile discrimination between traders and markets committee and neither there is any reasonable basis for classification between the two nor such classification has any reasonable nexus to the object sought to be achieved. The addition in the schedule to the Act of any commodity is as such important and it affects very valuable rights of the traders as the deletion of the commodity from the schedule affects the rights of the markets committee. Hence, granting of opportunity of hearing in one and denying the same in the other is violative of principles of natural justice and is also otherwise unreasonable and arbitrary and violative of Article 14 of the Constitution. In. this connection he has referred to *State of Orissa Vs. Sridhar Kumar Mallik and Others*, ; *Baldev Singh and Others Vs. State of Himachal Pradesh and Others*, ; Vol. C.B. *Gautam Vs. Union of India and Others*, .

4.1.2.6 Regarding Section 4B he has submitted as follows: The expression "the notification No. 730 dated 2nd May, 1977 shall be deemed never to have been issued" not covered by any amendment to the substantive provision made by

Section 4A. By the back door this provision purports to nullify the judgment of this Court in D.C.M.'s case (supra) and hence is bad. It is also beyond legislative competence of the Legislature. Further, it may be mentioned that there are five notifications which deleted various items from time to time (details of these notifications are to be found on pages 20 to 26 of Vol. II). Out of these notifications only one notification of deletion has been specifically mentioned which shows the gross discrimination and arbitrariness as no cogent reason has been given to leave all other items except to mention specifically the notification relating to sugar.

4.1.2.7 His next submission was in respect of the effect of exemption notification u/s 42 of sugar mills from operation of Section 15 of the Act. He has submitted that Section 15 is the core of the Bihar Act. When read in the light of Section 3, which provides for "regulating the purchase, sale, storage and process" and a notification is issued exempting the sugar mills, then the main purpose and object of the Act are in substance admitted by the State Government also that the purpose and objects in respect of sugar and sugarcane by sugar mills cannot be fulfilled or achieved under the Bihar Act as it is practically impossible to do. It is important to be noted that levy of fee u/s 27 is only incidental to the main provision relating to. Entry 28 of List. II of Seventh Schedule, under Entry 66 of List II of Seventh Schedule. The said purpose of Bihar Act cannot be imposition of fees. The levy of fee is not an independent power conferred by the Constitution but it is only incidental to the main purpose, as would be apparent from Entry 66 of List II of the Seventh Schedule. In these circumstances, if the main purpose of the Act is dispensed with, the consequential levy of fee would also fall and become invalid and without authority of law, so far as sugar mills are concerned. It is also to be noted that u/s 27(2) the market fee is payable by the purchaser and not by the seller. The seller only collects the market fee as an agent of the market committee. Primary liability is on the purchaser. Therefore, so far as sale of sugar is concerned, the primary liability is only on purchaser and not on sugar mills. Sugar Mills act as an agent of the market committee for recovering the amount. If it is established that sugar factories have recovered the amount from the purchasers but have not paid the same to the market committee, it may be Anr. matter bill many sugar mills have not collected the market fee from their purchasers. In this connection he has referred to Anand Swarup Mahesh Kumar Vs. Commissioner of Sales Tax, .

4.1.2.8 His next submission was that in any event the retrospectivity is for over thirty two years which is wholly unreasonable and arbitrary and hence void. During this period various notifications amending the Schedule either making additions or alterations were issued from time to time. On the basis and faith, which the parties have acted for such a long period, now after a lapse of such a long period an artificial situation contrary to what factually existed and dubbing the same as correct and factual legal position prevalent infact in those times is very much unreasonable and harsh. In this connection he has referred to State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, ; Ujagar

Prints Vs. Union of India (UOI) and Others etc. etc., ; Yadlapati Venkateswarlu Vs. The State of Andhra Pradesh and another, (2nd column towards bottom).

He has submitted that it is a matter of common knowledge that the economic and political policies are of a particular party which is in power in the State. These policies may differ from political party to party. In 1977, when the item of "sugar" was deleted, the party in power was different than the one which is in power today. In this connection he has relied on The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc., .

He has further submitted that it is also well settled that no Parliament can bind its successor. The successor can change the economic and political policies of his predecessor. He has referred in this connection to Blackburn v. Attorney General (1971) 2 All ELR 1380 (running page 87 vol. I), Captain Subash Kumar Vs. Principal Officer, Mercantile Marine Department, Madras,). However, there is no authority laying down that the successor can legally say that his economic, fiscal and political policy of today shall be deemed to be the economic, fiscal and political policy of its predecessor when its predecessor was in the office and the present party was not in the office. This will be wholly unreasonable. Retrospectivity is, therefore, wholly unreasonable.

4.1.2.9. Regarding Rule 82(iii) read with Section 27(2) he has submitted that it makes the seller a collecting agent from a buyer on behalf of the market committee, Rule 82(xi) provides for penalty, u/s 27A monthly returns are to be filed and in default not only penalty but cancellation of licence is also provided, Rules 95, 96, 98, 99, and 104 and. Section 48 provide for various situations. These provisions are wholly impossible of compliance now. It is also wholly impossible to collect fee and deposit for all these periods. Huge liability to pay will arise when the liability is of a purchaser. In this connection he has relied on Anand Swarup Mahesh Kumar Vs. Commissioner of Sales Tax, and J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, . The general principle is that past and closed transactions are not to be reopened. J.T. (1992) 1 287 (para 15). The various factors and reasons mentioned above cumulatively make the retrospective operate a wholly unreasonable and arbitrary.

4.1.2.10 He has next submitted that the notification No. 3027 dated 12.5.1992 published in the Gazette dated 23.5.1992 and notification No. 3028 dated 12.5.1992 published in the Gazette dated 23.5.1992 and the notification No. 229 dated 31.8.1992 are illegal and are liable to be struck down inter alia on the following grounds:

The notification No. 3027 adding "sugar" u/s 39 in the Schedule is dated 12.5.1977 and published in Gazette dated 23.5.1977, while notification No. 3028 u/s 3 is also dated 12.5.1977 published in the Gazette dated 21.5.1977. The submission was that Section 3 notification inviting objection had been issued in respect of an item which was not there in the schedule. The legal procedure would have been after the introduction of "sugar" by notification No. 3027 in the

schedule objections should have been invited thereafter and prior thereto. According to a Division Bench judgment of this Court in *Sree Bahariji Mills Ltd. and Others Vs. State of Bihar and Others*, it has been laid down by Mr. Justice L.M. Sharma (as he then was):

I, therefore, hold that the Schedule stood amended on 15.5.1980 when the order in this regard dated 12.2.1972 was published in the Bihar Gazette and not earlier.

Notification No. 3028 u/s 3 expressing the intention to include "sugar" and inviting objection is dated 12.5.1992 (though published in Gazette dated 23.5.1992) but for the purpose of Section 3 the effective date is 12.5.1992 and hence when objections were invited, the item of "sugar" was not in the schedule as laid down above.

The objections Were neither considered nor any enquiry was made nor the application of mind by the authority concerned took place on the various aspects and points raised therein, hence the final notification No. 229 dated 31.8.1992 issued u/s 4 is illegal.

The proper authority, namely, the State Government, has not considered the objections filed or held any enquiry thereon. No hearing at all was given to the Petitioners. Thus there is complete violation of principles of natural justice and hence the notification u/s 4 is illegal and void, not only on the ground of violation of principles of natural justice but also on the violation of conditions precedent laid down under Sections 3 and 4 of the Act.

The discretion conferred in Section 39, 3 and 4 has been illegally exercised contrary to the policy laid down earlier by accepting the fact that no regulation of sale and purchase was feasible in respect of "sugar" sold by sugar mills in the light of exemption, granted to those sugar mills u/s 15 of the Act. (*Kedar Nath Bajoria Vs. The State of West Bengal*, .

The submission was that the three notification Nos. 3027, 3028 and 229 are liable to be quashed.

4.1.3 Argument by Mr. Basudeva Prasad, Senior Advocate, appearing on behalf of the Petitioners and Appellant In Second Appeal.

He has submitted as follows:

4.1.3.1(I) The submission of the Advocate, on behalf of the Committee, that the Amending Section 4-B, by itself, has the effect of validating the levy declared illegal by the judgment of the Patna High Court in D.C.M's case, does not validate the levy declared invalid by the High Court but not collected, as was the case With Petitioner Harinagar Sugar Mills. The validating provision, if at all, provides for a limited validation of only the levy which was collected.

4.1.3.2(II) While enumerating the valid reasons for non collection of Market Fee by the Petitioners, the learned Counsel stated:

(1) that this Hon''ble Court was pleased to decide a case in relation to the Sugar industries vis-a-vis Market Act, in a judgment commonly know as Belsund Sagar reported in 1976 BBCJ, page 453, in which liberty was given to move the Courts of law if in an appropriate case proper quid pro quo is not being satisfied under the Act.

(2) That on 26th July, 1977, the Petitioner filed a Title Suit No. 84 of 1977 relying on paragraph-20 of the judgment of the Belsund Sagar case and pleaded inter alia the quid pro quo is not being satisfied.

(3) In the written statement (paragraph-13) filed in the said suit, the Market Committee has said "...Market committee has plans to render various types of services in the market area including construction of roads, culverts, etc., which will benefit the Plaintiffs also. It is absolutely wrong to say that these Defendants will not render any service to the Plaintiffs. The provisions of Section 30 of the Act are quite clear that the Markets Committee fund will be spent for various purposes beneficial for the persons in the Market Areas. The scheme of the Act shows that benefit to the people at large is the object for which the fund is to be spent, the Plaintiff having a network of trading, relations which the people in buying sugarcane, selling sugar, molasses etc. does get the benefit and service as envisaged by the Act. The Plaintiff might be getting the services under different other provisions of law but that does not render the Act inapplicable in the case of sugar mills.

(4) In the said suit an order of interim injunction was passed by the Trial Court on 24th August, 1978. Thereafter the said order was also confirmed by the District Judge Bettiah and the Hon''ble High Court and the said suit was decreed in favour of the Plaintiff by the judgment and decree dated 13th March, 1985 and 29th March, 1985.

(5) Thereafter the Market Committee filed an appeal and during the pendency of the appeal neither the High. Court nor the Additional District Judge was pleased to stay the operation of the judgment and decree passed by the Trial Court, therefore the injunction granted continued, However, the appeal of the Marked Committee has been disposed of vide judgment and decree dated 28th August, 1993 and 15th September respectively, by which the injunctions was vacated for the first time.

(6) However, the Petitioner filed a second appeal bearing Second Appeal No. 516 of 1993 which has been admitted and is pending final hearing. In the Second appeal, the judgment passed by the Lower Appellate Court was stayed and thus, the injunction granted by the Trial Court still continues.

(7) It is, therefore, obvious that the Petitioner, acting bonafidely under valid judicial decree in his favour, has not realised market fee since 1977 (See paragraph 26 of the reply of the Petitioner to the counter affidavit of Respondent No. 1 and paragraph! 9 of the reply of the Petitioner to the counter affidavit of Respondent Nos. 3 and 4) and if it is asked to pay such a huge amount since

1977 through the impugned retrospective validating Ordinance Act, it will be confiscatory in nature and will amount also to unreasonable restriction under Article 19(1)(g) as also grossly discriminatory and violative of Article 14 of the Constitution apart from being violative of Articles 301 to 304(b) of the Constitution.

4.1.3.3(III) Article 246 of the Constitution of India does not permit invalidation of a valid law or Notification so as to make the judgment of the High Court ineffective without removing the defects in the law or the Notification (issued under the law) which was the foundation of the judgment. (The Court's verdict (reported in AIR 1993 Patna 43 = 1992 (2) PLJR 253) was based on the absence of the requisite action u/s 39, and, alternatively absence of Notification under Sections 3 and 4 of the Act, assuming that the Notification of cancellation of the Notification deleting Sugar from the Schedule had the effect of its restoration to the Schedule u/s 24 of the General Clauses Act).

4.1.3.4(IV) The newly added Section 4-A(1), in terms, is attracted only for the purpose of issuing a Notification u/s 39 to amend the Schedule by addition of any item and not to the stage after the amendment of the Schedule for making a valid levy. The words "to amend the schedule" are important. The Patna High Court, did not treat the Notification of cancellation of the deletion (Notification dated 21st May, 1977) as one u/s 39 but considered Section 24 of the General Clauses Act for the purpose of restoration of "Sugar" in the Schedule.

4.1.3.5(1) The exemption, u/s 42, of the Sugar Industries, from Section 15 of the Act implies exemption from Sections 3, 4, and 5 of the Act also. If purchases and sales of sugar are not required to be done by the Industry in the Market yard, no creation of Market yard, in the market area, for the transaction by the exempted industries is required. If Sections 3, 4 and 5 are not required, no market fee can be levied u/s 27 of the Act.

(2) The exemption was granted to Sugar Industry (because they were placed under the control of the Central Parliament under Article 246 read with Entry 52 of List I of the VIIth Schedule), to which the mandatory provisions of Clause 4 of the Sugar Control Order, 1966; Section 9(BB) and Section 37 of the Central Excise Act read with Rules 52A and 173G of the Central Excise Rules, Bihar Trade Articles (Licences Unification) Order, 1984; Bihar Essential Articles (Display of Stock and Prices) Order, 1977 etc. etc. were attracted and sugar could not be moved out of the factory premises without a permit and it could not be sold under "auction" or "tender" system and maximum price could not be displayed and fixed as required by the concerned law mentioned above (1985 Suppl. SCC p. 476 and AIR 1968 SC 108).

4.1.3.6(VI)(1) Newly added Section 4A (2) of the impugned amending Ordinance/ Act are ultra vires Article 14 of the Constitution, because of the discrimination that it creates in the matter of the right of hearing between the industry concerned and the Market Committee before inclusion or exclusion of an item

from the Schedule. It is also arbitrary.

(2) Section 4-A (2) taken to its logical conclusion provides for a disastrous situation as all deletions right from 1960, the date when the Marketing Act came in force, to the date of the impugned Ordinance become void for non-compliance of the new requirement of hearing for which it provides.

(3) It has been held in AIR 1975 SC 555 , and in the case Sakuni Chaudhary v. Speaker, Bihar Assembly, in Civil Writ Jurisdiction case Nos. 2709 and 2782 of 1992 of the Patna High Court (popularly known as Speaker's Case) reported in Awaneesh Kumar Singh Vs. Mr. Gulam Sarwar and Another, that denial of natural justice voids the State action concerned. In the Speaker's case the law has been summarised in these words:

From the aforesaid decisions it is clear that the principle of natural justice and fair play, which includes the right to be heard, is a substantial right and not a matter of mere "Procedure". It is basic, substantial and inherent right. It is a part of the fundamental right guaranteed by Article 14. Where there is a violation of a principle of natural justice, it results in arbitrariness, which is the same as discrimination within the meaning of Article 14

4.1.3.7(VII)(I) No question of removal of any defect in the High Court judgment arose, which could be remedied by the Legislature to validate the illegal and unconstitutional, levy and collection of Market fee, which was in violation of Articles 19(1)(g) and 14 of the Constitution. Further, the basis of the judgment, in fact, continues and the amendments are otiose.

(2) The first defect was absence of Section 39 Notification for restoration of Sugar in the Schedule, and, the alternative, was absence of Sections 3 and 4 Notification even if the cancellation Notification be deemed to have restored sugar in the Schedule u/s 24 of the General Clauses Act.

(3) It is important to note that absence of Sections 3 and 4 Notification was not referable to any Section 39 Notification, in the High Court decision. The defect continues and amendment of Section 4-A (1) in terms of the judgment is of no effect.

4.1.3.8 (VIII) Amended Sections 4-A (1) and (2) and 4-B of the impugned amending Ordinance and Act purport to withdraw, with retrospective effect from 1960, (a period of more than 30 years) the benefit of the reliefs granted by the Notification u/s 39 deleting Sugar from the schedule of the Act from 2nd May, 1977 and provide for causing crippling financial burden on the Petitioners for no fault of them because they had validly not collected any market fee on the sales of sugar from the purchasers buying the sugar during the period in question which turned out to be correct as per the judgment in D.C.M's case; and therefore, is arbitrary and unreasonable and violative of Article 14 and 19(1)(g) of the Constitution of India. Please Lohia Machines Ltd. and Another Vs. Union of India (UOI) and Others, . Justice A.N. Sen's declaration of law is binding on this

Court because other Judges of the Bench have not expressed any contrary view, (see AIR 1973 Ker 155 (para 168 to 1706 at page 176), Mahendra Bhawanji Thakar Vs. S.P. Pande and Another, and Prem Prakash Gupta Vs. Union of India (UOI) and Another, .

4.1.3.9 (IX) Section 4-A of the Act and Section 4-B are ultra vires the basic features of the Constitution, which prevent usurpation of judicial power of review, by the Legislature by declaring the Hon"ble High Court's judgment as ineffective and, further bar Judicial remedy against the illegal demands. 1976 SC 2250 (2254-55), 1972 SC 2205, 1971 SC 57 , P. Sambamurthy v. State of Andhra Pradesh, AIR 1987 SC 663; State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, and 1984 SC 1780 ; Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough Municipality and Others, .

4.1.3.10 (x)(1) The Notification u/s 4 at Annexure-7 is void for non-compliance with the requirements of Section 4 of the Act in respect of hearing the objection; and enquiry. In fact no reason for rejecting the objections has been given Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others, ; Bombay Oil Industries Pvt. Ltd. Vs. Union of India (UOI) and Others, and Raghunath Thakur Vs. State of Bihar and Others, .

(2) Section 4(1) contemplates the issuance of a final Notification for the purpose of regulation of an agricultural produce in respect of a specified market area. It also provides, as a condition precedent and in compliance with the concept of procedural fairness, hearing of objection before issuance of a Notification in this regard which is the only valuable safeguard granted to the affected person against the restrictions which are imposed and the levy of fee which will be imposed.

(3) In the present case the procedure established by law in the scheme of Sections 3 and 4(1) with regard to procedural hearing has not at all been followed.

(4) Issuance of a Notification u/s 4(1) was a concluded affair from the very beginning rendering the Act and the actions of the State Government of issuing the final Notification u/s 4(1) invalid and un sustainable (Refer to paragraph 18 of the writ application).

(5) It may be stated that despite the specific request made by the Petitioner, no hearing was afforded. (It is admitted case).

(6) No reasons have been assigned while disposing the said order much less communicated to the Petitioner.

(7) No enquiry has been held.

(8) The representations have not been disposed of by the State Government which is the requirement of the Act.

(9) No authority of the State Government has ever been named which

considered and/or disposed of the objections raised.

(10) The objections which were filed were of valuable nature and were, inter alia:

(a) sugar factories were exempted from the regulatory measures of Section 15 of the Act.

(b) the nature of transaction of the sugar factories was such that the regulatory measures could not at all be applied.

(c) no other State in the country levies market fee on sugar sold by the sugar factories.

(d) the intention to regulate sugar was contrary to the aims and objects of the Market Act.

(e) in any event, the regulation of sugar does not subserve the aims and objects of the Market Act.

(f) Sugar factories are not "Agriculturist" but they are "Industrialist" and they do not need any purported protection of the Market Act.

(g) by the very nature of the transaction, there can be no middleman in respect of the purchase of sugarcane and sale of sugar and molasses.

(h) there can be absolutely no role of the Market Committee, in the storage and processing of sugar and in any event sale, storage and processing of sugar are governed by the Special Acts.

(i) A personal hearing be granted so that the views of the Petitioner could be urged. It was also urged that a reasoned order be passed and enquiry may also be conducted (see paragraphs 17, 18 and 19 of the writ application) (see counter affidavit filed on behalf of the Respondent No. 1. paragraph 7, page 4).

(ii) It does not lie in the mouth of State Government or the Respondents who were duty bound to grant an opportunity of hearing to urge now that no prejudice was caused nor the hearing was needed. This only goes to show that objections were a mere formality and have not been considered in its perspective.

4.1.3.11 (XI) Validity of the Notification No. 3027 dated 12th May, 1992 published in the Gazette on 23rd May, 1992 u/s 39 of the Market Act including sugar in the Schedule:

(1) The power conferred on the State Government by Section 39 of the Act is a discretionary power as inter alia the Section uses the word "may". Discretionary power can be exercised only for achieving the objects of the Act and in accordance with the Policy underlining the Act.

(2) As set out in greater detailed below, the object of the Act is to protect the "Agriculturist" (see statement of objects and reasons published in the Bihar Gazette Extra Ordinary dated 8th December, 1958). In the Statement of objects

and reasons for the amendment bill of 1977 (which was translated into an Act being Act No. 60 of 1982) the word used is "farmer".

(3) The object of the Act is to have "regulated markets" where the Agriculturists or Farmers can sell their produce in the supervision of the Market Committee by open auction or open tender system so that the middlemen can be eliminated.

(4) By a notification bearing No. S.O. 550 dated 22nd March, 1976, sugar factories were exempted from the provisions of Section 15 of the Act. The policy underlying the Act, therefore, is that the transactions of the sugar factory (which is an industry) will not be regulated.

(5) When sugar factories do not have to operate in the regulated market, the object of the Act cannot be subserved by applying the provisions of the Act to the sugar factories.

(6) The said notification is bad on account of procedural unfairness because it was issued and published without affording any opportunity of hearing to the affected parties including the writ Petitioner.

(7) The object of the Act as judicially determined and the purpose of the Act as judicially determined even in the D.C.M's case was to regulate the transactions in agriculture produce and the evil sought to be remedied was the exploitation of the agriculturists at the hands of the traders and middlemen etc. This object is neither served nor the evil sought to be remedied is of any consequence so far as sugar is concerned. Sugar is an industrial product which is neither produced by agriculturists nor sold by agriculturist as such, regulation of sugar serves no purpose under the scheme of the Act and as such its inclusion in the Schedule in purported exercise of power u/s 39 is grossly arbitrary and discriminatory, apart from causing unreasonable restriction in the manufacture and trade of sugar including that relating to inter State trade and commerce. In *Arunachal Nadar v. State of Madras* reported in 1959 Supreme Court page 300, paragraph 5 at page 303 dealing with marketing legislature it has been held that in order to be reasonable, a restriction must have a rational relation to the object which the Legislature seeks to achieve and must not go in excess of that object.

(8) In *Kedarnath's case*, the Supreme Court held that if discretion is exercised in a manner which does not achieve the object of the Act or if it has not been exercised in accordance with the policy of the Act, the exercise of the power would be arbitrary and annulled due to Article 14 of the Constitution, (see *Kedar Nath Bajoria Vs. The State of West Bengal*, last five lines)

4.1.3.12. (XII) Validity of Notification No. 3028 dated 12th May, 1992 published in the official Gazette on 23rd May, 1992 purported to have been issued u/s 3 of the Act (annexure-6A page 73 of the writ application).

(J) For the reasons set out in respect of invalidity of Notification adding sugar u/s 39, the Notification in respect thereof u/s 3 is equally bad.

(2) The Notification u/s 3 is premature because the sugar was not brought validly in the schedule when the objections were invited.

(3) In view of the exemption of the sugar industry from the purview of Section 15, the Market Committee having withdrawn from regulation of sale, purchase etc. of the sugar Mills, the issue of Notification u/s 3 is a result of complete non-application of mind. Moreover, regulating transaction of sugar is of no relevance to the agriculturist.

4.1.3.13. (XIII)(1) The argument on behalf of the Market Committee that Sections 3 and 4 Notifications initially issued referred to all the items of the original Schedule suggesting that expression meant as "from time to time". The actual fact was different, Sections 3 and 4 Notifications related to items of Schedule as on that date on which they were issued. This, besides what has been urged itself required issuance of Sections 3 and 4 Notification after following the procedure prescribed after every new addition by amendment of the Schedule, as has also been held by this Hon'ble Court in D.C.M's case.

(2) Sections 3 and 4 are not merely procedural. They are a combination of substantive and procedural, substantive because the Scheduled item could be subjected to levy of market fee against service rendered by the Market Committee only after the Government Notification under Sections 3 and 4.

(3) Actions under Sections 3 and 4 are not legislative in character which could be obliterated with retrospective effect by a retrospective amendment of the law by adding a provision. They involve a quasi judicial Act in compliance of the provisions concerned for creating liability.

While arguing as to why Market Act should not be made applicable to the Sugar Industry in Bihar Mr. Prasad stated that its application to the Sugar Industry is wholly unjust, unwarranted and unlawful. He further pointed out that although almost all the States have Agricultural Produce Markets Act of their own, in no other sugar producing State such as Maharashtra, U.P., Gujrat, Tamilnadu, Andhra Pradesh, Karnataka, Punjab and Haryana (which account for more than 95% of the India's sugar production) has the sugar industry been subjected to their respective Agricultural Produce Markets Act. A copy of the fax message dated 18th and 19th November, 1993 received from Indian Sugar Mills Association setting out the aforesaid fact is enclosed and marked annexure-I. Mr. Prasad stated that this fact alone glaringly brings put grave injustice being caused to the Bihar Sugar Industry.

(ii) The undisputed basic objective of the Act is to ensure that the farmer/agriculturist gets a fair and reasonable price for his agricultural produce and to achieve the aforesaid objective the Act basically provides only for the regulation of sale, purchase, storage and processing of the agricultural produce of the farmer/agriculturist as would be evident from Sections 3 and 4 which are the very foundation of the Market Act.

(iii)(a) The fact of the matter is that the Bihar Government itself realised that it was impossible to regulate the sale and purchase of sugarcane, sugar and Molasses qua the sugar industry. Therefore, by Notification bearing No. S.O. 550 dated 22nd March, 1976 exempted the sugar Mills from the provisions of Section 15 of the Market Act, which is the heart and soul of the said Act as far as the regulation of sale, purchase, storage and processing is concerned.

(iii)(b) It was submitted that exemption granted from the provisions of Section 15 of the said Act, clearly establishes that the Market Act can play no role in the regulation of sale, purchase, storage and processing of the items relatable to sugar industry namely, sugarcane, sugar and molasses.

(iv) One should examine very minutely as to whether the sale, purchase, storage and processing of the items relatable to the sugar industry namely, sugarcane, sugar and molasses is at all feasible as per the provisions of the Market Act and whether the Market Act can play any role whatsoever in ensuring that the agriculturist receives a fair price for the sugarcane that he supplies to the Sugar Mill.

(v)(a) As far as the regulation of buying and selling of sugarcane is concerned, the Market Committee can not play any role whatsoever in ensuring that the sugarcane grower realises a fair price for his sugarcane. The fact of the matter is that all aspects of sugarcane supplied to the sugar factory are covered since about 1937 by special enactments such as Bihar Sugar Factories Control Act, Sugarcane Control Order, 1966 issued under the Essential Commodities Act, Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1981 (hereinafter referred to as the "Sugarcane Act") and several orders" and notifications issued thereunder.

(vi)(b) The minimum sugarcane price to be paid to the sugarcane growers is fixed by the Government of India under the provisions of the Essential Commodities Act which mandatorily requires that a fair price, ensuring a reasonable return to the cane growers is paid. However, in practice, over and above the statutory minimum cane price fixed by the Government of India, the State Government including the Government of Bihar, after taking into consideration the views of the cane growers and the sugar factories announce the cane price to be paid by the sugar factories to the cane growers at levels much higher than the minimum cane prices fixed by the Government of India.

(v)(c) Under the circumstances it would be obvious, that by the acts and deeds of the Central Government and the State Government the sugarcane grower is assured of a fair price for his sugarcane. The Market Act plays no role and can play no role whatsoever, in the determination of the price to be paid to sugarcane growers by the sugar factories.

(v)(d) It would be abundantly clear that the mode of sale prescribed under the Market Act i.e. by open auction or tender system, which is the very foundation of the Act, cannot at all be made applicable to the purchase of sugarcane by the

sugar factories.

(v)(e) The Petitioner's sugar factory receives every day over 2000 tyre-carts, 400 trailers and 50 trucks bringing in sugarcane and it is physically impossible to auction each of them or to enter into separate agreement as stipulated under the provisions of the said Act.

(v)(f) In fact realising the impracticability of this provision, the Authorities have as stated above, exempted the sugar factories from operation of the Section 15 of the said Act.

(v)(g) Further it is a sine qua non of the Market Act that the sale and purchase of the agricultural produce should take place in the regulated market yard itself with a view to ensure that the buyers and sellers come face to face at a given place, eliminating the middlemen for the purpose of carrying out the transaction.

(v)(h) The concept of the transaction taking place in the market yard or in the sub-market yard cannot at all be implemented in the case of sugar factories and in these circumstances it is no wonder that the Market Committee has made no attempt whatsoever even to establish/construct any market yard/sub-market yard for the use of sugar factories for their purchase of cane, sale of sugar and molasses. The authorities have illegally declared the private factory premises of the Petitioner as a sub-market yard which itself shows the impracticability of applying even the basic concept of "Market Yard".

(v)(i) As far as storage of sugarcane is concerned it would be readily conceded that it is impossible to store sugarcane say in a godown or some such place and no where in the factory. Sugarcane has to be crushed immediately after harvesting and not stored, which would only lead to deterioration in the quality of sugarcane. The question of providing storage for the sugarcane thus does not at all arise. In fact the Market Committee has not even undertaken any step whatsoever in this direction.

(v)(j) As far as the processing of sugarcane is concerned, the sugar is manufactured out of sugarcane and there are elaborate laws and rules governing the functioning of the sugar factories such as Industries Development and Regulation Act, Bihar Sugarcane Act, Essential Commodities Act, Sugar Control Order passed thereunder, Bihar Factories Act etc., which control the entire operation of the sugar factory and leave no scope whatsoever for the Market Committee has rightly taken no step whatsoever to regulate the processing of sugarcane. (vi)(a) So far as realisation of a fair price by the sugar factory for the sugar and molasses produced is concerned the sugar factory is not an Agriculturist but an Industrialist and is quite capable of looking after its own interest and it does not need, and the Market Committee cannot give, any assistance for this purpose.

As far as regulation of sale of sugar is concerned, a considerable portion (40 percent) of the sugar produced by the Petitioner sugar factory is taken over by

the Government of India as "levy sugar" at the prices determined by the Government of India under the provisions of the Essential Commodities Act. The provisions of the Market Act cannot play any role whatsoever in the price fixation of levy sugar.

(b) As far as regulation of sale of "free sugar" is concerned, the provisions of the Market Act again can play no role whatsoever in determining the price of free sugar as the sale of free sugar is affected, in the case of Petitioner at Bombay, on telephone after getting prices from all over the country and cannot be done by open auction or tender in the market yard" as required by Section 15 of the Market" Act. It is impossible to effect sale of free sugar within the market yard by open tender etc. as stipulated under the Market Act as inter alia the prices of free sugar prevailing in the relevant parts of the country; can never be made available in the market yard, nor would the large number of purchasers be attracted to the Market yard and there is wide fluctuation in free sugar price which can. never be effectively monitored in the market yard. Thus it would be obvious that the Market Committee can play no role in the sale of sugar, which is governed by several Central and States Act and the orders passed thereunder.

(c) As far as regulating sale of molasses is concerned, the price of molasses at all material times was fixed by the Government of India/State Government and the Market Act could not play any role whatsoever in the determination of the price of molasses at which the molasses has to be sold by the sugar factory.

In this context, the preamble of the Bihar Molasses (Control) Act, 1947 is relevant to be perused which runs as follows:

The Act to provide for the control of the distribution, supply, storage and price, of molasses produced by factories in the State of Bihar.

Certain provisions of the Molasses Act are relevant for appreciation of the issue.

Section-8 (price of molasses)

Section-4 (Movement of molasses)

Section-4 (Movement of molasses)

Section-9 (Provision of storage tanks etc.)

Section-5 (occupier of factories and

stockists not to enter into agreement except with the permission of Controller).

Section-3 (submission of returns by

occupier of factory and stockist.

Section-6 (power of Controller to issue directions).

Section-7 (compliance of the directions issued by the Controller)

and thus it is again obvious that the Market Act can play no role whatsoever in the said of Molasses

(viii) From the aforesaid it would be abundantly clear that the important and, basic provisions of the Market Act viz. regarding regulating sale, purchase, storage and processing are totally inapplicable, both in law and on facts, in the case of transactions of sugar factories relating to sugarcane, sugar and molasses.

(ix)(a) The Petitioner respectfully submits that if the Petitioners were to be made to follow the provisions of the Market Act (which is physically impossible to do so) they would be contravening several important provisions of the sugarcane Act, Essential Commodities Act, Sugar Control Orders, Molasses Control Order etc. etc:

(b) By way of illustration the Petitioner submits that whereas there is no restriction under the Market Act for the Petitioner to purchase sugarcane from any source as long as the cane is brought to the market yard, under the Sugarcane Act the Petitioners are restrained from purchasing sugarcane coming from the reserved area of other sugar factories. The sugarcane growers cannot bring their agricultural produce (sugarcane) into sugar factory precinct of the Petitioner and claim a right to auction the same to other licensed dealers as provided under the Market Act. Similarly, sugar factory cannot sell sugar or Molasses except to recognised dealer/allottee and is not entitled to sell sugar or molasses to any other person even though such a person may be a licensed trader within the meaning of the Market Act.

(c) There are several other contradictory and conflicting provision between the Market Act on the one hand and the laws and legislation such as Sugarcane Act, Molasses Control Order, Sugar Control Order, Essential Commodities Act and a host of other laws governing sugar factories. A copy of an illustrative list of the Acts and Orders governing the sugar factories is annexed hereto and marked as Annexure-II which is a part of this note.

(x) The Management Control and Regulation of the Sugar Factory precincts lies with the Managements of the Sugar factories themselves and no Market Committee can exercise any control whatsoever therein nor have they ever attempted to do so for the past several years. A mere deeming Notification (as was issued around 1981 u/s 5 of the Market Act) notifying sugar factory precincts as sub-market yards (which in any event, is blatantly illegal) cannot, therefore, solve the problem especially as the Market Committee, even in fact, does not exercise any control whatsoever over the affairs in the sugar factory precincts.

(xi) It is also worth examining as to what is the purpose of levying market fee on sugarcane, sugar and molasses. From the detailed observations made hereinabove, it would be abundantly clear that not one of the objectives sought to be achieved under the Act, can be achieved by levying Market fee on the said items.

(xii) It is settled law that fee is charged for a special service being rendered in connection with which the fee is charged. In the year 1954, in a case reported in A.I.R., 1954 Supreme Court page 282, it has been laid down that a fee is sought in return or consideration for services rendered. As such there has to be an element of quid pro quo in the relation of fee and fee realising authority may be called upon to show the co-relationship between the fee levied and the services rendered by it to the person who is required to pay the fee. Since there is absolutely no element of quid pro quo in the transactions of the sugar Industry by the Market Committee, the proposed levy of fee on sugar is without authority of law and would amount to a tax which the State Government is not competent to levy.

It is necessary to state here that the Market Committee under the Act cannot render any service with regard to the items relating to the sugar Industry, nor any service is being or has ever been rendered by the Market Committee nor is the Market Committee (under the scheme of the Act, Rules and bye-laws) capable of rendering any service with regard to the items pertaining to sugar Industry.

(xiii) Sugar factories do not need any service within their precincts. They are fully equipped with the infrastructure connected with the purchase of sugarcane, sugar and molasses sales, and therefore, to forcibly impose market fee on sugar Industry knowing fully well that neither the factories need any service, nor the Market Committee are capable of rendering any service; is totally against the letter and spirit of the Law. Such a move would be most unfair, unjust, inequitable and totally illegal. If a further burden by way of market fee is added to the already high cost of sugar produced in Bihar, the Sugar mills in Bihar would be wholly incompetent in the fiercely competitive national Market resulting in almost total ouster of Sugar Mills of Bihar from the National market.

(xiv) It is significant to note that overwhelming majority of about 30 sugar factories in the State of Bihar are incurring heavy losses which implies that Sugar factory even in the existing circumstances are unable to realise a price, for sugar, which is commensurate with the cost of production. The levy of market fee on Sugar Industry would further increase cost and increase the losses that the sugar factories are already incurring and lead to eventual extinction of the sugar Industry from the State. The entire economy of the State will be very badly effected with the collapse of this most important and oldest industry and millions of people including sugarcane cultivators, factory and agricultural labour and persons engaged in allied activities related to the Industry would be thrown out of their employment and occupations and lose their means of livelihood, Therefore, the levy of market fee on sugar industry should be withdrawn/struck down.

(xv) The Petitioner submits that it is imposition of such irrational and unlawful imposts and the wrong policies followed by the State Government that has contributed towards the decline of the sugar Industry in Bihar which are facing

extinction. Thus, in the 1930s Bihar used to produce about 35% of the Country's sugar production but in the 1990s Bihar contribution has dwindled to hardly 3%. Almost 80% of the Bihar's approximately 30 sugar factories are already sick and are on the verge of collapse.

(xvi) The Petitioner most respectfully submits that the larger aspects should also be kept very much in mind as to how the imposition of the market fee would affect the sugar industry of Bihar vis-a-vis sugar industry in the rest of the country.

(xvii) The Petitioner submits that appreciating the merits of the sugar industries case that no market fee should be levied on the sugar Industry, the popular Government of Bihar had decided to withdraw market fee on sugar around 2nd May 1977. Again the withdrawal of market fee on sugarcane was announced around 9th April, 1987 by the late Chief Minister of Bihar, Sri Bindeshwari Dubey. Further Anr. Chief Minister of Bihar Shri Bhagwat Jha Azad announced around 12th November, 1988 the withdrawal of market fee on sugarcane. However inspite of aforesaid repeated decisions/announcements from the highest authorities, the said announcements were never put into effect, apparently due to be stranglehold of the vested interests in perpetuating the illegal, unfair and unjust levy on the sugar industry.

4.1.3.14. From the aforesaid it would be abundantly clear that there is absolutely no justification for applying the Market Act to the Sugar Industry. It can serve no useful purpose at all and it would only go to further cripple the Bihar Sugar Industry, which is already facing extinction. None of the objectives of the Market Act can at all be achieved by imposing the same on the Sugar Industry. If the entire matter is considered in a fair and just manner, the inescapable conclusion would be that there is no case whatsoever for applying the Market Act to the Sugar Industry.

4.1.4. Argument of Shri Ramesh Kumar Agrawal, learned advocate appearing on behalf of the Petitioners in C.W.J.C. Nos. 610, 756 and 835 of 1993.

4.1.4.1. He has filed a written argument to the following effect while adopting the entire argument advanced by Sri Gopal Subramaniam, Shri Raja Ram Agrawal and Sri Basudev Prasad in analogous cases, he has made the following additional submissions.

4.1.4.2 Regarding impugned notification No. 3028 dated 12.5.1992 issued u/s 3, he has submitted that the Petitioners have not filed any objection because the aforesaid notification does not cover sugar for the following reasons. Admittedly, notification No. 3027 dated 12.5.1992 issued u/s 39 was published in the Bihar Gazette dated 23.5.1992 and, therefore, in view of the law laid down by this Court in the case of Bihariji Mills (Supra) "sugar" stood added in the schedule of the Act only on 23.5.1992 and not prior to 23.5.1992; as such on 23.5.1992 "Sugar" became schedule item. Notification No. 3028 dated 12.5.1992 inviting objections only with regard to items mentioned in the present schedule means

items in schedule as existed on 12.5.1992 Since "sugar" was validly added in the schedule on 23.5.1992, notification No. 3028 dated 12.5.92. i. e., prior to sugar becoming one of the scheduled items, cannot cover "sugar" and therefore, the notification No. 3028 issued u/s 3 is not in relation to sugar.

4.1.4.3. Regarding impugned notification No. S.O. 229 dated 21.8.1992 issued u/s 4, he has submitted as follows: Since the notification No. 3028 dated 12.5.1992 issued u/s 3 does not cover "sugar" notification No. 229 dated 21.8.92 also cannot cover "sugar". In view of the aforesaid reasons market fee cannot be realised on sale and purchase of sugar for want of proper notification under Sections 3 and 4.

4.1.4.4 Regarding impugned amending Ordinance /Act he has submitted as follows. So far as Section 4-A(1) is concerned, this new provision is meaningless because previously also there was no requirement of following provisions of Sections 3 and 4 for amending the schedule of the Act. So far as Section 4A (2) is concerned, the nature of this new provision is such which cannot be enforced with retrospective effect and it can be enforced always prospectively, because the State Government has already issued five different notifications as mentioned below in the last thirty two years.

(a) S.O. 750 dt. - Sugar and some other Items were deleted

2.5.1977.

(b) S.O. 55 dt. - Rice bran was deleted.

1.4.1976

(c) S.O. 1056 dt. - Total 16 items were deleted.

14.7.1981

(d) S.O. 1002 dt. - Milk (only liquid milk) was deleted.

21.8.84

(e) No. 9600 dt. - Lah was deleted.

23.7.1986

4.1.4.5 So far as Section 4-B is concerned, he has submitted as follows: This new provision does not amend any provision of the principal Act and this is only validating provision. It is well settled law that nothing can be validated unless there is amendment in the law. In this connection he has referred to C.W.J.C. 1238 of 1990.(R) disposed of on 15.2.1991 M/s. Central Roller Flour Mills (P) Ltd. Para 25. Mere by declaration that "notification No. 730 dated 2nd May, 1977, shall be deemed never to have been issued" actual fact cannot be changed. The object of a validating law is to validate an invalid Act by curing the defects pointed by the Court and not by creating the new defect. In this connection he relied on D. Cawasji and Co., Mysore Vs. State of Mysore and Another, and Bimla

Nand Prasad and Others Vs. State of Bihar and Others, .

4.1.4.6 In order to fill up the lacuna, as pointed out by this Court in DCM's case, "sugar" has been again added in the schedule of the Act by notification dated 12.5.1992 and, therefore, declaration in respect of notification No. 730 dated 2.5.1977 made subsequently for the first time on 13.10.1992 in Section 4B is not effective.

4.2. Argument on behalf of the Respondents.

4.2.1. Arguments of Mr. H.N. Salve, Senior Advocate, Supreme Court, appearing on behalf of the Respondent Agricultural Marketing Board in all these cases.

4.2.1.1. Mr. Salve has made oral submissions and also filed written submissions.

4.2.1.2 On the question of constitutional validity of Section 4-B he has submitted as follows

Section 4B, read in the proper order and shorn of unnecessary words, comprises of four parts-

(i) The first part provides that Notification No. 730 dated the 2nd May, 1977 shall be deemed not to have been issued.

(ii) The Second part declares the levy and collection made under the Act to be valid.

(iii) The third part bars prosecution of legal proceedings for the refund of fees.

(iv) The fourth part bars a challenge to the recovery of fee on the ground that the liability ceased on the issuance of the notification dated 2.5.77. Referring to the Delhi Cloth and General Mills Co. Ltd. and Others Vs. The Agricultural Produce Market Committee and Others he submitted that the Court had held that the cancellation of the Notification dated 2.5.1977 by the subsequent Notification of 21.5.1977 was not valid in law. Referring to para 54 of the judgment he submitted that the law laid down by this Court was that the notification dated 2.5.1977 was legally ineffectual and that the notification dated 2.5.1977 deleting sugar still held the field. The deletion of sugar from the schedule was obviously contrary to the legislative policy which is apparent also from the attempts to undo the notification by the executive itself. Thus a defect occurred in the act due to an erroneous act of the delegate. To cure this defect, the plenary legislature overrode, by a legislative measure, the amendment made by the delegate to the Act (the schedule being a part of the Act). Such a legislative measure is clearly within the Legislative competence and falls clearly in the class of Curative legislation. The judgment of this Court is on the basis that the Notification 2.5.1977, deleted "sugar" from the Schedule of the Act. The legality of the notification of 2.5.1977 was not in question-before this Court. As a result of the retrospective nullification of the amendment to the Schedule by the legislative retraction of the notification, the law underlying the judgment has been modified. The basis of the judgment i.e. the notification dated 2.5.1977

having been taken away, the second, third and fourth parts of Section. 4 B, which are validating clauses in common form, are clearly within the legislative competence. The Competence of the plenary Legislature to override an amendment to the Act made by the delegate is not conditional upon the existence of any defect in such amendment by the delegate and it may be even a matter of policy. In the instant case it is clear that the deletion was itself an error, and was sought to be rectified within 19 days-- only that the procedure followed therefore was found to be legally untenable. Thus, Section 4B does not need any sustenance from Section 4A for its validity.

The contention that on account of the attempted deletion of the 2nd May, 1977 notification by the 21st May 1977 notification Section 4-B is either redundant or would fail is fallacious in that (a) this Court held that the 21st May, 1977 notification was invalid and legally ineffectual. Having so held, this Court went on to further hold in addition, that even if the 21st May, 1977 notification could be treated as reintroducing sugar in the schedule, it would in the absence of a further notification u/s 4, not result in the levy of a fee. Thus, the suggestion that this Court merely held the fee Unenforceable because of the absence of Section 4 notification is not correct, in that merely because the Court held that a notification u/s 39 must in addition be followed up by a notification by Section 4 does not detract from the finding that the impugned notification dated 21.5.1977 was illegal and void. This being so, it was open to the Legislature to undo the effect of the notification dated 21.5.1977. There is a basic difference between the notification of 21.5.1977 and the validating Act. While the notification of 21.5.1977 only sought to prospectively cancel an earlier notification, the legislation retrospectively supersedes the notification of 21.5.1977. The correct position in law then would be that even if the Notification dt. 21.5.1977 is held to be legally alive, it is the legislation which renders it redundant and superfluous and not the converse. The power of a Legislature to declare retrospectively that an Act of its delegate shall be taken as never having been done is not denuded by that delegated attempt to cancel its own act particularly when the delegate can only act prospectively and not retrospectively. The use of the Words "...as amended..." in Section 4B do not relate only to Section 4A, but also relate to the amendment proposed by Section 4B itself. As submitted that the effect of the first part of Section 4B is to amend the Act (i.e. the schedule which is a part of the Act) by nullifying the deletion of "Sugar" from the Schedule. The further use of the word as amended is therefore inevitable because the validation can only be on the basis of the amended law. Thus, even if Section 4A is ignored, there is an amendment to the Act brought about by the first part of Section 4B. Thus, Section 4B itself having amended the Act, goes on further to declare that notwithstanding any judgment or decree of any Court, the act as amended would prevail and no proceedings etc. would lie for either obstructing recoveries or effecting refunds. Assuming therefore, that there is some constitutional infirmity found in Section 4A Section 4B will stand on its own and even if Sections 4A is done away with, the amendments made by the impugned Act, namely, the

retrospect live amendment to the Schedule is the foundation of the validation, which, can stand on its own footing. Therefore, the use of the words "as amended" in Section 4B is necessary. The contention that the retrospective insertion of Section 4B is violative of Article 19(1)(g) is untenable inter-alia for the reason that: (a) admittedly, all the Petitioners (except Hari Nagar Sugar Mills) have collected the amount of fee from the buyers and have also deposited the fees payable on sugar. Thus no hardship by way of fresh liability arises on account of the retrospectivity, (b) Harinagar Sugar Mills have withheld the deposit of fees on entirely different grounds-this ground based on the illegality in the notification of 21.5.77 has been raised for the first time. In this context it was submitted that significantly even in the suit filed by Hari Nagar in 1977 which was disposed of in 1985--no issue was raised on the question whether the Notification dated 21.5.1977 was invalid on the grounds on which the High Court found it illegal. Besides none of the Sugar mills, prior to the judgment in DCM case ever challenged the validity of the two notifications. They were not even parties to the said case, (c) The question of unreasonableness would arise where the liability is unforeseen. In the instant case it cannot be said that the liability is unforeseen. The very deletion of sugar from the Schedule was in questionable circumstances. Besides, within 19 days the process was sought to be rectified by issuance of the amending notification dated 21.5.77. It was only in 1992 that this Court declared the notification of the 21st May, 1977 to be invalid, (d) a levy could constitute a restriction only when it results in serious detriment to the right to carry on trade. The Petitioners have not even placed - facts as would sufficiently make out a prima facie case under Article 19(1)(g) so as to shift the burden on the State to make out a defence under Art.19(6), (e) the State Government and the Board have not accepted the judgment of this Court and the entire matter is at large as appeals are pending in the Supreme Court. It cannot, therefore, be said that any rights have-accrued by virtue of the Notification of 2nd May, 1977, and its withdrawal in 1993 casts an "unforeseen" liability.

4.2.1.3 On the question of validity of Section 4-A(1) he made the following general submissions. Section 3 read with Section 4 confer upon the Government, the power to create market areas. The exercise of this power has two dimensions, namely (a) the geographical dimension which requires the Specification of area and (b) the commodity dimension, namely, the commodities to which the Act is to be applied. Section 3(1) read with Section 4 provides that in relation to a "market area" the State Government may, by notification, cover all such commodities which, constitute agricultural produce within the meaning of the Act. There is no ceiling imposed by the statute on the number of commodities which the State Govt. may include in relation to a market area. Thus, it may even include, in relation to a market area, all agricultural produce. This object can be attained in two ways.

(a) by specifying the commodities individually by description, in the body of the notification or (b) by referring generally to the schedule and thereby covering all commodities which fall therein.

A perusal of the various Notifications shows that it was the latter method which was followed. In other words, all the notifications, creating market area (a) specified in the area covered, and (b) referred to the schedule generally-to indicate the commodities covered in relation to such market area.

Prior to the amendment of the Act by insertion of Section 4-A, where the Notification u/s 1 referred generally to the Schedule without specifying any commodity by name, there was a doubt as to whether an addition of a commodity to the schedule or a deletion of a commodity from the Schedule would, pro Canto bring the newly added commodity within the sweep of the notification u/s 4 (or exclude the deleted commodity from the sweep of the notification u/s 4) without following the procedure prescribed in Section 3.

This Court in D.C.M.'s case held that "...even if some time later sugar could again be sought to be treated as an agriculture produce by virtue of the notification dated 21.5.77, no market fee could be realised solely on that basis as there was no fresh notification under Sections 3 and 4 of the State Act to that effect..."

In this connection reference may be made to Section 4(3) of the State Act which authorises the State Government to issue a notification to exclude in any market area any agricultural produce included in the notification issued under Sub-section (1) of Section 4. No such notification was issued either. Thus, this Court construed the law as requiring a fresh compliance with Section 3 and Section 4 every time the Schedule was amended, without which there would be no inclusion or exclusion of a commodity from the operation of a notification u/s 4 this was on the basis of Sub-section (3) of Section 4.

The purport and effect of Sub-section (1) of Section 4-A is to make the provisions of Sections 3 and 4 inapplicable to an amendment of the Schedule by addition of any item. As a result of this amendment, the legislative intention is to provide clearly that any change u/s 39 to the schedule would apply pro tanto to an existing notification under Sections 3 and 4. In other words, where the commodities are included by reference generally to the schedule in Notification u/s 4, then an amendment of the schedule would, without more, have the effect of bringing in the newly added commodities to the Schedule within the embrace of the existing Notification u/s 4. It is submitted that there is nothing unusual in such a statutory device. Any other interpretation would defeat the clear intention of the Legislature. The only objective of including an item within the Schedule is to bring it within the regulation and control of law. That being so, a notification u/s 4, which is made generally with respect to the Schedule, must necessarily cover all items which are from time to time brought within the Schedule. This principle cannot and will not apply where a Notification only specifies by description some commodities, however, in point of fact most notifications do not expressly specify any particular commodity but refer generally to the Schedule.

The procedure for creating a market area and for including commodities which

are to be dealt with in such market has been evolved by Legislature. It is equally competent for such Legislature to modify such procedure. The effect of Sub-section (1) of Section 4A is to dispense with a fresh inquiry u/s 3 and a notification u/s 4 at the time of incorporation of new commodities where the original notification generally covers all the commodities within the Schedule-the amendment being made only to the Schedule. In other words, it modifies Sub-section (3) of Section 4 in so far as a class of Notification it concerned.

The judgment of this Court was based on Sub-section (3) of Section 4 which made the addition of any commodity in whatsoever way, subject to the rigour of Section 3 This law is modified. This procedure earlier prescribed by the Legislature has now been modified by the impugned legislation and, therefore, the basis underlying the judgment stands substantially altered. The validation clause is therefore within the legislative competence of the Legislature.

So far as the challenge under Article 14 is concerned, he has submitted as follows There is no discrimination involved in the modified procedure. The addition of items to the Schedule brings trade in the newly added commodity within the protective umbrella of the Statute. Ex hypothesi, it affects the middlemen and Ors. whose trade is sought to be regulated, and expands the ambit of the protection sought to be afforded by the statute. The removal of an item from the schedule result in trade in such item losing the protection of the law. Ex hypothesi, such a change would affect the weaker sections which are intended to be afforded the protection of the law. Thus the addition and deletion affect two separate classes of persons. Prescribing different procedures for addition as against deletion is in no manner discriminatory. The addition or deletion to a Schedule clearly is a function which is legislative in nature. In this connection, he has referred to the Supreme Court's decision in AIR 1981 1127 (SC) wherein it was observed as follows:

... the making of a declaration, in the context, is certainly an act legislative in character and does not oblige the observance of the rules of natural justice.

The context in which these observations were made was a notification relating to the shifting of a market area, and would apply a fortiori to the constitution of a market area.

The law in Well settled that there is no requirement to comply with the principles of natural justice in exercise of powers which are legislative in nature. In this context reliance was placed on the decision in M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, .

The right to make a representation against the proposed Notification u/s 3 undoubtedly is a valuable right, but is more in the nature, of a right to participate than for compliance with the principle of natural justice stricto sensu. Once an area is declared a market area generally with regard to all items in the Schedule, the exclusion of the right to participate in an expansion of the list of commodities, in these circumstances I would not by itself, make the law

unconstitutional.

4.2.14 On the question of validity of Section 4-A(2) he has submitted as follows: There is nothing objectionable in Section 4-A(2) of the Act, as it merely seeks to preserve the law as it stood prior to its amendment by the Act in question, insofar as it related to exclusion of commodities from the protection of the Act. This Court, in D.C.M.'s case (para 55) held as follows: "... in this connection reference may be made to "Section 4(3) of the State Act which authorises the State Government to issue a notification to exclude in any market area any agricultural produce included in the notification issued under Sub-section (1) of Section 4. No such notification was issued, either..."

Section 4(3), on its plain terms applies to additions and deletions. Thus, all the deletions from the Schedule would also require a fresh Notification u/s 4 read with Section 3. Section 4-A(1) of the impugned Act however seeks to do away with this requirement of a fresh compliance under Sections 3 and 4 every time there is an addition to the Schedule u/s 39. The legislature, however, did not want to withdraw the protection of the procedure evolved under Sections 3 and 4 while deleting items from the Schedule which deletions affected the weaker sections of the society whom the Act is designed to protect.

Section 4A(1) did not expressly affect the pre-existing law insofar as deletions from the schedule were concerned. However, to preclude any argument that the whole of Section 4(3) (namely both in relation to additions as well as deletions), by implication, under the amended scheme of the Act, becomes inapplicable to amendments to the Schedule, the legislature has inserted Section 4-A(2). Section 4A(2) thus merely clarifies, as a measure of abundant caution, that the legislature intended to preserve the law laid down by this Court in relation to deletions from the Schedule. On the question of effect of expiry of the Ordinance of 1988, he has submitted that expiry of Ordinance by efflux of time would result in revival of the law repealed, as the principle of Section 7 of the General clauses Act in relation to the effect of repeal do not apply to a temporary Act. Unless an intention is clearly evinced to the contrary, if an Act which repeals an earlier Act in itself only a temporary Act, the general rule, is that the earlier Act is revived after the temporary Act is spent. In this context he had referred to the decision in State of Orissa Vs. Bhupendra Kumar Bose, . However, vested rights under a repealed law, would be protected u/s 6 of the General Clauses Act. Thus, on the expiry of the Ordinance, the original Section would be revived and would operate *proprio vigore*.

4.2.2. Argument on behalf of the State of Bihar

4.2.2.1 On behalf of the State of Bihar no oral submission was made but a written argument was submitted.

4.2.2.2. Referring to, the history and background of the case it was submitted as follows:

All the writ petitions challenged is with regard to the 1993 amending Act. By the impugned Act Section 4-A and Section 4-B were inserted. Under Sub-section (iii) of Section 1 of the Act, the provisions of the amending Act have been made retrospective in operation and deemed to have come into force with effect from 6th of August, 1960 i.e. the date on which the original Act (received the assent of the Governor. Section 2 of the amending Act provides that Sections 4-A and 4-B shall be inserted and shall always be deemed to have been inserted. Thus by deeming fiction these two sections will be deemed to have always existed, as if these sections were, in the original Act. The amending Act has been passed in view of the Division Bench judgment of this Court. In the above case a challenge was made on various grounds; namely that the Agriculture Produce Market Act is repugnant to the various Central Acts, levy of Market Fee is bad as there is no quid pro quo, levy of Market Fee amounts to double taxation and that Sugar which was an agricultural produce as specified in Schedule-I of the Act was deleted vide Notification S.O. No. 730 dated 2.5.77 and Notification dated 21.5.77 whereby and whereunder Notification No. 730 dated 2.5.77 was withdrawn. The High Court had held that Sugar was excluded from Schedule of the Act as item of Agricultural Produce and merely by issuing a subsequent Notification dated 21.5.77, Sugar was not automatically introduced. It was further held that a commodity may be an item of Agricultural produce within the meaning of the Act but no Market Fee can be realised on sale or purchase of the commodities unless and until there are appropriate notifications under Sections 3 and 4 of the Act. Reference was made in this connection to paragraph 55 of the judgment quoted above. The Amending Act is to be considered in this background. The object of the Amending Act is to cure the defects noticed in the D.C.M's case and to validate the levy and collection of Market Fee on Sugar. It is submitted that the Legislature has the power to cure the defects in a statute pointed out by any judgment and validate the levy and collection of tax which prior to the validating Act was invalidly done. The Legislature can cure the defect by amending the provisions of the Statute and such a validating and curative Act can have retrospective operation. By the Amending Act, the Legislature intended, by inserting Section 4-A and Section 4-B that the Notification dated 2.5.77 shall have no effect as if it was never issued. The Legislature in plenary exercise of power, has cancelled the Notification dated 2.5.77 as if it was never issued. The effect and validity of retrospective legislation as considered by the Federal Court of India, the Supreme Court and High Courts in number of decisions in the case reported in AIR 1968 Supreme Court page 1138 (paras 19 and 25).

4.2.2.3. All these decisions lay down that the power to legislate for validating actions taken under statute, which were not sufficiently comprehensive for the purpose, is only ancillary or subsidiary to legislate, on any subject within the competence of the legislature and such validating Acts cannot be struck down merely because courts of law have declared, actions taken earlier to be invalid for want of jurisdiction. Nor is there any reason to hold that in order to validate action without legislative support the validating Act must enact provisions to cure

the defects for the future and also provide that all actions taken as notifications issued must be deemed to have taken or issued under the new provisions so as to give them full retrospective effect. No doubt legislatures often resort to such practice but it is not absolutely necessary that they should do so, so as to give full scope and effect to the Validating Act. By way of illustration reference was made to the following Acts.

(1) The Professions Tax Limitation (Amendment and Validation) Act, 1949.

(2) The Hindu Marriages (Validation or (Proceedings) Act, 1960 (Act 19 of 1960).

The said judgment has been followed in a case reported in M/s. Amrapali Films Ltd Vs. State of Bihar and others, . Reliance was placed in all those cases i.e., 1941 E.C. page 16- 1040 F.C.R. 110, AIR 1968 S.C. 1138, 1977 Ind App 178, AIR 1970 S.C. 194 and AIR 1985 S.C. 1863. East End Dwellings Co. Ltd. v. Finsbury Borough Council reported in 1951 (2) ELR 857: 1952 App Cases 109 (132-33).

The above mentioned decision has been cited with approval in The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others, , Commissioner of Income Tax, Delhi Vs. S. Teja Singh, and The Additional Income Tax Officer, Salem Vs. E. Alfred, .

The above mentioned decision has been cited with approval in The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others, , Commissioner of Income Tax, Delhi Vs. S. Teja Singh, 352, The Additional Income Tax Officer, Salem Vs. E. Alfred, ,

4.2.2.4 The effect of validating Act is that the above mentioned provisions will be deemed to have always existed. In the case of State of Haryana and others Vs. The Karnal Co-op. Farmers' Society Limited, etc. etc. and others, , the law with regard to power of legislature to pass a law prospectively as well as retrospectively has been authoritatively dealt.

4.2.2.5. The legislature has the legislative power to render ineffective the earlier judicial decisions, by removing or altering or neutralising the legal basis in the unamended law on which such decisions were founded retrospectively." State of Haryana and others Vs. The Karnal Co-op. Farmers' Society Limited, etc. etc. and others, .

4.2.2.6 The Amending Act is in two parts. Section 4-A has made Sections 3 and 4 of the original Act inapplicable in exercise of the power by the State Government u/s 39. It may be noticed that Section 39 has not been amended and Section 39 as it stands runs as follows:

Sections 39: The State Government may by Notification, add to, amend or cancel any of the items of agricultural produce specified in the Schedule.

In the main Act for adding in Schedule in exercise of the powers and Section 39 of the Act, the provisions of Sections 3 and 4 was not applicable earlier and the

same provision has been added as such there is no restriction to the power of the State he adding to the Schedule even in the parent Act. Section 4A (i) has only stated the position as it stood earlier with regard to Section 39 and the power of the State Government.

Sub-section (ii) of the said section only imposes restrictions that State was not empowered for deletion of any item without giving any opportunity for hearing. The said section has been introduced with the object that once market committee takes the regulatory measure with regard to certain market produce and the Act being the beneficial legislation for the benefit of the public and in public interest the market committee could be heard in case of any deletion of any agricultural produce which is already subjected to the regulatory measure under the Act. The said Sub-section (ii) is with the object to subserve public interest and cannot be termed as unreasonable or violative of Article 14. In this regard the submissions made above are supplemental to the submission made by Mr. Salve and the arguments in support of the validity of the Act by Mr. Salve is being adopted and is not being, repeated hereunder.

4.2.2.7. The Act is to promote general welfare, is reasonable and has been enacted in the interest of the general public. It has been held by the Supreme Court and this Court that the Act is reasonable and enacted in the interest of general public, and the Act is not violative of Article 19(1)(g). In this connection in cases reported in AIR (1964) Mad 621 , State of Madras Vs. V.G. Row, , M.C.V.S. Arunachala Nadar etc. Vs. The State of Madras and Others, , AIR 1981 1127 (SC) , and 1975 PLJR 1, it has been held that law is reasonable and is not violative of Article 19(1)(g).

4.2.2.8. In respect of the argument of the Petitioners based on the principle of natural justice, it was submitted as follows.: Exclusion of hearing at the stage of addition in Section 39 is not denying the principle of natural justice. The law earlier also did not provide for hearing for addition of Section. 39. The law is in the interest of general public and by not providing hearing for inclusion of any item u/s 39 the law has not been amended.

4.2.2.9. The real object of Section 4B is to nullify the notification issued by the State Government on 2.5.77. The legislature has the legislative power to do and to do so retrospectively. Section 4-B of the Act is an independent provision and the levy of market fee on the "sugar" is valid and legal, because by the amending Act "sugar" is deemed to have never been deleted as an item of agricultural produce.

4.2.2.10. In Porwal's case (1981) S.C. 1127 : 1982 PLJR 35(SC) it was held that Section 5 does not require that principle of natural justice be followed for establishing market yard as that is the exercise of the legislative power. The said decision is with regard to this very Act. The reasoning given for exclusion of hearing for issuance of notification u/s 5 is also applicable with full import with regard to Sections 3 and 4 of the Act. If the legislature with clear intent excludes

the opportunity of hearing for regulating the agricultural produce in a particular area, the power will not be termed as arbitrary or that the legislature is incompetent to make such a law. The said principle has been upheld in AIR 1981 1127 (SC) , S.N. Mukherjee Vs. Union of India, .

4.2.2.11. However, in the present case the challenge to the Act on the ground of natural justice and on the levy of market fee on the ground of violation or non-application of Sections 3 and 4 of the Act cannot be sustained. Section 4-B of the Amending Act has by deeming fiction continued sugar as one of the items of agricultural produce. In the DCM's case, this Court has held that Sections 3 and 4 was applied with regard to sugar earlier. Now under the deeming provision if sugar is not deleted for ever from the schedule, the question of following Section 3 and 4 again does not arise. The argument that Sections 3 and 4 must be followed cannot be sustained.

4.2.2.12. So far as Section 33M is concerned, it was submitted as follows: The said section has been introduced with the object that the State Government was giving grant to the Marketing Board and the market committee. In order to recoup the amount, which they State had given as grant to all the market committees every year for a long time, the said provision has been made. It was submitted that the amount contributed by the market committee to the said consolidated fund shall not be spent for any other purpose except for rendering services and for the purposes of the Bihar Agricultural Produce Markets Act Alternatively, it was submitted that Section 33M is severable and does not affect the validity of the other provision of the Act.

4.2.2.13. It has been submitted that tax can be levied retrospectively. It has been noticed in Delhi Cloth and General Mills Co. Ltd. and Others Vs. The Agricultural Produce Market Committee and Others that during all these periods the traders were realising market fee. The amending Act has imposed the levy and has empowered the market committee to realise the said fee. Harinagar Sugar Mills had taken an injunction order in a civil suit and as such they were not paying the market fee but other traders have been paying the market fee till the decision of the DCM's case and again after passing of the Act they are paying. The retrospective operation of the Act for realisation of the market fee is not violative of Article 19(1)(g) and as a matter of legislative policy especially taking into account the legislative history of the Act, reliance is placed on the following cases:

AIR (1972) SC 2245 (para 30), AIR (1963) SC 1167 , J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another, .

4.3. Arguments-in-Reply -- Several written arguments in reply were filed. However, it is not necessary to refer to the same.

5. Points involved:

From the various contentions raised as aforesaid, it is clear that the following

broad points arise for our consideration in this case:

1. (a) Whether sub-sections. (1) and (2) of Section 4A as introduced by the impugned Validating/Amending Act/Ordinance, is valid and constitutional so far as prospective part of the same is concerned?

(b) If the answer to (a) above is in the affirmative, whether the said provisions are valid and constitutional so far as the retrospective part of the same is concerned?

2. Whether Section 4-B of the said provisions is valid and constitutional?

3. (a) Whether Section 33-M of the 1960 Act, as introduced by amendment of the main Act by the Amending Ordinance and Act is valid and constitutional?

(b) Whether Rule 68(iii), as inserted by notification No. 4 dated 30.11.1992, is valid?

4. What is the effect of grant of exemption made u/s 15 of the Act?

5. What is the effect of Bihar Ordinance No. 8 of 1988 having lapsed so far as levy of market fee is concerned?

6. Whether a limited and restricted meaning can be given to the expression "agricultural produce" by excluding the industrial products produced by industry from the scope and ambit of the Act?

7. Is the notification dated 31.8.92 a valid notification u/s 4 of the Bihar Agricultural Produce Markets Act, 1960?

6. Decision:

6.1.1 Before I deal with the merits of the contentions, it is necessary to refer to the relevant provisions and decisions to ascertain the objects and purpose of the main 1960 Act.

6.1.2 We shall first refer to the judgment in the Delhi Cloth and General Mill's case (ibid) in this connection where we quoted as follows:

Statement of Object and Reasons.

The importance of properly organised markets of agricultural and allied commodities, though long recognised, has once again been emphasised by the Planning Commission. They have recommended that all the States which have not done so should review the present position and draw up suitable programmes for regulating all important whole-sale markets during the Second Plan. The need for legislation for regulating markets is all the greater in Bihar where the agriculturists have to depend in a large measure on the mercy of middlemen to whom they are obliged to sell their produce as soon as the harvesting season is over. The Arhatiyas and wholesale buyers enter into a secret understanding; to

exploit the unwary agriculturists and they prevent him from having correct information as to the current sale prices of agricultural produce with the result that the agriculturist seldom gets a fair share of the price paid by the consumer for his produce. The main object of having regulated markets is to secure to the cultivator better prices, fair weighment and freedom from illegal deductions. A fair deal for his produce is a good incentive for an agriculturist to adopt improved agricultural programme.

6.1.2 The question of regulation of markets was first taken up in Bihar in 1939. A Bill called the Bihar Market and Dealers Bill, 1939, was introduced in the Legislature in 1939, but it could not be passed as the then Ministry went out of office. It was again taken up in 1944, but it was considered that the Bill, which had been prepared in 1939, required modification and secondly, redrafting in view of the changed conditions. It was then decided that the question of regulating markets should be taken up after the war. The States of Andhra, Bombay, Madras, Madhya Pradesh, Mysore and Punjab have already enacted such legislation and conditions of agricultural marketing in those States have improved appreciably by virtue of legislation.

The main objects of the Bill are:

- (1) Creation of market area and markets with a view to ensuring fair trade transactions in agricultural and allied commodities.
- (2) Appointment of Market Committees fully representative of growers, traders, local authorities and Govt. to supervise the working of regulated markets.
- (3) Regulation of market charges and prohibition of realisation of excess charges.
- (4) Regulation of Market practices.
- (5) Licensing of market functionaries.
- (6) Arrangement for conciliation of disputes regarding quality, weighment, deductions etc.
- (7) Sale by open auction.
- (8) Arrangement for the display of reliable and up to date market information in the market yard.
- (9) Improving generally the conditions of agricultural marketing.

6.1.3 The recital Clause of the Act is as follows:

To provide for the better regulation of buying and selling of agricultural produce and the establishment of markets for agricultural produce in the State of Bihar and for matters connected therewith.

6.1.4.1. In the case of AIR 1981 1127 (SC) the Supreme Court was dealing with Maharashtra Agricultural Produce Marketing (Regulation) Act (20 of 1964) which

Act is in part materia with the Bihar 1960 Act. It was observed as follows:

The basic assumption of the submission was that the Maharashtra Agricultural Produce Marketing Regulation Act was conceived in the interests of the agriculturists only and intended for their sole, benefit. This basic assumption is not well, founded. It is true that one of the principal objects sought to be achieved by the Act is the securing of a fair price to the agriculturist for his produce, by the elimination of middlemen and other detracting factors. But, it would be wholly incorrect to say that the only object of the Act is to secure a fair price to the agriculturist. As the long title of the Act itself says, the Act is intended to regulate the marketing of agricultural and certain other produce. The marketing of agricultural produce is not confined to the first transaction of sale by the producer to the trader but must necessarily include all subsequent transactions in the course of the movement of the commodity into the ultimate hands of the consumer, so long, of course, as the commodity retains its original character as agricultural produce. While middlemen are sought to be eliminated, it wrong to view the Act as one aimed at legitimate and genuine traders. Far from it, the regulation and control is as much for their benefit as it is for the benefit of the producer and the ultimate consumer. The elimination of middlemen is as much in the interest of the trader as it is in the interest of the producer. Promotion of grading and standardisation of agricultural produce is as much to his benefit as to the benefit of the producer or consumer. So also proper weighment. The provision of settlement of disputes arising out of transactions connected with the marketing of agricultural produce and ancillary matters is also for the benefit of the trader. It is because of these and various other services performed by the Market Committee for the benefit of the trader that the trader is required to pay a fee. It is, therefore, clear that the regulation of marketing contemplated by the Act involves benefits to traders too in a large way. It is also clear to our mind that the regulation of marketing of agricultural produce, if confined to the sales by producers within the market area to traders, will very soon lead to its circumvention in the guise of sales by traders to traders or import of agricultural produce from outside the market area to within the market area. The Shirname Committee which Was appointed by the Maharashtra Government to review the working of the Bombay Agricultural Produce Marketing Act, 1939 considered the matter and reported as follows:.

They (the traders) have argued that imported produce has nothing to do with the legislation meant to confer benefits on the agriculturist. We are afraid that this view is untenable. In our opinion the benefits sought to be conferred by the Act are not compartmental inasmuch as a regulated market seeks to benefit the agriculturist within its area only. The problem of regulation is to be viewed in the wider context. This was well emphasised by the Royal Commission on Agriculture which stated that the establishment of properly regulated markets can act as a powerful agent in bringing about a reform which is much needed, primarily in the interest of the cultivator, and in that of all engaged in trade and commerce in India. It is in this larger perspective that an answer to the question is to be

found. Moreover, no agricultural produce goes by a particular brand with the result that the produce brought from a particular source cannot be distinguished from the one secured from the other. If the produce imported from outside the market area were to be exempted from the scope of the market regulation, it would only provide an additional opportunity for the traders to circumvent the provisions of the Act and Rules even in respect of the agricultural commodities produced within the market area. We, therefore, recommend that once a commodity is regulated in a market, it should be subjected to regulation irrespective of its source or final destination." Again they said in paragraph 95 as follows:

We wish to record here that there appears to be a doubt among the traders as well as the Market Committees about the precise position of sales of Commodities after they are bought from agriculturists by traders vis-a-vis the provisions of the Act and the Rules. It has been the belief of the traders that the law is for the benefit of agriculturists and on this ground they have pleaded that its scope should be restricted only to the dealings with them. We are afraid that this plea is not tenable. The benefit of a regulated market will no doubt primarily accrue to the agriculturists but traders also will be profited by it. Furthermore, no market can be regulated effectively unless and until the regulation covers all the stages of marketing within a particular area. Above all it is not possible to distinguish, between the agricultural produce subjected to resale or changing hands between the traders themselves and the one sold by the agriculturists through the commission agents to the traders. We, therefore, recommend that all transactions including the resales between the traders and traders in respect of the agricultural commodities which are regulated, should be covered by the Act and the Rules. Thus in a regulated market trading in agricultural commodities irrespective of the fact as to whether they are produced in the market area or sold by the agriculturists or not will be brought within the scope of the legislation,

6.1.4.2 In *Kewal Krishian v. State of Punjab* : (1979) 3 SCR 1217 : AIR 1980 SC 108 the Supreme Court was dealing with the provisions of the Punjab Agricultural Produce Markets Act (23 of 1961). The Supreme Court pointed out that the whole object of the Act was the supervision and control of the transactions of purchases by the traders from the agriculturists in order to prevent exploitation of the latter by the farmer.

6.2.1 At first I shall examine the scheme of the Act as it was before the introduction of amendment which are challenged in these proceedings, before I deal with the merits of the several contentions raised before us.

6.2.2 In my opinion, Mr. Subramaniam is right in contending that a systematic machinery and procedure has been laid down in the Act to achieve the ultimate object and purpose. Section 27 provides for levy and collection of market fee in respect of a market area and in respect of "agricultural produce" within the meaning of the said Act. Market area has been defined under Section. 2(i) as any area declared to be a market area under Section. 4, Section 15 introduces a bar

regarding certain transaction at any place other than the affiliated market yard or sub-market yard established within the Agricultural Market Area indicated in the notification issued under Sub-section (1) of Section 4. As a matter of fact, in view of Sub-section (2) of Section 4, on or after the publication of a notification u/s 4(1), no one can, inter alia, set up or establish or continue or allow to be set up, continue or establish, within the market area, any place for the purchase, sale, storage or processing of any agricultural produce so notified, except in accordance with the provisions of the said Act, the rules and bye laws. The bar u/s 4(2) can operate only when there is publication of a notification under Sub-section (1) of Section 4. Publication of notification u/s 4(1) is dependent upon a notification issued u/s 3. Without a notification under Section 3 there cannot be a declaration u/s 4(1). Further, only upon consideration of objections and/or suggestions invited u/s 3, that a notification under Section 4(1) can be issued. Further, Section 4(3) confers some power on the State Government regarding exclusion or inclusion of some agricultural produce in respect of a market area. However, this also arises out of a notification issued under sub-section(1) of Section 4. Moreover, the exercise of such power under Sub-section (3) of Section 4 has been specifically made subject to the provisions of Section 3. The question of exercise of power under Sub-section (3) of Section 4 cannot and does not arise until and unless there are notifications u/s 3 and Section 4(1) both. Section 3 contemplates about a declaration of the intention of the State Government to regulate the purchase, sale, storage and processing of agricultural produce as may be specified in the notification. Section 3 specifically provides for an opportunity to make objection and/or suggestions in respect of such proposal only upon consideration of which by the State Government, that a notification u/s 4(1) establishing a market area can be issued.

6.2.3 Let us approach the same step by step in Anr. way from the beginning of the Act. Broadly speaking the object and purpose of the Act is to regulate the marketing of "agricultural produce" which, has been defined by Section 2(1)(a). This refers to the items of "agricultural produce" specified in the schedule. Unless an item is specified in the schedule, none of the provisions of the Act is attracted. The regulatory provisions specified in the Act would apply only in respect of agricultural produce specified in the schedule. Mr. Subramanyam is right in contending that the condition precedent for the purpose of rendering the provisions of the Act, Rules and bye-laws applicable to any product is that it must be an "agricultural produce" specified in the schedule to the Act. Otherwise there cannot be any other follow up action under the Act. For the purpose of such regulation, there is a system or procedure laid down. This contemplates certain procedure and machinery to be followed-certain systematic action given effect to. To start with, there must be a notification u/s 3. Without such notification, which is the first step, no other step can be taken or regulation introduced. By such notification the State Government is to declare its intention of regulating the purchase, sale, storage and processing of such "agricultural produce" and in such area, as may be specified. Such agricultural produce must be an agricultural

produce already specified in the schedule. Such notification under Section. 3(1) must invite objections and/or suggestions. Further, such notification u/s 3(1) must invite such objections/suggestions, which are to be taken into consideration "by the State Government. Accordingly, the notification u/s 3 must contain a declaration not only regarding "agricultural produce", as specified in the schedule, but also regarding the area with reference to such "agricultural produce" Accordingly, such objection and/or suggestion are to be invited and can be made in respect of proposed agricultural produce or in respect of the proposed area or both, to be specified in the notification u/s 3. It is only after the compliance of such requirements u/s 3, that is, publication of a notification under and as required by Section 3, that the provisions contained in Section 4, can come into play. Without there being a notification as required by Section 3, the question of acting under or giving effect to the provisions of Section 4 cannot and does not arise. It is only after the expiry of the period specified in the notification u/s 3 and only after consideration of the objections/suggestions received pursuant to notification u/s 3 and it is only after holding an enquiry in this regard, that a notification may be issued u/s 4(1) in the manner laid down therein. This declaration/notification u/s 4(1) must refer to "market area" and "agricultural produce" both. Existence or creation of a market or market area within the meaning of Section 2(h) and 2(i) cannot arise until and unless there is such notification u/s 4(1), which in its turn is dependent upon the existence of a valid notification u/s 3. It is clear that it is only after a notification as required u/s 3 is issued, regarding and specifying the proposed "market area" and the concerned "agricultural produce", and it is only after consideration of the objections and suggestions made pursuant to such notification u/s 3, and it is only after an enquiry to that effect is carried out, that the State Government has to take a decision u/s 4(1). It is only after compliance of all these requirements, that the State Government can issue a notification u/s 4(1) regarding "market area" and "agricultural produce". Only after such a declaration is made u/s 4(1) after compliance of such requirements that all the regulatory provisions contained in the Act come into play and can be enforced and not otherwise. These are mandatory in nature and condition precedent to the exercise of power of issuing a notification u/s 4(1). As a result of such notification u/s 4(1), section. 4(2) comes into effect, as a result of which no one can carry on the activities referred to therein, within the market area or within the distance to be notified therein, in respect of any "agricultural produce", so notified u/s 4(1), except in accordance with the provisions of the Act; the rules and bye-laws. Accordingly, this bar under Section. 4(2) would come into force only if there is a proper notification/declaration under Section. 4(1), which, as I have pointed out, in its turn is dependent upon compliance of several procedural requirements including issuance of a notification under section.3. The power under Sub-section (3) of section. 4 can also be exercised only after such a notification u/s 4(1) is issued. Further, exercise of such power, as conferred by Sub-section (3) of Section 4, is also specifically made "subject to the provisions of Section 3". There must be a "market area" in the first instance which is an area declared u/s 4. Only

thereafter that there can be a principal market yard and sub-market yard. The "market committee" is established in respect of a "market area". The principal market yards and sub-market yards would be in relation to the "market area" constituted following such procedure. After there is declaration of a "market area" u/s 4, that there can be declaration of market yards u/s 5. The establishment of a "market committee" u/s 6 is in respect of a market, area within the meaning of Section 4. It is only as a result of a proper declaration under section. 4(1), that the bar u/s 15 comes into force. If a notification is properly and validly issued u/s 4(1), then no one can carry on the activities specified in Section 4(2) in the market area specified u/s 4(1), excepting in accordance with the provisions of the said Act, the rules and bye-laws, in respect of the specified agricultural produce. Moreover, as a result of such notification/declaration validly and properly issued u/s 4(1) that in view of Section 15 no one can carry on the activities specified therein at a place other than the affiliated market yard or sub-market yard established within such market area. Further, it is only in respect of only such "agricultural produce" and such "market area" that such a "market committee" can levy market fee u/s 27 of the Act and not otherwise.

6.2.4 From the aforesaid it is clear that certain series of steps have to be taken, certain machineries provided must be worked out, certain conditions have to be fulfilled, before the regulations and restrictions introduced under the Act can have any application or can be enforced or a market fee can be levied. Compliance of Sections 3 and 4 is sine qua non. Compliance of the same forms the basis of the Act. There are mandatory provisions and which are condition precedent to the exercise of any power of conferring any right or imposing any liability under the provisions of the Act following the same and the rules and bye-laws framed thereunder. Without due compliance of Sections 3 and 4, other provisions do not come into play. Without such notifications under Sections 3 and 4, there cannot be any regulation or any restriction or any levy of market fee. If there is no "market" or "market area" or "market yard" or "market committee" with reference to "agricultural produce" in terms of Section 4(1) read with Section 3, the provisions of the Act, rules and bye-laws can have no application and restriction or regulation under the same is attracted, including those contained in Section 4(2) or 15 of the Act and there can be no question of levy of any market fee u/s 27 of the Act. If the market was not found to have been properly established then market committee could not enforce any of the provisions of the Act or the Rules or the bye-laws and accordingly the question of the rate of market fee does not fall for consideration. Reference may be made in this connection to the case of P.P. Kutti Keya and Others Vs. The State of Madras and Others, and M.C.V.S. Arunachala Nadar etc. Vs. The State of Madras and Others, which were approved in the case of Kewal Krishnapuri v. State of Punjab (ibid).

6.2.5 In this context I may point out that the argument of Mr. Subramaniam that the scheme of the Act discloses a clear intention of a logical and systematic

compliance of a machinery and procedure would also be borne out by the observations made in the case of Lakhan Lal and Others etc. Vs. The State of Bihar and Others etc., . This position has not been changed even after several amendments introduced in the 1960 Act until the amendments of 1992 which are challenged in the proceedings. This was the position under 1960 Act when such Amending/Validating Act was introduced. In the background of the aforesaid, I shall consider the scope and validity of the Amending/ Validating Act. The amendments sought to be introduced by the Amending/Validating Act does not apply only prospectively but it is given retrospective effect also and that also from the very inception of the Act which was introduced in August, 1960.

6.3.1 I shall at first consider the question of validity of the Validating/Amending Act in so far as it is prospective in nature.

6.3.1.1. I shall first consider the question of the validity of prospective operation of Sub-section (1) of Section 4A of the Amending Act. If the provisions of Sections 3 and 4 are not made applicable in respect of any item to be added to the schedule, then the following result would follow.

6.3.1.2. If Sections 3 and 4 are not made applicable in respect of any item of "agricultural produce" hereinafter to be added to the schedule of the Act, as sought to be intended by Section 4A(1) of the Amending Act, then the result would be incongruous, chaotic and disastrous as the whole purpose and object of the Act would be frustrated. The effect of not applying Section 3 and 4 in respect of the added items would be, that none of the bars, regulations and restrictions or any other provision of the Act, rules or bye-laws, would be applicable in respect of the added items. Such added items of "agricultural produce" would remain outside the scope of the Act. As I have already narrated, it is a chain of actions. There is a scheme, a procedure, a machinery, as laid down in Sections 3 and 4 which has to be followed before the restrictions and regulations specified in other subsequent provisions of the Act and the rules framed thereunder can be attracted. If Sections 3 and 4 are not made applicable in respect of the "added" items, as contemplated by the Amending Act, then the question of applying Sub-section (2) of Section 4, would not also obviously arise in respect of the added items. The bar, the restrictions and the regulations under the Act shall be applicable in view of Section 4(2) of the Act. Section 4(2) would not apply in respect of the added items as the whole of Sections 3 and 4 are made non-applicable in respect of the same. Further, Sub-section (3) of Section 4 would not apply and the State would not be entitled to exercise such power under such sub-section in respect of the added items. Section 4(2) is dependent upon a notification u/s 4(1). Without notification u/s 3, and compliance of requirement of Sections 3 and 4, as stated above, there cannot be a notification u/s 4(2). Therefore, Section 4(2) would not apply as Sections 3 and 4 would not apply. Further, for the same reasons Section 5 would not apply. Moreover, the restrictions u/s 15 would not apply because there cannot be a "market area" under the Act unless Section 4 read with Section 3 is complied with. If Sections 3

and 4 do not apply in respect of some "agricultural produce", that is, the added "agricultural produce", then the bar u/s 15 would also not apply. Moreover, if Sections 3 and 4 do not apply in respect of the added items, then no "market fee" can be levied in respect of the same, because this fee u/s 27 is to be paid with reference to the "market yard", "market area" and the "agricultural produce", which in its turn, are dependent upon the applicability of Sections 3 and 4. If the said sections are not applicable in respect of such-added items, then the market fee is not applicable in respect of the added items. The result would be that the whole purpose and object of the Act and the whole purpose of addition of an item to the schedule would become nugatory, so far as added items are concerned, if Sections 3 and 4 are not attracted in such cases. Without application of Sections 3 and 4, the mere addition of some "agricultural produce" u/s 39 would be a futile gesture, as none of the provisions of the Act, Rules or bye-laws would be attracted. This will be contrary to the whole object and purpose of the Act. This destroys the entire scheme of the Act as scheme is made totally nugatory. In my opinion it is clearly arbitrary and discriminatory and imposes an unreasonable restriction and accordingly ultra vires Articles 14 and 19(1)(g) of the Constitution.

6.3.1.3 There is Anr. aspect of the matter. If Sections 3 and 4 are not applicable in respect of the added items, then two different artificial classes would be created, one in respect of those "agricultural produce", which are already in, the schedule and the other type of agricultural produce which are to be added to the schedule subsequently. The provisions of Sections 3 and 4 would apply only in respect of those items of agricultural produce which stand included in the schedule but it would "not apply in respect of those "agricultural produce" which are henceforth added to the schedule after the Amending Act. In respect of agricultural produce already in the schedule, the procedure laid down in Sections 3 and 4 has to be followed; whereas in respect of new items added afterwards, such procedure is not to be followed. This is arbitrary and discriminatory. It is well-settled that classification having an intelligible differentia is permissible but not an arbitrary classification without such intelligible differentia because this would amount to unlawful discrimination. Such classification, as sought to be introduced by the Amending Act, is not based on any intelligible differentia, particularly having regard to the object and purpose of the said Act. Having regard to the scope and object of the Act, as stated hereinabove, there is no justification or any intelligible differentia as to why the agricultural produce, which are in the schedule from before, would attract Sections 3 and 4, whereas in respect of "added" agricultural produce Sections 3 and 4 are not to be complied with. They are equally situate having regard to the object and purpose of the Act, whether one is already included or to be included. This would amount to equals being treated unequally. In substance, they belong to the same class. It would amount to following two procedure in respect of the same class without any rhyme or reason. Having regard to the object and purpose of the Act, an uniform procedure is to be followed in respect of all the items of agricultural

produce and a different procedure, which is substantive in nature, cannot be justified. In respect of only some items. Accordingly, in my opinion, the same is ultra vires Article 14 as the same is arbitrary and discriminatory.

6.3.1.4. In my opinion, the same also amounts to unreasonable restriction on the right to carry on business under Article 19(1)(g) and not saved by Article 19(6) so far as persons concerned regarding the added items are concerned. This is unreasonable restriction so far as they are concerned both from the substantive and the procedural point of view. The scope and object of the Act has been set out hereinabove. It is also well settled by various decisions of this Court and the Supreme Court. The object of the Act is to regulate buying and selling of agricultural product by establishing markets for the same. This is to protect the interest of agriculturists in general. The purpose of regulation of the market is to protect the traders from the middlemen. This prevents any one to carry on any business in any market area except in accordance with the Act, Rules and bye-laws in view of the provisions of Sections 4(2). Certain other restrictions are imposed u/s 15. Market fee is payable u/s 27. As it is a fee, there must be quid pro quo. In case of agricultural produce already, in the schedule there is provision for hearing of objection and suggestion and consideration of the same regarding the market area and the agricultural produce both. Sections 3 and 4 including provisions for objections/suggestions and consideration of the same, constitute a statutory safeguard conferring a valuable right on the persons concerned so far as their fundamental right to carry on trade and business is concerned. In this connection reference may be made to the observations made by the Supreme Court in the case *Lakhan Lal v. State of Bihar* (ibid) where it was observed that the power u/s 4(1) should be exercised reasonably. As a result of the same, the regulatory provisions are to be treated as reasonable restrictions both from procedural and substantive point of view. There is sufficient safeguard and machinery provided before such restrictions are imposed. However, if in the case of agricultural produce introduced/included in the schedule afterwards, there would be no requirement of inviting any such objection or suggestion or consideration of the same and the bar, regulation and restriction applicable by the Act, Rules and bye-laws will be attracted in respect of the added items without compliance of such requirements, this would amount to unreasonable restriction so far as persons dealing with the added items are concerned both from substantive and procedural point of view.

6.3.2. Regarding the provisions of Sub-section (2) of Section 4-A, from the prospective aspect, it is not clear as to what is meant by affected parties. By deletion of any item it affects everyone covered by the Act. It does not merely affect agriculturists. It affects buyers and sellers both. This is vague. Moreover, if by "affected persons" it means buyers and sellers both including agriculturists then it does not make any sense. It would only mean that in respect of all deletions everybody must be given an opportunity of being heard.

6.3.3 There is Anr. aspect of the matter. Sub-sections (1) and (2) of Section 4-A

must be read together. It is not severable. It is part of a single course of action. If both the sub-sections are read together and applied at the same time, the result would be that it would become arbitrary and discriminatory and it will impose an unreasonable, restriction. In the case of addition of an item of agricultural produce the necessity of compliance of requirements of Sections 3 and 4 is being totally and wholly dispensed with, whereas so far as deletion of any item u/s 39 is concerned, an opportunity to be heard is being conferred. In the case of "addition" u/s 39, such opportunity as contemplated by Sections 3 and 4 are sought to be taken away, whereas in respect of deletion, such opportunity is being introduced afresh. Such addition and deletion deal with the same kind of people, i.e., traders, sellers and buyers. Such addition/deletion deals with the middlemen. Accordingly, this classification between "addition" and "deletion", in my opinion, is neither rational nor shows any intelligible differentia. This is arbitrary and discriminatory. Equals are being treated unequally. It is ultra vires Article 14. For the same reason it amounts to unreasonable restriction within the meaning of Article 19(1)(g) and not saved by Article 19(6) of the Constitution.

6.4.1 I shall now consider the question of the constitutional validity of Section 4-A as introduced by the Amending Act so far as its "retrospective operation is concerned. In view of the conclusion I have arrived at, on the question of validity of the said Section 4-A from the prospective point of view, it is strictly not necessary to examine the validity of the retrospective aspect of the same. If the prospective operation of an Act is otherwise valid, then if the retrospective part is not valid, that would not by itself make the prospective part invalid. However, the con verse is not correct If the prospective operation of an Act is invalid, then the question of the retrospective part remaining Valid or invalid cannot and does not arise. However, having regard to the arguments made before us on this point also and assuming for the sake of argument that the prospective operation of the Act is valid, I shall deal with the question of the validity of the Section 4-A from the retrospective point of view.

6.4.2. If retrospective effect is given to Section 4-A in terms of Section 1(m) of the Amending/Validating Act challenged in these proceedings then the same shall be deemed to have come into effect from the 6th of August, 1960, that is, the date when the original Act 1960 came into force. So far as Sub-section (1) of Section 4-A is concerned, I have already discussed the effect of the same if it is introduced prospectively. The result would be disastrous if it is to be given effect to from the date of the original 1960 Act coming into force. In respect of item originally in the schedule on 6.8.1960, that is, when the Act came into force, Sections 3 and 4 would be applicable whereas all items of "agricultural produce" added to the schedule from the very next day, such sections would not be deemed to be applicable. Then, in respect of those items added since 6.8.60, Sections 3 and 4 not being applicable, none of the prohibiting or regulations or provisions of the said Act or the rules or bye-laws framed thereunder would be applicable. Section 4(2) would not be applicable. Section 15 would not be

applicable. Market fee is not leviable in respect of the same. All the market fee realised in respect of such items would be deemed to be unlawfully realised. This would be wholly against the scope and object of the Act. This would defeat the whole purpose of the Act. We have dealt with this aspect of the matter in detail while considering this point on the prospective aspect and the same need not be repeated. If retrospective effect is given it would be mere arbitrary and discriminatory. This would also amount to more unreasonable restriction. Accordingly, it would be ultra vires Article 14 and 19(1)(g) for more the reason.

6.4.3. So far as Sub-section (2) of Section 6-A is concerned, if it is sought to be given a retrospective effect, as sought to be proposed, that is, if the said sub-section shall be deemed to have come into force with effect from 6th of August, 1960, that is, since the inception of the main 1960 Act, the result would be as follows. Apart from the general objections to the validity of the same for the same reasons as discussed in connection with the prospective part, the result would be disastrous and chaotic if such retrospective effect is given. Admittedly various items have been deleted from the schedule in exercise of power u/s 39 since 6th of August, 1960. Admittedly, in none of these cases any opportunity for hearing was ever given to any "affected parties" before such order of deletion of the items was made. As a result of introduction of such provision with effect from 6th August, 1960, the result would be that the deletion of all such items, during the course of last 33 years, without such opportunity for hearing, would be treated as a nullity. It shall be treated as of no effect at all and accordingly they will be deemed to have been all along in the statute book, that is, they remain included in the schedule, as if they were never deleted though they were in fact deleted at some point of time. Violation of the provisions requiring opportunity for hearing, amounts to violation of the principle of natural justice, violation of principle of natural justice amounts to violation of Article 14. Any such order is a nullity. The result would be that all concerned including the Marketing Committees which had acted on the basis of such deletion since 1960, would now be affected. Before such proposed amendment with retrospective effect, in view of such deletion, all concerned were not required to comply with the provisions, restrictions and regulations as provided under the said Act, bye-laws and regulations and accordingly they did not comply with the same. They acted accordingly and freely regarding the same. Now in view of such retrospective effect being given in view of such deeming clause, such deletion without such opportunity being a nullity, they will be deemed to remain covered by the provisions of the Act, rules and bye-laws. As a result of such deletion in fact, they were not covered by the bar/restriction u/s 4(2) of the said Act. Now as a result of the same such restrictions shall be deemed to have continued to apply in respect of the said items throughout, irrespective of such deletion in fact. Similar would be the position so far as bar u/s 15 is concerned. Because of the retrospective effect of the Amending Act, the same would continue to be applicable and applicable with retrospective effect from 1960 in respect of such deleted items. As a result of the same, the bar u/s 4(2) and Section 15 would

continue to be applicable in respect of such deleted items. Moreover, they would continue to be liable to pay such market fee as such deletion would be treated to have been made unlawfully and the deletion being a nullity. As a result of the same, in respect of such "agricultural produce", which were in fact deleted but now deemed not to be deleted, all persons concerned who have not complied with the provisions of the Act, Rules and bye laws, they can be dealt with on the basis that they have acted illegally as they were required to comply with the same in view of such deeming or retrospective provision. The omission to comply with the requirements of the Act, Rules and bye-laws would attract the "offence" clause. Such omission on their part would be treated as illegal and this would also amount to an "offence" under the said Act. Therefore, they will be punishable for such offences because of such retrospective effect. This, in my opinion, apart from anything else, is quite clearly arbitrary and discriminatory and in any event it would amount to an unreasonable restriction to carry on trade and business and violation of Article 19(1)(g) and not saved by Article 19(6).

6.4.4 There is another aspect of the matter. Under Article 20 of the Constitution, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. Before such amendment with retrospective effect, as a result of such deletion in fact, persons concerned who had not complied, were not required to comply with the provisions of the Act Rules and bye-laws. Now because of the retrospective effect of Section 4-A(2), as such deletion without such opportunity was a nullity and they continued to be governed by the Act, the persons concerned had committed various offences because they did not comply with such provisions. They can now be convicted for having committed offence for not having complied with the provisions of law since such deletion. Though during the last 30 years, they were not considered to have violated any law or committed any offence, because of such deletion, but now because of the retrospective effect being given to Section 4-A(2), they can be convicted for various offences they will be "deemed" to have committed which they had not in fact committed at the relevant time. This, in my opinion, also amounts to violation of Article 20 of the Constitution.

6.5. I shall now consider the question of validity of Section 4-B.

6.5.1 In this context I shall first deal with the relevant decisions on this point.

6.5.1.1 Regarding the scope of power of a legislature to enact a law, particularly a Validating Act, the law is now well-settled. The legislative power conferred in the appropriate legislature to enact law in respect of topics covered by the several entries in the three lists can be exercised both prospectively and retrospectively. Where the legislature can make a valid law, it may provide not only for prospective operation of the material provisions of law but it can also provide for the retrospective operation of the said provisions. Similarly the legislative power includes the subsidiary or the auxiliary power to validate laws which have been found to be invalid. If a law passed by a legislature is struck

down by the courts, as being invalid for one infirmity or Anr. , it would be competent for the appropriate legislature to cure the said infirmity and pass a validating law so as to make the provisions of the said earlier law effective from the date when it was passed. On the question of unreasonableness of the retrospective operation, the length of time covered by the retrospective operation cannot by itself be treated as a decisive test. *Rai Ramkrishna and Others Vs. The State of Bihar*, .

6.5.1.2 Regarding a law relating to tax, the retrospective effect may be challenged on the ground that it alters the character of the tax imposed by it so as to take it outside the limits of the entry which gives the legislative competence to enact the law or that it is arbitrary and that, therefore, it is violative of Article 14 or that the restrictions are unreasonable and, therefore, violative of Article 19(1)(g) of the Constitution and not saved by Article 19(6). When a legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition is that the legislature must possess the power to impose the tax, otherwise the section must ever remain ineffective and illegal. However, even if the legislature has the legislative competency, it is not sufficient merely to declare that the decision of the Court shall not bind because that would amount to reversing the decision in exercise of judicial power, which the legislature does not possess or exercise. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the reenacted law. Sometimes the legislature gives its own meaning and interpretation of the law under which the tax was collected and by legislative fiat makes the new meaning binding upon Courts. The legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the Courts had found in the existing law and makes adequate provisions in the validating law for a valid imposition of the tax. (*Shri Prithvi Cotton Mills Ltd. and Another Vs. Broach Borough*

Municipality and Others,).

6.5.3. The legislature can remove the basis of a decision rendered by a competent Court thereby rendering that decision ineffective. However, no legislature has power to ask instrumentalities of the State to disobey or disregard the decisions given by Courts. (*The Municipal Corporation of Ahmedabad v. The New Shrock Spinning and Weaving Co. Ltd.* AIR (1970) SC 1992).

6.5.4. A Court of law can pronounce upon the validity of any law and declare the same to be null and void if it is beyond the competence of the legislature or if it infringes the rights enshrined in Part III of the Constitution. It can strike down or declare invalid any Act or direction of a State Government which is not authorised by law. The position of legislature is, however, different. It cannot declare any decision of a Court of law to be void or of no effect, *Mahal Chand Sethia v. State of West Bengal* (Supreme Court decision quoted in *Ahmedabad Municipality* case (ibid)). It is not open to the legislature to attempt to overrule or set aside the decision of a Court. It is open to the legislature, within certain limits, to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but is not open to the legislature to say that a judgment of a Court properly constituted and rendered in exercise of its power in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court: *Janpada Sabha Chhindwara v. Central Provinces Syndicate Ltd.* (Supreme Court decision referred to in *Ahmedabad Municipality* case).

6.5.1.5 The amendment which does not proceed to cure the defect or the lacuna may not be considered to be validating Act. A Validating Act seeks to validate the earlier Acts declared illegal and unconstitutional by Courts by removing the defect or lacuna which led to invalidation of the law. With the removal of the defect or lacuna resulting in the validation of any Act held invalid by a competent Court, the Act may become valid, if the Validating Act is lawfully enacted. But the question may still arise as to what will be the fate of acts done before the validating Act is lawfully enacted. But the question may still arise as to what will be the fate of acts done before the Validating Act curing the defect has been passed. To meet such a situation and to provide that no liability may be imposed on the State in respect of such acts done before the passing of the Validating Act making such act valid, a Validating Act is usually passed with retrospective effect. The retrospective operation relieves the State of the consequences of acts done prior to the passing of the Validating Act. The retrospective operation of a Validating Act properly passed curing the defects and lacuna which might have led to the invalidity of any Act done may be upheld, if considered reasonable and legitimate. If the only object of enacting the amended provision is to nullify the effect of the judgment, which became conclusive and binding on the parties, to enable the State Government to retain the amount wrongfully and illegally collected, this would not be valid and legal *D. Cawasji and Co., Mysore Vs. State of Mysore and Another*, .

6.5.1.6 The legislature can change the basis on which decision is given by the Court and thus change the law in general, which will affect a class of persons and events at large. It cannot, however, set aside an individual decision inter partes and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power of the State and to functioning as an appellate court of Tribunal. In the matter of : CAUVERY WATER DISPUTES TRIBUNAL, .

6.5.1.7 In the State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, , it was observed as follows:

The legislation is pure and simple, self-deceptive if we may use such an expression with reference to a legislature-made law. The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back twenty years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the Constitutional rights accrued in the course of the twenty years. That would be most arbitrary, and a negation of history. It was pointed out by a Constitution Bench of this Court in B.S. Yadav and Others Vs. State of Haryana and Others, , Chandrachud, C.J. speaking for the Court, "Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But that date from which the rules are made to operate must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case". Today's equals cannot be made unequal by saying that they were unequal twenty years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws (para 52)

6.5.2. In the light of the aforesaid, I shall examine the validity of Section 4-B of the Amending Act.

6.5.2.1 I have already held Section 4-A(1) and (2) of this Amending/Validating Act to be ultra vires and unconstitutional. We shall now consider whether section.

4-B is valid or invalid.

6.5.2.2 It appears that the provision of Section 4-B are divided in four parts:

(1) Any market fee levied and collected shall be deemed to be valid as if such levy and collection was made under the provisions of this Act as amended by this Act.

(2) Notification No. 730 dated 2nd May, 1977 shall be deemed never to have been issued;

(3) No suit or legal proceedings shall be maintained in any court for the refund of the fee collected under the provisions of this Act merely on the ground that liability had ceased on the issuing of the notification No. 730 dated 2nd May, 1977.

(4) No Court shall entertain any proceedings challenging the fee recovered or the continued levy and recovery of the fee merely on the ground that liability had ceased on the issuing of the notification No. 730 dated 2nd May, 1977.

6.5.2.3 The third and the fourth part are dependent on the first and second part. If the first and second part do not exist, whether factually or legally, the third and fourth part cannot stand by themselves. It would amount to merely nullifying the effect of a judgment without curing the defect, which, as pointed out, is not permissible. It is only if the other parts are valid and operative, that the third and fourth part can be treated as valid and effective.

6.5.2.4 So far as the first part is concerned it is a deeming provision. The market fee levied and collected shall be valid in view of the deeming provision, as if such levy and collection was made under the provisions of the 1960 Act as amended by this Act, i.e., the Amending Act. The most important provision of this part is the expression "as amended by this Act". Therefore, such levy and collection are to be treated as valid in view of such deeming clause, provided such levy or collection was made under the 1960 Act as amended by the present validating Act/Ordinance. The market fee levied and collected under the 1960 Act so far as sugar is concerned, could not be levied and collected because of the judgment in Delhi Cloth Mills case. Such levy and collection could not be effected under the 1960 Act as such. The same was not being and cannot be validated without curing the defect, because the same would amount to merely nullifying the judgment. Only because of such deeming clause, such levy and collection, which was otherwise invalid, shall be treated as valid, only if they had been under the 1960 Act as amended by the Amending/Validating Act. If this amendment is valid, then it would amount to curing of the defect. However, if for any reason this amendment cannot be sustained, then there will be no valid deeming clause. If this amendment made by this Amending/Validating Act cannot be upheld, then the deeming clause does not help the situation. If the deeming clause cannot come into force, then such levy and collection cannot be treated as valid. Such curing of the defect is sought to be achieved by the amendment introduced by

Section 4-A(1) and 4-A(2) I have held both the sub-sections of Section 4-A to be unconstitutional and void. Accordingly, such amendment is not valid and it does not become operative and the deeming clause cannot be given any effect at all. Without such amendment it is merely nullyfying the effect of judgment without curing the defect. Accordingly, the first part cannot be held to be valid or effective validation and it does not save such levy or collection..

6.5.2.5 The second part is that "notification No. 730 shall be deemed never to have been issued". The question is whether this by itself can save the situation; whether this by itself cures the defect. The question is whether it is severable from the first part or whether this must be read with the first part" as an integral part of the same. In my opinion the second part can stand alone. This is severable from the first part. In our judgment in Delhi Cloth Mills case we have held that having regard to the notification dated 2nd May, 1977 and having regard to the fact that the later notification dated 21.5.77 did not lawfully introduce sugar as an item for which market fee could be levied, accordingly no such levy regarding sugar was permissible after notification dated 2.5.77. In view of our judgment the notification dated 2.5.77 prevailed. Now by this Validating Act this notification itself is being removed. Even if the amendment as contemplated by Section 4-A is invalid, and even if the first part cannot be given effect to because of the same, that by itself does not make the second part of Section 4-B invalid by itself. If the amendment as envisaged in Section 4-A is not valid, then only the first part of Section 4-B is inapplicable. But even in that event, the second part of Section 4-B can stand by itself if it is otherwise valid. In my opinion the second part of the said section amounts to curing of the defect.

6.5.2.6 It is true that in Delhi Cloth and General Mills case we did not point out any defect regarding the 2nd May, 1977 notification. We pointed out the defect in respect of the 21.5.77 notification. We have held that there was no proper addition to the schedule so far as sugar is concerned by such notification dated 21.5.77 and therefore the 2.5.77 notification stands. This situation is sought to be rectified by the second part.

6.5.2.7 There is Anr. aspect of the matter. In the D.C.M. judgment it was pointed out that the 21st May, 1977 notification did not amount to a notification u/s 39 so far as addition of "sugar" as an item of the schedule is concerned. It was further pointed out that even if such notification dated 21.5.1977 could be treated as addition of sugar as an item u/s 39 of the Act, fresh notification under Sections 3 and 4 was required before market fee regarding sugar could be levied or collected. As pointed out, though a SLP was preferred against this judgment, fresh notifications have been issued under Sections 3 and 4 in respect of sugar after the judgment was delivered in Delhi Cloth Mill's case and before the Amending Act. However, that by itself did not prevent the second part being enacted because merely by issue of such notifications under Sections 3 and 4 subsequently, the whole of the area of the lacunae as pointed out by the said judgment was not rectified. Accordingly, there was and is still the scope of curing

of the defect by way of introduction of the second part by this Validating/Amending Act.

6.6. The other broad point involved is regarding the validity of Section 33-M which we have quoted hereinabove, as introduced by Bihar Agricultural Produce Markets (Amendment) Act, 1992, which replaces the earlier Ordinance to that effect.

6.6.1 In my opinion, this is wholly unconstitutional and void. The difference between "fee" and "tax" has been pointed out in various decisions of the Supreme Court and this High Court. Reference may be made in this connection to Lakhan Lal and Others etc. Vs. The State of Bihar and Others etc., . In Delhi Cloth Mills case the validity of such imposition of such fee u/s 27 has been upheld by us on the basis that it is a fee and not a tax. We have held the imposition of fee to be valid as there was a quid pro quo. In this context I set out the conclusion arrived at on this point at paragraph 36 of the said judgment:

Having regard to the aforesaid and particularly applying the test laid down by 5 Judges Bench in the case of Kewal Krishna v. State of Punjab (supra), I am of the opinion that the test of a "Fee" has been fully satisfied in this particular case. I fully agree with the Division Bench decisions in Belsund Sugar case and Raptakos Brett (supra), which have dealt with this point and upheld the validity of the State Act on this question. I am of the opinion that there is relationship between the fee collected and the services intended to be rendered under the State Act. There is no attempt to impose any tax by the said Act. It is not only expressed as "fee" but in reality and substance also it is a "fee". Accordingly, in my opinion, there is no merit in this contention and I reject the same", (para 36)

We had specifically pointed out that there was no attempt to impose any tax by the said Act. On this ground the validity of the 1960 Act was upheld. Now this attempt is being made to impose a tax. If the Act had originally imposed a tax directly and not a "fee", it would have been an incompetent exercise of power of legislation by the State legislature. What, cannot be done directly cannot be done indirectly.

6.6.2 There is Anr. aspect of the matter. The power of taxation of the legislature is limited. It does not have a residuary power like Entry 97 of List I. The power of taxation of the State Legislature is confined only in respect of certain and not all matters of List II of the Seventh Schedule. It is well settled that only certain powers have been specifically conferred by some entries in List II so far as levy of tax and not any other tax. So far as Entry 66 is concerned, the residuary power of the state Legislature is only in respect of fee and not tax

6.6.3.1 It may be pointed out that under the scheme of the Entries in the Lists, taxation is regarded as a distinctive matter and is separately set out (M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another,)

6.6.3.2 In the case of Second Gift Tax Officer v. D.H. Nazareth AIR (1970) SC

999 it was observed as follows:

The Constitution divides the topics of legislation into three broad categories:

(a) entries enabling laws to be made, (b) entries enabling taxes to be imposed, and (c) entries enabling fees and stamp duties to be collected. It is not intended that every entry gives a right to levy a tax. The taxes are separately mentioned and in fact contain the whole of the power of taxation. Unless a tax is specifically mentioned it cannot be imposed except by Parliament in the exercise of its residuary powers already mentioned. Therefore, Entry 18 of the State List does not confer additional power of taxation. At the most fees can be levied in respect of the items mentioned in that entry, vide Entry 66 of the same list, nor is it possible to read a clear cut division of agricultural land in favour of the States although the intention is to put land in most of its aspects in the State List. But, however, vide that entry, it cannot still authorise a tax not expressly mentioned. Therefore, either the pith and substance of the Gift Tax Act falls within Entry. 49 of State List or it does not. If it does, then Parliament will have no power to levy the tax even under the residuary powers. If it does not, then Parliament must undoubtedly possess that power under Article 248 and Entry 97 of the Union List. (para 10)

6.6.3.3 Taxing Statutes are also subject to the provisions of the Constitution, including part III thereof, and, accordingly, it can be struck down if it violates Articles 14, 19, 31, 265, 301 or any other provisions of the Constitution. In this context we may refer to the decision of *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, .

6.6.3.4 In the case of *Kewal Krishan Puri and Others Vs. State of Punjab and Another*, , which dealt with the Punjab Agricultural Produce Markets Act, it was held as follows:

The Constitution, therefore, clearly draws a distinction between the imposition of a tax by a Money Bill and the impost of fees by any other kind of Bill. So also In the Seventh Schedule both in List I and List II a distinction has been maintained in relation to the entries of tax and fees. In the Union List entries 82 to 92-A relate to taxes and duties and entry 96 carves out the legislative field for fees in respect of any of the matters in the said list except the fees taken in any Court. Similarly in the State List entries relating to taxes are entries 46 to 63 and entry 66 provides for fees in respect of any of the matters in List II but not including fees taken in any Court. Entry relating to fees in List III is entry 97. Our Constitution, therefore, recognises a different and distinct connotation between taxes and fees.

But the market fee has to be realised from the traders on the purchase of the agricultural produce in the market which consists of the market yards and some purchasing centres established at some other places in the area due to the urgency or exigency of the situation. Such it fee cannot be utilised for the purpose of rendering all sorts of facilities and services for the benefit of the

agriculturists throughout the area. It may be very necessary to render such services to the agriculturists rather, they must be rendered. But the laudable end in itself cannot justify the means to achieve that and if the means have got no sanction of the law.

From a conspectus of the various authorities of this Court we deduce the following principles for satisfying the tests for a valid levy of market fees on the agricultural produce bought or sold by licensees in a notified market area:

(1) That the amount of fee realised must be earmarked for rendering services to the licensees in the notified market area

and a good and substantial portion of it must be shown to be expended for this purpose

(2) That the services rendered to the licensees must be in relation to the transaction of purchase or sale of the agricultural produce.

(3) That while rendering services in the market area for the purpose of facilitating the transaction of purchase and sale with a view to achieve the objects of the marketing legislation it is not necessary to confer the whole of the benefit on the licensees but some special benefits must be conferred on them which have a direct, close and reasonable co-relation between the licensees and the transactions.

(4) That while conferring some special benefits on the licensees; it is permissible to render such "service in the market which may be in the general interest of all concerned with transactions taking place in the market.

(5) That spending the amount of market fees for the purpose of augmenting the agricultural produce, its facility of transport in villages and to provide other facilities meant mainly or exclusively for the benefit of the agriculturists is not permissible on the ground that such services in the long run go to increase the volume of transactions in the market ultimately benefiting the traders also. Such an indirect and remote benefit to the traders is in no sense a special benefit to them.

(6) That the element of quid pro quo may not be possible, or even necessary, to be established with arithmetical exactitude but even broadly and reasonably it must be established by the authorities who charge the fees that the amount is being spent for rendering services to those on whom falls the burden of the fee.

(7) At least a good and substantial portion of the amount collected on account of fees, may be in the neighbourhood of two-thirds or three-fourths must be shown with reasonable certainty as being spent for rendering services of the kind mentioned above, (para 23).

6.6.4 In my opinion, this is a tax which is not authorised by the Constitution. The State legislature has no legislative competence to enact such provision or impose such tax. As a matter of fact, the learned Advocate appearing for the Market

Committee has frankly submitted before us that he cannot support the validity of the same. The State has not made any oral submission in this regard but has merely submitted a written argument after the conclusion of the hearing, trying to justify such imposition.

6.6.5 There is Anr. aspect of the matter. The object of such taxation u/s 33-M is specified as follows:

Aims and Objects. --At present, the State Government is passing through very difficult financial stringency. With a view to bring improvement in the present financial situation, arrangements have to be made to deposit to the State Fund as contribution to a certain percentage (to be fixed by the State Government from time to time) out of income accruing to the Agricultural Produce Markets by way of Market fee and licence fee.

Therefore, necessary provision has been made in the Bihar Agricultural Produce Markets (Amendment) Ordinance, 1992 (Bihar Ordinance No. 1992) and the "object of the Bill is to enact those provisions.

6.6.6 It is well settled that the "subject" and "object" of a tax are two different things. The "object" of a tax may be "laudable" but the "subject" of a tax must be legal. If the "subject" of tax is not lawful, even if the "object" of tax is to be highly appreciated, that will not be an authorised and legal imposition. The Court must not look only at the object of legislation. An Act may have a perfectly lawful object, but may seek to achieve the object by unlawful method which is not permitted. An Act may also have nothing to do with the object. Reference may be made in this connection to *Gallagher v. Lyun* (1937) A.C. 863 (at page 870), *The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc.,* , *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, . Accordingly, in my opinion, Section 33-M is beyond the legislative competency of the State. It is not a taxation authorised by law within the meaning of Article 265. 6.6.7 The contention of the State in this [regard as put forward in its written submission is to the following effect:

.Section 33-M.-- !The said section has been introduced with the object that the State Government was giving grant to the Marketing Board and Market Committee. In order to recoup the amount which the State had given as grant to all the Market Committees every year for a long time, the said provision has been made. It is submitted that the amount contributed by the Market Committee to the said Consolidated Fund shall not be spent for any other purpose except for rendering services and for the purposes of the. Bihar Agricultural Produce Markets Act.

(ii) Alternatively it is submitted that Section 33-M is severable and does not affect the validity of the other provisions of the Act.

Tax can be levied retrospectively.

It has been noticed in *Delhi Cloth and General Mills Co. Ltd. and Others Vs. The*

Agricultural Produce Market Committee and Others that during all these periods the Traders were realising Market fee. The amending Act has followed the levy and has "empowered the Market Committee to realise the said fee. Harinagar Sugar Mills had taken an injunction order in a Civil Suit and as such they were not paying the market fee but other traders have been paying the market fee till the decision of the D.C.M. case and again after passing of the Act they are paying.

The retrospective operation of the Act for realisation of the Market Fee is not violative of Article 19(1)(g) and as a matter of legislative policy; especially taking into account the legislative history of the Act...

6.6.8 In my opinion, such contention is without any merit. Firstly, the statements of fact made in the said written submission are not supported by any sworn affidavit nor does it appear from the Act. Moreover, it is contrary to and inconsistent with the "Objects and Reasons" of such introduction of such provision as quoted above. Further, merely an assurance made in such written argument that such amount collected as tax shall not be spent for any other purpose except for rendering services and for the purpose of the said Act, is not by itself sufficient to uphold the validity of the same particularly having regard to the fact that such "promise" is contrary to and inconsistent with the "Object" and "Reasons" quoted above.

6.7 I shall next deal with the arguments of the Petitioners based on Section 15. In my opinion, such order of exemption by itself does not help the Petitioners. Firstly, it is to be pointed out that in view of our decision in Delhi Cloth and General Mill's case, no such point can be allowed to be argued. In any event, any exemption granted u/s 15 would not change the situation. The only effect of grant of exemption u/s 15, if any, is that the bar u/s 15 shall not be applicable. But even if that is so, all other provisions of the Act, Rules and bye-laws remain effective in respect of sugar even after such exemption u/s 15, as long as sugar remains included within the schedule. Sugar was excluded by the notification dated 2.5.77 and this aspect of the matter is covered by our judgment in Delhi Cloth Mill's case. and our finding hereinabove. Mere exemption u/s 15 might exempt a person from the requirements u/s 15, but it does not by itself amount to an exemption from other provisions of the said Act as long they are otherwise applicable.

6.8 On the question as to whether the notification dated 31.8.92 is a valid notification u/s 4 of the Bihar Agricultural Produce Markets Act, 1960, it was contended on behalf of the Petitioners that there was no such consideration of objections as required under Sections 3 and 4 as required before such notification u/s 4(1) could be issued. The details of such contention would appear from the arguments of Mr. Gopal Subramaniam which I have quoted in details hereinabove. However, it is not necessary for me to go into the said question having regard to the conclusion I have arrived at regarding the validity of the second part of Section 4-B of the said Amending/Validating Act/Ordinances.

6.9.1 I shall now deal with some additional points advanced by Mr. Raja Ram Agrawal, learned Advocate appearing on behalf of some of the Petitioners.

6.9.2, It was submitted by him that the expressions in the Act has to be given a limited and restricted meaning, in accordance with the intention of the Act, so as to exclude the industrial products produced by the industry from the scope of the Act. In this context he has relied upon various intrinsic evidence including the parliamentary debate etc. I am unable to accept such contention. These materials can be looked into for ascertaining the background and for other purposes but the same cannot change the plain and clear meaning of the provisions of an Act. If the meaning is clear, then that has to be given effect to. Accordingly, I reject this contention.

6.9.3 It was next contended by Mr. Agrawal that no market fee is now payable. It was submitted that Section 27 originally provided for market fee @ Rs. 1/- . This was amended by Bihar Ordinance No. 8 of 1988 whereby the expression "at the rate, of rupee one" was substituted by "at the rate of Rupees one and fifty paise". This Ordinance No. 8 of 1988 lapsed and was not replaced by any Act or any other Ordinances. This is the admitted position. However, on the basis of the same it was submitted that as a result of the Ordinance having lapsed, the old provisions in the Act did not revive and accordingly no market fee at all can be now levied, as there is no rate now specified. In this connection he has relied on the decisions in Govind Saran Ganga Saran v. C.S.T. (1985) 3 SCC 1041 and T. Venkata Reddy and Others Vs. State of Andhra Pradesh, . I am unable to accept such contention. It is to be remembered that such amendment was introduced merely by an Ordinance. Such Ordinance was valid only for a limited period. Thereafter it automatically came to an end having spent its force. This is not a case of permanent amendment to a permanent Act, in which case, when the amendment is repealed, the original provision, which was substituted, does not automatically revive. The provisions made by the Ordinance, which is temporary in nature and of a limited duration, having expired, the main provision automatically revives. The decisions relied upon are clearly distinguishable.

7. I shall now shortly answer the broad points involved in this case as indicated by me earlier:

1(a) No. Neither Sub-section (1) nor Sub-section (2) of Section 4-A is valid or constitutional prospectively. They are ultra vires Articles 14 and 19(1)(g) of the Constitution and not protected by Article 19(6) thereof.

(b) Having regard to my answer to 1(a) above, this question does not strictly arise. However, even assuming that the prospective part of such Sub-section (1) and (2) of Section 4-A is valid and constitutional, in any event, the retrospective part of the same is void and unconstitutional being ultra vires Articles 14 and 19(1)(g) of the Constitution.

2. Section 4-B of the said provision is partly valid and partly invalid. This Section can be divided into four parts. Third part and fourth part of the said section are

merely ancillary and consequential to first and second part. The first part of the said section is invalid and cannot be given effect to. However, the second part of the said section is valid and can be given effect to.

3. (a) No. Section 33-M of the Act, as sought to be introduced by the amendment of the main 1960 Act, by the Amending Ordinance and Act, is invalid and ultra vires the Constitution. The said legislation lacks legislative competency.

(b) In view of my answer in respect of 3(a) above, the answer is in the negative. Such rule is invalid.

4. The grant of exemption made u/s 15 of the Act, so far as sugar is concerned, does not affect the applicability of the other provisions of the Act, rules and bye-laws, if they are otherwise valid and applicable.

5. The Bihar Ordinance No. 8 of 1988 having lapsed, the rate of Market fee provided u/s 27 of the Act before the Ordinance No. 8 of 1988 was promulgated, revives after the said Ordinance lapsed. The rate shall be Re. 1/ - and it will continue to be so until and unless it is modified according to law.

6. No. No such limited or restricted meaning can be given to such expression to agricultural produce by excluding the industrial products produced by the industry, under the ambit of the Act.

7. Having regard to our decision on the points, particularly point No. 2 indicated above, it is not necessary to go into this point and accordingly I refrain from expressing my opinion regarding the same.

Final Order:

The writ petitions are allowed partly to the extent indicated above and they are disposed of accordingly. So far as the Second Appeal is concerned, which was heard along with the writ petitions on common points, the same will be governed by this judgment so far as the points decided herein are concerned. The Second Appeal shall be heard on other points and disposed of accordingly.

There will be no order as to costs.