
(2003) 07 PAT CK 0061
In the Patna High Court
Case No : C.W.J.C. No. 8483 of 2001

Shree Prakash Singh

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 11-07-2003

Acts Referred:

Citation : (2003) 07 PAT CK 0061

Final Decision : Allowed

Judgement

Nagendra Rai, J.—The petitioner,, a clearing and sales agent of products of Nestle India Limited (hereinafter referred to as the Company) has filed the present writ application for quashing the notification dated 10th April, 2001 whereby amendment has been made in the Schedule of the Bihar Agricultural Produce Markets Act (hereinafter referred to as the Act) in exercise of power u/s 39 of the Act in so far as the products made by the Company included under Item No. VIII of the schedule captioned as Animal Husbandry Products and notices issued by the agricultural Produce Markets Committee, Mussalahpur (hereinafter referred to as the Committee) asking the petitioner to take licence and to pay market fee with regard to the said products. At the time of argument, learned Senior counsel appearing for the petitioner confined the challenge to the notification only with regard to two products, namely, lactogen and milkmaid being sub-items No. 22 and 25 under heading VIII, Animal husbandry products. Copies of the notification as well as two notices have been annexed as Annexures 1, 2 and 3 to the writ application respectively.

2. The case of the petitioner is that the Company has factory in various locations in the country for manufacture of its product. The products manufactured by the Company are milkmaid, everyday, lactogens milk, cereals, nestum, nescafe, noodles, sauces, cubes, tea, Kitkat and other items. The Company has appointed number of clearing and sales agents (hereinafter referred to as C & S Agents) in various parts of the country to whom products are despatched from its factory on stock transfer basis. The C & S Agents clear the said products despatched to

them from Rail/Road heads and store the same in their godowns. The Company has also appointed distributor in various parts of the country for distributing the said products to retail dealers. The C & S agents invoice the goods to the distributor of the respondent-company received from the Company's representatives. The Patliputra Cands owned by the petitioner has been appointed as Clearing and Sales Agent of the Company and M/s Patliputra Trading Company has been appointed as distributor by the Company for distribution of its products in Patna covering the area of Patna Town and M/s Sarvottam Sales Corporation has also been appointed as distributor within the jurisdiction of Agricultural Produce Markets Committee, falling within Patna City.

3. Originally Milk was in the Schedule of the Act. By notification No. S.O. 730 dated 2-5-1977 it was deleted from the Schedule. Subsequently the notification dated 2-5-1977 was cancelled by another notification dated 21-5-1977, Again in 1984 the milk except in liquid form was substituted. In the year 1986, the Bihar Agricultural Produce Markets Board (hereinafter referred to as the Board) took a stand that the petitioner-firm is liable to pay market fee on the various products of the company and a demand was raised towards the market fee by the Committee on all the products sold by the Company through the petitioner. The petitioner challenged the validity of the aforesaid action taken by the Committee by filing C.W.J.C. No. 4133 of 1986. Its claim was that the Act was not applicable with regard to products dealt with by it. The said writ application along with other writ applications was heard and disposed of on 15-12-1987 which is reported in 1988 PLJR 830. The petitioner in the said writ application challenged that the product marketed by it, namely, Milk maid, Lactogen, Nestum Baby Cereal, Cerelac, Nespray milk powder, Lactogen Full Protein Followup Formulas, Everyday dairy coffee whitener in powder form, Tomoato Ketchup and Hot and sweet type sauces made from sugar, chilli synthetic vinegar etc. are not covered by the Act. It was held by this Court that Nestum, Cerelac, Amulspray, Chocolate, Ketchup, Milkafe and cheese are not agricultural produce but the two products, namely, Lactogen and milkmaid which are subject matter of challenge in this writ application and other products were held to be covered by item No. 9 in Part VIII (Animal Husbandry Products) of the Schedule, "Milk". The said judgment was challenged by the petitioner before the Apex Court by filing SLP and the Leave was granted in the year 1988 but no stay was granted and the Civil Appeal No. 1216 of 1988 arising out of the aforesaid SLP was dismissed for default on 9th December, 1991.

4. Thereafter the Committee issued notice to the petitioner to pay market fee on all products marketed by it except those products, namely, Nestum, Cerelac, Amulspray, Chocolate, Ketchup, Milkafe and cheese which have been held to be not covered by the provisions of the Act. The petitioner was also directed to obtain licence, file return and to pay outstanding market fee. The petitioner aggrieved by the aforesaid action taken by the Market Committee filed a writ application being C.W.J.C. No. 5799 of 1998 before this Court challenging the applicability of the Act which is still pending. The petitioner has subsequently

filed other writ applications also challenging the applicability of the Act which are pending. In the meantime, the aforesaid notification dated 10-4-2001 has been issued amending the Schedule including item No. VIII, captioned as "Animal Husbandry Products" of the Schedule and sub- items were added which are as follows;

20. Products made from milk- Milk Powder, Baby food and Products used therein alongwith ingredient (except milk) i.e. Amul Spray.

21. Amulya.

22. Lactogen.

23. Lactodex

24. Raptakos.

25. Milk Maid.

26. Cheese.

27. Panir.

28. Glaxo.

29. Skimmed Milk.

30. Milk Whitener.

5. As stated above, initially the petitioner challenged all the entries from 20 to 30 but later on he confined the challenge only to two items, namely, Lactogen and Milkmaid being sub item Nos. 22 and 25. Accordingi to the petitioner, these two products though included in the schedule are not milk products and thus are not the agricultural produce as defined u/s 2 (a) of the Act and, accordingly, the Act is not applicable. The further grievance is that even if they are agricultural produce, by only inclusion of the products in the schedule in exercise of power u/ s 39 of the Act, the Act is not applicable to the said products unless formalities as contemplated under Sections 3 and 4 are complied with. In support of the aforesaid stand, learned Counsel for the petitioner has made several submissions which will be considered hereinafter.

6. The stand of the respondents- Board and the Committee as evident from their counter-affidavits is that both the products are the Milk products and covered by the provisions of the Act and State Government being a competent authority in terms of the provisions of the Act in exercise of power has amended the Schedule and categorically and specifically added milk product and Baby food including Lactogen and milk maid as a product of the milk under the heading Animal Husbandry Products. The name of lactogen itself suggest that it is a milk product as "Lacto" is adjective of Milk, "acqua" is of water and "gen" is the abbreviation of the word Genus and the two words together "Lactogen" means a product of which milk is the genus. Thus, by business name and terminology also

it is a species of manufactured milk. It is further stated that the composition of milk of different species shows that it contains about 90% "of water and on dehydration water content comes down with the result that percentage of protein, fat, sugar, salt and vitamins goes up. From the composition and process of manufacture of lactogen as mentioned in the writ application it becomes clear that items added in the schedule are manufactured milk product. Reference has also been made to the Milk and Milk Product Order, 1992 issued by the Central Government wherein milk product has been defined which includes infant milk food, skimmed milk powder, whole milk powder, Chocolate products, cheese and other items containing milk or milk product. Thus, both the products are agricultural produce and amenable to the provisions of the Act.

7. The further stand is that once the products are included as agricultural produce in the Schedule, the provisions of the Act are applicable and it is not necessary to take recourse to the provisions of Sections 3 and 4 of the Act before applicability of the Act to the said agricultural produce. The respondents have rightly asked the petitioner to obtain licence fee and pay market fee with regard to these products and other produces as mentioned in the notification and the notices issued in pursuance thereof.

8. Before dealing with the submissions advanced at the bar it will be apt to refer to the provisions of the Act and the notifications issued from time to time and the relevant judgments rendered by this Court as well as by the Apex Court in the matter.

9. The Act has been enacted 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. Section 2(a) defines the Agricultural produce, according to which agricultural produce means all produce whether processed or non-processed, manufactured or not, of agriculture, Horticulture, Plantation, Animal Husbandry, Forest, Sericulture, Pisciculture, and includes livestock or poultry as specified in the Schedule. Section 39 of the Act empowers the State Government to add, amend or cancel any of the items of agricultural produce specified in the Schedule by issuance of notification. Section 2 (h) of the Act defines the market which 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 and 2 (i) defines the market area which means any area declared to be a market area u/s 4 and Schedule has been defined u/s 2 (r) which means Schedule of this Act.

10. Chapter II of the Act deals with constitution of markets and market committees. Section 3 of the Act contains a provision with regard to issuance of notification of intention of exercising control over purchase, sale, storage and processing of agricultural produce in specified area and the same runs as follows;

"(3) Notification of intention of exercising control over purchase, 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, by 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."

11. According to the said provision, once the State Government decides to make the provisions of the Act applicable into any area then it will declare its intention by issuance of notification of regulating the purchase, sale, storage and processing of such agricultural produce and in such area which is to be specified in the notification. The notification will further provide that the objection or suggestion may be received with regard to issuance of the aforesaid notification within the specified period mentioned therein which shall be considered by the State Government.

12. Section 4 of the Act contains a provision with regard to declaration of market area which runs as follows:

"(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, stores or processing of any agricultural produce so notified, except in accordance with the provisions of this Act, the rules and bye-laws."

Explanation.--A municipality or other local authority or any person shall not be deemed to set up, establish or continue or allow to be set up, established or continued a place as a place for the purchase, sale, storage or processing of agricultural produce within the meaning of this section, if the quantity is as may be prescribed and the seller is himself the producer of the agricultural produce offered for sale at such place or any person employed by such producer to transport the same and the buyer is a person who purchases such produce for his own use or if the agricultural produce is sold by retail sale to a person who purchases such produce for his own use.

(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 or 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."

13. According to the said provision after 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 notification 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 issued under the preceding section. After the publication of the notification under Sub-section (1) of Section 4, the municipality or other local authority or any other person is prohibited to set up, establish, or continue, or allow to be set up, established or continued any place for the purchase, sale, stores or processing of any agricultural produce so notified in the market area, or within a distance thereof to be notified in the official Gazette except in accordance with the provisions of the Act, the rules and Bye-laws. Subsection (3) empowers the State Government by notification to delete any make area or any agricultural produce mentioned in Sub-section (1) of Section 4.

14. Section 5 of the Act contains a provision with regard to declaration of market yards. Section 15 of the Act contains a provision with regard to sale of agricultural, produce and it provides that once the notification has been issued u/s 4 of the Act no agricultural produce shall be bought or sold by any person at any place in the market area other than the relevant principal market yard or sub-market yard or yards established therein except such quantity as may on this behalf be prescribed for retail sale or personal consumption. Sub-section (2) of Section 15 provides that the sale and purchase of such agricultural produce in such area notwithstanding contained in any law be made by means of open auction or tender system except in case of such class or description of produce as may be exempted by the Board. Section 27 of the Act empowers the Market Committee constituted under the Act to levy and collect market fee on agricultural produce bought or sold in the market area at the rate specified therein. The market fee chargeable is paid by the buyer.

15. By notification No. S.O. 730 dated 2nd May, 1977 the State Government in exercise of power u/s 39 of the Act deleted several items from the agricultural produce. Butter and Milk were deleted from item No. VIII (Animal husbandry products). Sugar was also deleted from the heading Miscellaneous (XII). Subsequently the State Government issued another notification No. S.O. 857 dated 21st May, 1977 cancelling the earlier notification dated 2-5-1977. The notification S.O. No. 857 dated 21st May, 1977 issued u/s 39 of the Act was challenged before this Court by filing batch of cases with regard to sugar only.

The said writ applications were disposed of by a common judgment dated 30th March, 1992 which is reported in Delhi Cloth and General Mills Co. Ltd. and Others Vs. The Agricultural Produce Market Committee and Others This Court held that cancellation of the earlier notification dated 2-5-1977 by notification dated 21-5-1977 did not tantamount to an automatic revival of sugar being an item in the schedule. For including the items in the schedule of the Act positive action of issuing separate notification adding items in the schedule was necessary. This Court also held that even if it is assumed that item was included by notification dated 21-5-1977 such inclusion does not authorize imposition of market fee u/s 27 of the Act because it did not comply with the requirements under Sections 3 and 4 of the Act including any item in the Schedule of the Act.

16. SLP was filed by the Board before the Supreme Court. Leave was granted but no stay was granted. Again by memo No. 3027 dated 12-5-1992 additional notification was issued clearly including sugar, milk and milk product and other products in the Schedule under different captioned. On 13-10-1992, Bihar Agricultural Produce Markets (Second Amendment) Ordinance, 1992 was promulgated which was replaced by the Bihar Agricultural Produce Markets (Amendment) Act, 1993. By the said Act, Sections 4-A and 4-B were inserted which run as follows.

"(4) 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 2-5-1977 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 had ceased on the issuing of Notification No. 730 dated 2-5-1977."

17. u/s 4-A it was specifically provided that the provisions of Sections 3 and 4 will 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 product not specified therein. However, in case of deletion of any item in exercise of aforesaid power an opportunity of hearing to be given to the affected person. Section 4-B validated the levy of market fee and collection and provided that notwithstanding any judgment, decree or order rendered by 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 the notification No. 730 dated 2-5-1977 shall be deemed to have never been issued and no proceedings shall be levied for refund of the fee. The said amendments were challenged by the sugar mills by filing several writ applications before this Court which were disposed of by order dated 20-1-1994 reported in 1994 (1) PUR 407 H.M.P. Sugar Ltd. and Ors. v. State of Bihar and Ors. This Court held that Section 4-A is ultra vires of Articles 14 and 19G of the Constitution of India and not protected by Article 16 of the Constitution. Even if the said provision is held to be valid the retrospective part is ultra vires of Articles 14 and 19(g) of the Act. Section 4-B is partly valid and partly invalid. The first part of Section 4-B is invalid and cannot be given effect to. The second part is valid and can be given effect to. Parts 3 and 4 of Section 4-B are merely ancillary and consequential to the first and second parts. The said judgment was challenged by the Board as well as by the Sugar Mills and was finally disposed of by the Apex Court on 8th July, 1996 which is reported in (1996) 9 Supreme Court Cases 681. The Apex Court held that Sections 4-A and 4-B are valid and the imposition of market fee and collection of such market fee are legal valid.

18. Thus it is clear that prior to issuance of the notification under challenge the milk was one of the items under caption "Animal Husbandry Products" which was deleted and subsequently the notification deleting the Milk and other products was cancelled which was challenged with regard to sugar covered by the said notification and the Apex Court held that in view of the amended provisions of Sections 4-A and 4-B, the notification dated 2-5-1977 deleting the items including Milk will be deemed to have never been issued.

19. Several writ applications were filed before this Court challenging the applicability of the Act to the products, namely, sugar, sugarcane and molasses, vegetable oils, rice products, animal husbandry products, milk, wheat products and tea. This Court decided that the Acts are applicable with regard to said products and the matter was challenged by the aggrieved party before the Supreme Court by filing several Civil Appeals and the same were disposed of by a Constitution Bench on 10th August, 1999 and the case is known as "Belsund Sugar Co. Ltd. v. State of Bihar and Ors.", reported in (1999) 9 Supreme Court Cases 620. The matter with regard to Milk and Milk products has been dealt with by the Apex Court under heading No. 5 from paragraph 135 to 140. The two products, namely, Lactodex and Raptakos SIF (Special infant food) manufactured by the appellant of Civil Appeal No. 1880 of 1988 were held to be non agricultural Produce by the Apex Court. The appellant in that case claimed that baby food under the trade name "Lactodex and Raptakos SIF are not agricultural produce. The Apex Court held that sub-item 20 captioned under the title "Animal Husbandry Products" refers to milk except liquid milk. By no stretch of imagination, tinned baby food containing various ingredients which may include some milk fats or proteins though in powder form can be said to be milk powder simpliciter or whole milk not in liquid form. The Apex Court noticed that there is

no item of milk products in the Schedule to the Act under the caption "Animal Husbandry Products" whereas such produce with regard to other items have been included in the Schedule and accordingly held that respondents-Board has not shown that these two products were agricultural produce being Animal Husbandry products of "milk" in a non-liquid form and accordingly held that the Act is not applicable. After the aforesaid judgment the State Government issued the notification dated 10th April, 2001 incorporating the products made from Milk such as milk powder, baby food and products used therein (along with ingredient except milk, i.e. Amul spray and subsequent entries from 21 to 30 giving the trade names of the products of milk.

20. Learned Senior Counsel appearing for the petitioner raised following submissions;

(I) Trade marks or brand names are not agricultural produce as defined u/s 2(a) of the Act. Lactogen and Milkmaid are trade marks and not the goods and thus not the agricultural produce and accordingly, cannot be included in the Schedule and will not be subjected to regulatory procedure under the Act. In support of the aforesaid submission he relied upon the Book named as "Intellectual property, Patents, Copyright trade marks and allied rights" written by W.R. Cornish and book named as "Property in trade mark" written by Mr. Narayanan (IVth Edition Chapter III), 1972 (2) All England Report 507 (General Electric Company v. The General Electric Co. Ltd.) 1886 (XXXIII) Chancery Division at page 395 (In re James's Trade Mark James v. Soulby,) 1986 FSR 472 (Coco Cola Trade Marks), AIR 1995 Supreme Court 2372 Gujarat Bottling Co. Ltd. and Ors. v. Coca Co/a Company and Ors., and AIR 1965 Supreme Court 35 Consolidated Food Corporation v. Brandon and Co. Private Ltd., Relying upon the aforesaid authorities, the learned Counsel for the petitioner submitted that the trade marks is an specie of intellectual property and it is a mark on the good and not the good itself and thus it cannot be treated as agricultural produce under the Act.

(II) Even if it is assumed that two products, namely, Lactogen and Milkmaid are agricultural produce and rightly included in the Schedule of the Act by the State Government in exercise of power u/s 39 of the Act, the said products cannot be subjected to regulatory procedure under the Act unless the procedure provided under Sections 3 and 4 has been followed. In support of the aforesaid submission he relied upon the judgment of the Supreme Court reported in (1996) 9 Supreme Court Cases 681, Sasa Musa Sugar Works and Ors. v. State of Bihar and Ors., and the judgments of this Court reported in Sree Baharji Mills Ltd. and Others Vs. State of Bihar and Others, , M/s Shri Shankar Makhana Bhandar Vs. The State of Bihar and Others, , and M/s Saraogi Paper Mills Vs. The State of Bihar and Others, .

(III) The State is not competent to issue the aforesaid impugned notification u/s 39 of the Act with regard to two products in question. As Trade Marks Act is a legislation made by the Union Government by virtue of an authority conferred under Entry 49 of List I of Schedule VII of the Constitution of India which covers

inter alia trade and Merchandise marks, the State has no power to make law with regard to matter covered by the said entry as the two products are not the goods but the trade mark and covered by the provisions of the Trade Marks Act, 1999 made by the Central Government. Consequently, the legislature has no authority in law to delegate the power to the State Government to include the articles in the Schedule of the Act.

(IV) Section 39 of the Act itself is ultra vires as it confers unguided power to add, substitute and delete the agricultural produce from the Schedule of the Act. Schedule is a part of the Act and addition, substitution and deletion of the agricultural produce falls within the domain of the policy matter and the same cannot be delegated by the Legislature to the delegatee (State Government). In support of the said submission he relied upon the judgments of the Supreme Court reported in AIR 1951 Supreme Court 332 (In re Art. 143, Constitution of India and Delhi Laws Act (1912) etc.) and Rajnarain Singh Vs. The Chairman, Patna Administration Committee, Patna and Another, .

(V) The Act is ultra vires as it has extra territorial operation. The object of the Act is to protect the agriculturist of the State of Bihar from the middlemen. The Milk used for preparing the milk product in question is not or this State, on the other hand, the same is of the other State and manufacturing of the goods by the Company is also made outside the State. In support of the same he relied upon the judgment of the Supreme Court reported in Jan Mohammad Noor Mohammad Begban Vs. State of Gujarat and Another, , and a Full Bench decision of the Bombay High Court reported in 1958 Bom 68 The State v. Narayandas Managilal Dayame.

(VI) In view of the Special provisions of the Milk and Milk Product Order 1992, made by the Central Government in exercise of power u/s 3 of the Essential Commodities Act, the Act in question has to give way to the aforesaid special provision.

(VII) By issuance of impugned notification the State Government has nullified the judicial decision of the Supreme Court in the case of Belsand Sugar Co. Ltd. v. State of Bihar and Ors., reported in (1999) 9 Supreme Court Cases 620.

21. Learned Counsel appearing for respondents-Board and Committee submitted that in Belsund Sugar Co, Ltd. (supra) the appellant before the Apex Court challenged that Lactodex and Raptakos SIF (special infant food) are not agricultural produce, The Apex Court having noticed that the milk except liquid milk was added at sub-item 20 captioned under the title "Animal Husbandry Products" held that the aforesaid two products which are admittedly milk products cannot be termed to be agricultural produce being animal husbandry products of milk in a non-liquid form and accordingly held that Act is not applicable with regard to the said products. Thereafter the impugned notification has been issued by the State Government on 10th April, 2001 including the milk products also as agricultural produce and under newly added entry No. 20 under

the caption "Animal Husbandry Products", the products made from milk - Milk powder, Baby food and products used therein (alongwith ingredient (except milk) i.e. Amul Spray have been added as agricultural produce. The brand names have been given only for the purpose of showing some of the products by way of example/ illustration to identify the products made from the milk. Thus trade mark has not been treated as an agricultural produce, on the other hand they have been included as a milk product.

22. He further submitted that once the Article is included in the Schedule of the Act in exercise of power u/s 39 of the Act as agricultural produce it is subjected to regulatory procedure under the provisions of the Act and fees are leviable even if the procedure under Sections 3 and 4 has not been followed, specially when " in this case the procedure under Sections 3 and 4 has already been followed with regard to milk.

23. The Act has been enacted by the State under Entry No. 28 (Market and Fairs) of State List of Schedule VII of the Constitution of India. It has nothing to do with the trade and merchandise mark as mentioned under Entry 49 of list I of Schedule VII of the Constitution of India. The Trade Marks Act, 1999 enacted by the Central Government under the aforesaid entry deals with different matter and it has no concern with the market and fairs which is a State subject under which Act has been enacted.

24. Section 39 of the Act does not confer unguided and uncanalised power on the State Government, on the other hand after reading the aims and object, preamble and the provisions of the Act it is clear that policy and object have been laid down by the Legislature and power has been conferred on the State u/s 39 to achieve the policy and object. No policy matter has been delegated to the State Government. Enough guideline has been provided under the Act itself with regard to addition, substitution and deletion in respect of agricultural produce u/s 39 thereof. This question has also been considered by a Division Bench of this Court in the case of Mahabir Tea Company and Ors. v. State of Bihar and Ors., reported in 1979 BLJR 560 and it has been held that Section 39 is a valid piece of legislation.

25. He further submitted that Act has no extra territorial operation and this submission in regard to Tea matter has already been considered and rejected by the Apex Court in Belsund Sugar Co. Ltd. (supra) in paragraph 153 of the judgment.

26. He further submitted that the Milk and Milk Product Order, 1992 has been issued u/s 3 of the Essential Commodities Act and the same deals with different matter and not with regard to matters covered by the provisions of the Act.

27. The aforesaid notification in no way nullifies the judicial decision given by the Supreme Court in Belsund Sugar Co. Ltd. (supra), on the other hand notification has been issued to include the milk products as agricultural produce which were not included earlier whereas the products of other agricultural produce such as

paddy etc. were already included in the Schedule.

Point No. (I)

28. The Act has been enacted 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, The main object of the Act is to protect the growers of agricultural produce who on account of their ignorance, illiteracy and lack of collective bargaining power may get exploited by middlemen and economically strong purchasers of their agricultural produce with the result that the agricultural produce with the result that the agriculturists may not get adequate price for their produce. The Apex Court has upheld the constitutional validity of the similar provision as well as the provision of this Act and emphasised the necessity of such enactment with a view to protect the producers of agricultural produce from being exploited by the middlemen and profiteers and to enable them to secure a fair return for their produce. Reference in this connection may be made to the Constitution Bench Judgments of the Supreme Court in the case of *M.C.V.S. Arunachala Nadar etc. Vs. The State of Madras and Others*, and in the case of *Belsund Sugar Co. Ltd.*, (supra).

29. From the definition of agricultural produce as quoted above it is clear that definition is very wide one and artificial definition has been given to word "agricultural produce" as it includes all produce whether processed or non-processed, manufactured or not, of agriculture, horticulture, Plantation, Animal Husbandry, Forest, Sericulture, Pisciculture and includes livestock or poultry as mentioned in the definition. It does not include only basic product but also product processed or manufactured from the said basic product. Any product after processing or manufacturing from basic raw material would remain agricultural produce. The milk is agricultural produce mentioned in the Schedule though it was deleted for some time but in view of the judgment of the Supreme Court in *Sasa Musa Sugar Works* (supra) such deletion was wrongly made as stated above." The word "milk product" was not included in the Schedule and by the impugned notification the milk product has also been included in the Schedule and some of the milk products which are commercially known as milk product have also been included in the Schedule though it would have been better if they had been mentioned by way of examples of milk products in entry No. 20 under caption "Animal husbandry products itself."

30. The two text books and the decisions cited by the petitioner as mentioned above show that the trade mark is an intellectual property and the function of the trade mark legislation is to protect the mark but not the article which is marked and the main purpose of the trade mark is to describe something which distinguishes the goods rather than the goods themselves. There is no controversy with regard to the aforesaid proposition and trade mark cannot be agricultural produce. The Trade Marks Act has been enacted by the Parliament with a view to amend and consolidate the law relating to trade marks, to provide

for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent marks. The said Act has no application with regard to sale, purchase etc. of agricultural produce. As stated above, the names of milk products have been mentioned in the notification by way of example of the milk product and thus mentioning of the product of the petitioner does not mean that the trade mark has been treated as agricultural produce, on the other hand, they have been included as agricultural produce being products of the Milk.

31. The main question is to be decided as to whether the products of the petitioner is agricultural produce or not by virtue of these ingredients. If it is milk product then it is agricultural produce as defined u/s 2(a) of the Act. The petitioner has given only the ingredients of Lactogen-1 and Lactogen-2 and not of Milkmaid in the writ application which are as follows.

Lactogen -1

INGREDIENTS

Partially skimmed milk, destromaltose, sucrose, edible vegetable oil, soya lecithin and vitamins.

Contains vegetable oil.

APPROXIMATE COMPOSITION

Per 100 g of powder Per litre of prepared formula

Energy Keal 501 670

kj 2090 2810

Total Fat g 25.1 336

Milk Fat g 17.25 2311

Vegetable Fat g 6.9 9.2

Soya Lecithin g 0.95 1.27

Linoleate g 43 5.8

Milk Protein g 1.29 17.3

Carbohydrates g 55.9 749

Total Ash g 3.1 42

Moisture g 3 904

Minerals

Sodium mg 200 270

Potassium mg 600 800

Chloride mg 430 580
Calcium Calcium 560 750
Phosphorus mg 390 520
Magnesium mg 43 58
Iron mg 6 8.1
Iodine mcg 75 100
Copper mcg 300 400
Zinc mg 3.8 5
Manganese mcg 30 40
Vitamins
Vitamin A I.U. 1800 2400
mcg RE 530 710
Vitamin D I.U. 300 400
mcg RE 7.5 10
Vitamin E I.U. 6 8.1
Vitamin K mcg 40 54
Vitamin C mg 50 67
Thiamine mcg 350 470
Riboflavin mcg 750 1000
Nicotinamide mcg 5000 6700
Vitamin B6 mcg 380 500
Folic Acid mcg 45 60
Pantothenic Acid mg 2.3 3
Vitamin B12 mcg 1.5 2
Biotin mcg 11 15
Choline mg 50 67
Inositol mg 25 34
Carnitine mg 8 11
Taurine mg 40 54
LACTOGEN-2

INGREDIENTS

Partially skimmed milk, destromaltose, sucrose, edible vegetable oil, minerals, soya, lecithin and vitamins.

Contains vegetable oil.

APPROXIMATE COMPOSITION

Per 100 g of powder Per litre of prepared formula

Energy Kcal 466 670

1950 2790

Total Fat g 18.5 26.5

Milk Fat g 12.93 18.5

Vegetable Fat g 5 7.2

Soya Lecithin g 0.57 0.81

Linoleate g 3.2 4.6

Milk Protein g 15 21.5

Carbohydrates g 59.9 85.7

Total Ash g 361 5.1

Moisture g 3 904.3

Minerals

Potassium mg 705 1010

Chloride mg 497 710

Calcium mg 653 930

Phosphorus mg 451 640

Magnesium mg 58 83

Iron mg 7.9 11

Iodine mcg 98 140

Copper mcg 560 800

Zinc mg 5.6 8

Manganese mcg 91 130

Vitamins

Vitamin A I.U. 1900 2700

mcg RE 560 800
Vitamin D I.U. 420 600
mcg RE 10 15
Vitamin E I.U. 56 8
Vitamin K mcg 21 30
Vitamin C mg 47 67
Thiamine mcg 700 1000
Riboflavin mcg 1100 1600
Nicotinamide mcg 13000 18000
Vitamin B6 mcg 930 1300
Folic Acid mcg 140 200
Pantothenic Acid mg 3.3 4.7
Vitamin B 12 mcg 0.93 1.3
Biotin mcg 16 23
Choline mg 47 67
Inositol mg 23 33

The manufacturing process of the aforesaid two products are as follows;

(1) Milk Powders (Lactogens/Everyday)

Milk is received in the FMR prep, and sent to the Liquid Plant, Here is first standardised and then routed through evaporator to increase the TO (Total concentration). Concentrated milk is then sprayed through drier fower (ESRON in Nestle terminology to get Milk Powder)

Fresh milk - TO -15% Rest water ? Standardised ? Evaporator to -51% ! ? Spray Drier ! ! Bulk ! Powder Filling

(II) MILKMAID

Fresh milk is standardised and then treated in a vacuum pan to make it thick principle is that boiling point induces when pressure is reduced hence it is easy to remove excess water content and thicker the milk.

Fresh milk--Standardisation--Vacuum pan--Concentrated milk

32. Thus, according to the petitioner, so far Milkmaid is concerned apart from milk no other item is added in it. So far Lactogen is concerned as it appears from the details mentioned above that milk fat is 12.93 per 100 gm of powder and milk protein is 15% and thereafter other items are included. According to the

petitioner both the items are not milk products.

33. The Board on the other hand has given the average composition of the milk of different species taken from Chambers Encyclopedia in paragraph 12 of the counter- affidavit which runs as follows:

Species Water Protein Fat Sugar Salt

% % % % %

Woman 874 1.4 4.0 7.0 0.2

Cow 871 3.4 3.9 4.9 0.7

Goat 87.0 3.3 4.2 4.8 0.7

Sheap 82.6 5.5 6.5 4.5 0.9

Mare 90.6 2.0 1.1 5.9 0.5

Ass 90.1 1.8 1.4 6.2 0.5

34. It is further stated on behalf of the Board that protein consists of (i) Casinogene, a phospho protein found in milk occurring when fresh as a soluble calcium salt (ii) lactolabmine and lactoglobiline- Milk sugar or lactose is formed from glucose- salts are mainly potassium, sodium and calcium salts of hydrochloric and phosphoric acids, vitamins are also present in milk. It is further stated that milk surplus to the liquid market is manufactured into butter, cheese, condensed evaporated and dried milk, malted milk and many patent foods, butter milk, cream and cream derivatives. Milk is produced in liquid manufactured and condensed form. Liquid milk contains 90% of water and also protein, fat, sugar and vitamins. On dehydration water content comes down with the result that percentage of protein, fat, sugar, salt and vitamins goes up.

35. Thus, from the composition of contents of milk as aforesaid and process of manufacture of Lactogen and Milkmaid it is clear that they are milk products and as such they have rightly been included.

36. Learned counsel appearing for the Board have also referred the definition of Milk and Milk Product under the Milk and Milk Product Order, 1992 which includes skimmed milk, panir and Chhena, condensed milk (Sweetened and unsweetened, whole milk powder, infant milk food and whole milk powder, chocolate products and other articles containing milk or milk product.

37. As stated above, artificial definition has been given to the word agricultural produce under the Act and once the item is covered by the sweep of the definition the same is an "agricultural" produce and it can be included in the Schedule of the Act. In view of the definition of the Act it is not only the basic produce of agriculture but the product resulting from processing or manufacturing from such raw material would also remain agricultural produce. The fact that the some other ingredients are also include while processing or

manufacturing the basic agricultural produce, the said products shall not cease to be agricultural produce. In this case as noted above so far as Milkmaid is concerned it is made of milk. So far the Lactogen is concerned apart from Milk other ingredients are also added. The basic material used in producing the product of the petitioner is Milk and as such it is covered by entry No. 20 under heading "Animal Husbandry Products" (VIII) of the Schedule of the Act which includes product of Milk, milk powder, baby food and products used therein (along with ingredient) except milk.

38. The Learned counsel appearing for the petitioner further submitted that the similar products, namely, Lactodex and Raptakos SIF (special infant food) of another Company have been held to be non agricultural produce within the meaning of the Act by the Apex Court in Belsund Sugar Co. Ltd, (supra) and the products of the petitioner be also held to be not covered by the provisions of the Act.

39. It is difficult to accept the aforesaid submission. It appears that the appellant-Company before the Supreme Court in Belsund Sugar Co. Ltd. (supra) had challenged that the Lactodex and Raptakos SIF were not the agricultural produce as defined u/s 2 (a) of the Act before this Court. This Court negated the said contention and held that the aforesaid two articles Lactodex and Raptakos SIF sold in packed tins were in substance milk products and, therefore, " agricultural produce" within the meaning of toe Act The matter was challenged before the Apex Court and the said matter has been considered from paragraph 135 to 140 in the judgment. The Apex Court held that only entry that has been made is Milk except liquid milk in the Schedule of the Act under heading "Animal Husbandry Products". There is no entry of milk products like Milk; powder, baby food etc. and as such in absence of such entry two products cannot be said to be agricultural produce being animal husbandry products of "milk" in a non-liquid form and accordingly held that the Act is not applicable. It is apt to quote paragraphs 135 to 140 of the said judgment.

"135. This takes us to the consideration of Civil Appeal No. 1880 of 1988. The appellant in this appeal, is an incorporated company with its registered office and factory at Bombay. It claims to produce baby food under the trade names "Lactodex and" Reptakos SIF" (special infant food). Its products are sold all over the country including Bihar State. It has its Central Office at Patna. Being located outside Bihar it purchases its raw materials from the territories outside Bihar. Out of the raw materials procured from outside, the aforesaid two types of infant food are manufactured outside Bihar but some of the products of the Company are received in Bihar State packed in sealed tins. The appellant Company earlier had two branches being Sales Offices, one at Patna and the other at Muzaffarpur. The latter branch is since closed. Both these branches fall within the jurisdiction of the Agricultural Produce Market Committees at Patna and Muzaffarpur. According to the appellant though its activities were not covered by the sweep of the Market Act, it was required to obtain licences under the Act for operating at

both these places in the market areas. The appellant contended in the writ petition before the High Court that the direction of the marketing authorities requiring the appellant to take licences under the Market Act was clearly ultra vires and illegal for the simple reason that the products sold by its within the market area were not agricultural produce at all. Therefore, they were not governed by the sweep of the Act.

136. The High Court in the impugned judgment negated this contention and held that, both these articles sold in packed tins were in substance milk products and therefore "agricultural produce" as defined by Section 2 (1) (a).

137. Learned counsel appearing for the appellant vehemently submitted that before the aforesaid two products can be subjected to the regulatory procedure of the market Act, it must be shown by the respondents that they are "agricultural produce". He invited our attention to Section 3 of the Act and submitted that the very first step of the applicability of the Act is the declaration of intention by the State Government for regulating the purchase, sale storage and processing of "agricultural produce" as mentioned in the notification. That the said term "agricultural produce" as defined by Section 2 (1)(a) clearly indicates that the agricultural produce which is to be covered by the sweep of the Act has to be one which should be specified in the Schedule. When we turn to the Schedule of the Act framed as per Section 2 (1)(a), we find one of the animal husbandry products at Item VIII, sub-item 20 as milk except liquid milk. Thus any product consisting of solidified milk, like milk powder, is contemplated by the said item, It was submitted that in the entire Schedule nowhere do we find any mention of baby food which may be substitute for milk or solidified milk. It was, therefore, contended that the appellant which manufactures and sells special infant foods like "Lactodex" and "Raptakos" cannot be required to take any licence under the Market Act.

138. Refuting this contention, learned Senior Counsel for the respondents submitted that as noted by the High Court the aforesaid two products manufactured and sold by the appellant do contain as base material "milk" in solidified form. He invited our attention to the details submitted by the appellant before the High Court and as noted by the High Court in its judgment in connection with the ingredients and constituents of these two products.

"LACTODEX"

Per 100 ml when reconstituted

6g : 45 ml

Proteins 1.99

Carbohydrates 9.6 g

Milk fats 0.9 g

Minerals 0.5 g

Vitamin A 265 IU

Vitamin B 640 mcg including that derived from milk powder

Vitamin D 40 IU

Calories 54

"RAPTAKOS SIF"

Per 100 ml when reconstituted

4.5 g : 30 ml

Proteins 1.8 g

Fats 3.0 g

Carbohydrates 9.6 g

Minerals (Ash) 0.4 g

Iron 0.6 g

Vitamin A 225 IU

Vitamin D 60 IU

Vitamin E 1.3 IU

Vitamin B 10.07 mg

Vitamin B2 0.11 mg

Nicotinamide 0.9 mg

Vitamin B6 0.04 mg

Vitamin B 120.15 mg

Vitamin C 0.5 mg

Calories 73 mg

139. Placing reliance on these ingredients, it was submitted that per content is 0.9 gm and that other minerals and vitamins may also include milk powder. Similarly, Raptakos (special infant food) also contains proteins and fats. He also contended that even milk which is a complete food may contain vitamins, therefore, it cannot be said that these two products are not milk products or products containing some ingredients of milk. It is difficult to accept this contention for the simple reason that the aforesaid Schedule at sub-item 20 captioned under the title "Animal Husbandry Products" refers to milk except liquid milk. By no stretch of imagination, tinned baby food containing various ingredients which may include some milk fats or proteins though in powder form can be said to be milk powder simpliciter or whole milk not in liquid form. It is

also pertinent to note that there is no item of milk products in the Schedule to the Act under the caption "Animal Husbandry Products". In this connection it is profitable to contrast this entry in the Schedule with items 14, 15 and 16 under the caption "Cereals" in the very same Schedule. In the listed items under the caption "Cereals", we find "Wheat" separately mentioned as Item 3 as compared to wheat, atta, suji and maida separately mentioned at Items 14, 15 and 16. This shows that the basic agricultural produce- "Wheat" is treated as a separate agricultural produce as compared to its own products manufactured out of wheat, namely, atta, suji and maida. Those products of the basic agricultural produce concerned are separately mentioned as "agricultural produces" in the Schedule so far as "cereals" are concerned. But similar is not the scheme in connection with milk. Milk products like baby foods are not separately mentioned. Under the very caption "Animal Husbandry Products", butter and ghee are separately mentioned as Items 7 and 8 which are wholly manufactured out of milk. It, therefore, becomes clear that save and except butter and ghee no other milk product is sought to be covered by the sweep of the Act as "Animal Husbandry Products" and the basic animal husbandry produce like "milk" only in solid form is sought to be covered by a separate solitary Item 20 as one of the "Animal Husbandry Products". Therefore, any other manufactured product like the present ones, utilising the same ingredients of milk powder as one of the ingredients but which are processed by addition of all other extra items with the result that finished products like baby foods emerge as manufactured items for serving as substitute for milk to be fed to infants who cannot digest liquid milk or solidified milk as such, cannot be treated to be "agricultural produce" as part and parcel of the listed "Animal Husbandry Products" mentioned in the Schedule to the Act. Learned Senior Counsel for the appellant in support of his contentions tried to rely upon specimen copies of printed material affixed to the sealed tins of these manufactured commodities "Lactodex" and "Raptakos", which, according to him, are substitutes for mother's milk and are to be used to feed infant babies who cannot take milk in its natural form. Learned Senior Counsel for the respondents tried to repel this submission by contending that this type of the printed material was not produced before the High Court. Be that as it may the undisputed fact remains that these two special infant foods are meant for infant babies who are to be fed by mixing this baby food powder with water to make it a paste as a substitute for mother's milk.

140. In the light of the express provisions concerning the relevant items of the schedule to the Act to which we have referred it has to be held that on the material before the High Court in connection with the ingredients of the aforesaid two products of the appellant, it could not be effectively shown by the respondents beyond any doubt that these two products also were "agricultural produce" being animal husbandry products of "milk" in a non-liquid form. Consequently, there was no occasion for the respondent authorities to insist that the appellant for the sale of the aforesaid two products within the market area governed by the Market Act in the State of Bihar was required to take any licence

under that Act. It is not the case of appellant that any market fee was required to be charged from him by the Market Committee. The only grievance made was that the appellant was required to take licence under the Market Act. Hence the question of refund of any market fee would not survive for consideration in the present case. This appeal will have to be allowed and the writ petition filed by the appellant in the High Court also consequently will have to be allowed by quashing the impugned, notice calling upon the appellant to take licences under the Market Act."

40. Thus, the view taken by the Apex Court with regard to two products does not support the case of the petitioner. As after the aforesaid judgment, notification has been issued amending the Schedule and the products of the Milk such as Milk powder, baby foods etc. have been included in the Schedule. The products of the petitioner have been included by way of instances. Even if these items would not have been there, the two products of the petitioner would fall under the category of the product of the Milk (Baby food) as mentioned in sub-item 20 brought by way of amendment under part VIII Animal Husbandry Products of the Schedule to Act.

41. Thus, the two products of the petitioner namely. Lactogen and Milkmaid are agricultural produces as defined under the Act and their inclusion in the Schedule of the Act cannot be assailed on the ground that the said products cannot be treated as agricultural produce being trade mark.

Point No. (II)

42. The question for consideration is as to whether the inclusion of article in Schedule of the Act making it agricultural produce itself is sufficient to subject the aforesaid agricultural produce to the regulatory procedure provided under the Act. In other words, if the goods are included in the Schedule any by virtue of it becomes agricultural produces the authority is competent to levy fee on the said produce on the sale and purchase thereof or the formalities under Sections 3 and 4 of the Act have also to be gone into before subjecting the aforesaid agricultural produce to the regulatory procedure under the Act.

43. Under the scheme of the Act, agricultural produce has to be specified under the Schedule of the Act and Section 39 of the Act empowers the State Government to add, substitute and delete the agricultural produce, Section 3 as quoted above clearly show that the State Government has first to declare its intention to exercise control over purchase, sale, storage and processing of such agricultural produce in specified area. This has to be done by issuance of notification and under Sub-section (2) of Section 3, affected person is empowered to file objection or suggestion and thereafter u/s (4) the said objection has to be considered and further inquiry, if necessary, has to be made and thereafter, the State Government will declare the area specified in the notification u/s 3 or any portion thereof to be a market area for the purpose of the Act in respect of all or any of the kinds of agricultural produce specified in the

notification u/s 3. Once the notification is issued under Sub-section (1) of Section 4, no municipality or other local authority, or other person, within the market area, or within a distance specified therein will set up any establishment for the purpose of sale, purchase, stores or processing of any agricultural produce so notified, except in accordance with the provisions of the Act, the rules and bye-laws. u/s 5 Market area has to be declared and thereafter a Market Committee has to be constituted and sale of agricultural produce has to be made in the Principal Market yard or as envisaged u/s 15 of the Act and thereafter, the Market Committee as constituted under the Act will be entitled to levy fee u/s 27 of the Act.

44. From the reading of the provision of the Act as a whole it is clear that inclusion of the article in the Schedule itself does not cover the agricultural produce within the sweep of the other provisions of the Act. The article may be included in the Schedule and will become agricultural produce as defined under the Act but the liability to pay fee will not arise unless the State Government declares its intention that a particular area with regard to specified agricultural produce shall be notified for the purpose of sale, purchase etc. of the agricultural produce and after hearing the objection of the affected person final notification is issued for the aforesaid purpose regarding specified area and specified agricultural produce. After the formalities under Sections 3 and 4 are complied with, the other provisions of the Act including establishment of market yard or sub-yard or Market Committee, prohibition from sale or purchase of agricultural produce in any market area and levying of fee will begin.

45. In *Sasa Musa Sugar Works's* case (supra) one of the question for consideration was as to whether any inclusion of an item in the Schedule of the Market Act u/s 39 brings about any control or regulation of sale, purchase storage or processing of such, produce or whether in order to regulate and bring the produce under control, it is necessary that intention to regulate a produce is to be notified and has to be decided as provided under Sections 3 and 4 of the Act.

46. Learned counsel appearing for the Board in that case submitted that Section 39 is an independent provision and it is the instrumentality by which a produce is brought into the Schedule. It is only when a produce finds its place in the Schedule, that its control under the Market Act by notifications under Sections 3 and 4 of the Act becomes relevant and possible. Before Sections 3 and 4 of the Act can be applied, the produce concerned must be in the Schedule, as defined in the Section 2(1)(a) of the Markets Act. Provisions of Sections 5 and 18 and the Rules imposing various restrictions and also levy of fee u/s 27 of the Markets Act will apply to all goods including goods notified u/s 4 (1) of the Markets Act. Dealing with the said matter, the Apex Court in paragraph 33 of the judgment held that once the good is included the actual control part of it including the goods to be controlled, the market area where the control will operate and where the controlled products will have to be sold are left to the judgment of the State

Government subject to the statutory conditions imposed by Section 3(1) and Section 4(1) of the Markets Act Only after issuance of the notification under Sections 3 and 4 is issued, Section 5 onwards including levy of fee comes into action. It is apt to quote paragraph 33 of the judgment which runs as follows ;

"Mr. Sen, in our view, has rightly contended that when the field of control is circumscribed by the items in the Schedule, the actual control part of it including the goods to be controlled, the market area where the control will operate and where the controlled products will have to be sold are left to the judgment of the State Government subject to the statutory conditions imposed by Section 3(1) and Section 4(1) of the Markets Act. Once the notification under Sections 3 and 4 are issued specifying the goods to be controlled and the areas where the control will operate, the other provisions of control contained in Section 5 onwards including the levy of fee u/s 27 of the Markets Act spring into action."

47. A Division Bench of this Court has also occasion to consider this question in the case of M/s. Sree Bahariji Mills Ltd. (supra) wherein similar view has been taken that unless notifications under Sections 3 and 4 are issued with regard to specified agricultural produce and the specified area with regard to sale etc., the agricultural produce will not be subjected to levy of fees under the Act.

48. Thus, though the products of the petitioner are agricultural produce as defined under the Act but it will not attract levy of fee unless notifications under Sections 3 and 4 are issued.

49. Thus, the aforesaid submission of the learned counsel appearing for the petitioner is accepted and it is held that unless notifications under Sections 3 and 4 are issued, the products of the petitioner cannot be subjected to levy of fee under the provisions of the Act. The respondent-Committee cannot insist for taking licence and pay fee under the Act.

Point No. (III)

50. The trade mark Act operates in different area as stated above. The Act has been enacted to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent marks. It has nothing to do with the sale and purchase of agricultural produce which the State Legislature is competent to do by virtue of entry 28 of the State List to Schedule VII of the Constitution, of India. The inclusion of the name of the products of the petitioner has been made by way of instances and the products of the Milk as such Baby food which is a product of the Milk.

Point No. (IV)

51. Law is well settled that whether any particular legislation suffers from excessive delegation or not is to be determined after going through the scheme, the provisions of the statute including its preamble, and the facts and circumstances in the background of which the statute has been enacted, the

history of the legislation, the complexity of the problems and once it is found that the legislation has laid down the policy and has also given guidelines to implement its policies in the enactment and the delegatee is empowered to carry out the policy within the guidelines laid down by the Legislature then the power exercised by the delegatee cannot be held to be ultra vires and impermissible in law.

52. Learned counsel for the petitioner relied upon two decisions of the Supreme Court in the case of *In re Article 143, Constitution of India and Delhi Laws Act (1912) etc.* (supra) and in the case of *Rajnarain Singh* (supra) and submitted that the Schedule being part of the Act, amendment could be made only by the Legislature as it relates to the policy matter and in exercise of delegated power u/s 39 of the Act the State cannot amend or add agricultural produce. It was held in the case of *In re Article 143, Constitution of India etc.* (supra) that the essential of the legislative functions, viz. the determination of the legislative policy and its formulation as a rule of conduct, vest in the Parliament or the State Legislatures as the case may be and nowhere else. In *Rajnarain Singh* case (supra) in paragraph 31 of the judgment it was held that "an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms and there was some divergence of view about this in the former case but this much is clear from the opinions set out above; it cannot include a change of policy".

53. As stated above, it is settled law now that policy and enacting the policy to be binding rule of conduct cannot be delegated and that is what the aforesaid two decisions lay down.

54. The question of delegation of power has been considered by the Supreme Court in catena of cases and as such it is not necessary to discuss all those cases in order to avoid multiplicity. Reference may be made only to some of the cases, viz; *Harishankar Bagla and Another Vs. The State of Madhya Pradesh*, , *The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another*, , *D.S. Garewal Vs. The State of Punjab and Another*, , *Union of India (UOI) and Others and State of Delhi (Now Delhi Administration) and Others Vs. BhanaMal GulzariMal Ltd. and Others*, , *Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. Vs. The Asstt. Commissioner of Sales Tax and Others*, , *Sable Waghire and Company and Others Vs. The Union of India (UOI) and Others*, and *Kishan Prakash Sharma and Others etc. Vs. Union of India and Others*, . It has been held therein that Legislature has to discharge its primary legislative function itself and not through others. It cannot abdicate its legislative function which include determination of policy and enactment laying down the aforesaid policy. The delegated authority has to act as subordinate authority and not parallel authority and the delegated authority can be given power only to carry out the objects and policy of the Act and delegation beyond that will amount to abdication and self effacement Recently in the case of *Kishan Prakash Sharma* (supra) the Apex Court

considered the question of delegated legislation and has reiterated the settled law in paragraph 18 of the judgment as follows:

"So far as the delegated legislation is concerned, the case law will throw light as to the manner in which the same has to be understood and in each given case we have to understand the scope of the provisions and no uniform rule could be laid down. The legislature in India have been held to possess wide power of legislation subject, however, to certain limitations such as the legislature cannot delegate essential legislative functions which consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. The Legislature cannot delegate uncanalised and uncontrolled power. The Legislature must set the limits of the power the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. Thus the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegatee is only empowered to carry out the policy within the guidelines laid down by the Legislature. The Legislature may, after laying down the legislative policy, confer" discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. When the Constitution entrusts the duty of law-making to Parliament and the Legislatures of States, it impliedly prohibits them to throw away that responsibility on the shoulders of some other authority. An area of compromise is struck that Parliament cannot work in detail the various requirements of giving effect to the enactment and, therefore, that area will be left to be filled in by the delegatee: Thus, the question is whether any particular legislation suffers from excessive delegation and in ascertaining the same, the scheme, the provisions of the statute including its preamble, and the facts and circumstances in the background of which the statute is enacted, the history of the legislation, the complexity of the problems which a modern State has to be face, will have to be taken note of and if, on a liberal construction given to a statute, a legislative policy and guidelines for its execution are brought out, the statutes, even if skeletal, will be upheld to be valid but this rule of liberal construction should not be carried by the Court to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on the executive. These very tests were adopted in *Ajoy Kumar Banerjee and Others Vs. Union of India (UOI) and Others*, also examine whether there is excessive delegation in framing schemes and reading the preamble, the scheme and the other provisions of the enactment taking note of the general economic situation in the country, the authorities concerned had to frame appropriate schemes. Therefore, it is not open to the petitioners to contend that there is excessive delegation in relation to the enactment to frame schemes."

55. The question for consideration is whether in view of the settled law it can be said that the State Legislature has abdicated its legislative power regarding laying down the policy and enacting the aforesaid policy to be binding rule of conduct to the State Government or by Section 39 only power has been given to

implement the policy and the object of the Act. For finding out the said question, the object and reasons mentioned in the Act along with the provisions of the Act and the Schedule has to be looked into. The preamble of the Act itself shows that it has been enacted for 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. Section 2(a) defines the agricultural produce which includes not only basic agricultural produce but all produce whether processed or non-processed, manufactured or not. It has specified the agricultural produce in the Act itself. Thus, the policy and the object of the Act has been made by the legislature and power u/s 39 has been only given to the State Government to add, substitute or delete the agricultural produce in the light of the object and policy of the Act and the definition of the agricultural produce. Thus, there is sufficient guideline given to the State Government to the State to exercise the power under the aforesaid section.

56. In the case of *Sable Waghire & Co. (supra)*, one of the questions for consideration, was as to whether the power given to the Central Government u/s 8 of Emblems and Names (Prevention of Improper Use) Act, (1950) to amend the Schedule containing the names of the emblems whose improper use was prohibited by Section 3 of the Act, was excessive delegation. The Central Government enacted the aforesaid Act to prevent the improper use of certain emblems and names for professional and commercial purposes, The petitioners before the Supreme Court were manufacturing bidis under the pictorial representation and the trade name "Chhatrapati Shivaji Bidi". After coming into the aforesaid Act they were allowed, sometime to use the same but later they were asked not to use the aforesaid trade marks in view of the provisions of the Act which was challenged before the Apex Court. Section 3 of the Act contains a provision for prohibition of improper use of certain emblems and names specified in the Schedule. Section 4 of the Act prohibits registration of certain companies etc. if the use of such name is in contravention of Section 3 of the Act. Section 8 of the Act conferred power on the Central Government to amend the Schedule which runs as follows:

Power of the Central Government to amend the Schedule 8.-- "The Central Government may, by notification in the Official "Gazette, add to or alter the Schedule, and any such addition or alteration shall have effect as if it had been made by this Act."

57. The said question was considered by the Apex Court from paragraphs 15 to 17 and it held that taking into considerations the provisions of the Act, objects and reasons it was imperative necessity for regulating the use of certain emblems and names and Section 8 of the Act rightly confers power on the Central Government to consider from time to time as to the items to be included in or omitted from the Schedule in the light of knowledge and experience gathered from the nook and corner of the entire country. There is, therefore, no excessive delegation of legislative power by Parliament in favour of the Central

Government. It is relevant to mention paragraph 17 of the judgment which runs as follows:

"We take it that the scheme disclosed in the provisions of the Act read with the preamble, and the Objects and Reasons make it clear that there was imperative necessity for regulating the use of certain emblems and names. The fact that only improper use of the names and emblems is prohibited itself provides guidance. The original entries in the Schedule would also point to the nature and character of the names, emblems and entities. It is not possible for the Parliament to envisage the possibility of improper use of all names and emblems as time goes on, Nor is it possible to enumerate in the Schedule an exhaustive list of all the names, emblems and entities. Section 8, therefore, makes provision for empowering the Central Government to add to or alter the Schedule. In the nature of things, there is no abdication of legislative function by Parliament in delegating its power u/s 8 in favour of the Central Government which will be the appropriate authority to consider from time to time as to the items to be included in or omitted from the Schedule in the light of knowledge and experience gathered from the nook and corner of the entire country. There is, therefore, no excessive delegation of legislative power by Parliament in favour of the Central Government. From the Objects and Reasons, the preamble and the provisions of the Act with the built in limitations in Section 3 taken with the Schedule, a policy is clearly discernible and there is sufficient guidance therein to enable the Central Government to exercise its power under the Act. The relevant matters mentioned above are sufficiently informative of the policy of the law to rob the efficacy of an argument on the score of scantiness in the Act. The impugned notification dated March 16, 1968 of the Central Government u/s 8 cannot, therefore, be invalid. The objection on the score of Article 14 is of no avail."

58. The case in hand is squarely covered by the aforesaid decision of the Apex Court. Here taking into consideration the object and reasons of the Act, the preamble and the definition of the agricultural produce which includes basic agricultural produce as well as processed or manufactured, it is clear that sufficient guideline has been given to the State Government u/s 39 of the Act to amend, substitute or delete the items of the Schedule. Thus, there is no excessive delegation of power to the State Government. This question has also been considered by a Division Bench of this Court in the case of M/s. Mahabir Tea Company (supra) and it has been held that Section 39 of the Act is not unconstitutional or a piece of excessive delegation, Thus, this point is also devoid of substance.

Point No. (V)

59. In support of the submission that the Act has extra territorial operation it was submitted that the Milk and other products used in preparation of the aforesaid two items are purchased from other States and the products are also manufactured in other States and not in the State of Bihar whereas the Act has been enacted for protection of the agriculturist of the State of Bihar from the

middlemen and as such it has no application to the said two products. This question cannot detain us for the simple reason that it has already been considered by the Apex Court in the case of Belsund Sugar Co. Ltd. (supra) in regard to Tea matter in paragraphs 145 to 153. Relying upon the earlier Constitution Bench judgment of the Apex Court in the case of M.C.V.S. Arunachala Nadar etc. Vs. The State of Madras and Others, , it was held in paragraph 152 that even if an agricultural produce initially is not grown in the market area and manufactured outside the market area but is brought in a manufactured from within the market area for sale, such sale transaction in connection with such a produce would be covered by the Sweep of the Market Act.

60. Thus, once the products of the petitioner are brought within the different market area in the State of Bihar for sale the same will attract the provisions of the Act.

Point No. (VI)

61. The Stand of the petitioner is that the Milk and Milk Product, Order, 1992 issued by the Central Government in exercise of power u/s 3 of the Essential Commodities Act covers the field with regard to milk and milk product and in that view of the matter the general provisions of the Market Act will get excluded and superseded by the special provision of the Control Order.

62. Milk and Milk Product Order has been enacted u/s 3 of the Essential Commodities Act and it defines the milk and milk product and Clause (3) provides for constitution of Milk and Milk Product Advisory Board and the function of the Board as mentioned in Clause (4) runs as follows:

4. Functions of the Board.--(1) The Board shall assist, aid and advise the Central Government on any matter Concerning the production, manufacture, sale, purchase and distribution of milk and milk product and on matters incidental thereto.

(2) Without prejudice to the generality of the provisions of sub-paragraph (1), the Board may advise the Central Government on matters relating,--

(a) facilitation of the supply of availability of liquid milk, by balancing uneven supplies in different regions and seasons;

(b) maintenance or increase in the supply of milk, and equitable distribution and availability thereof;

(c) Establishment of proper standards and norms for control and handling of milk and milk product;

(d) maintenance of high standards of sanitary and hygienic conditions in the manufacture of milk and milk product;

(e) establishment, promotion or registration of any industry which relatable to

milk product; and

(f) such other purposes as are necessary or incidental to the effective implementation of the Order.

3. Where the Central Government considers that the expertise of the Board may be utilised in the implementation of this order in any respect, it shall be competent for the Central Government to direct that any of its functions relating to the implementation of the Order shall be performed by the Board, subject to such conditions, restrictions and limitations as the Central Government may specify, whereupon it shall be competent for the Board to discharge those functions."

63. There is provision for registration under Clause (5) which provides inter alia that no person shall manufacture or carry on business in milk or any milk product nor create any manufacturing facility for the business unless registration is granted. Clause (10) deals with production or handling of milk or milk product which prohibits handling of milk and milk product in excess of the capacity specified in the registration. Clause (11) provides for collection of the milk as specified in the registration certificate.

64. No where in the control order there is any provision with regard to fixation of price and regulating the sale and purchase of milk and milk products. Thus, in no way provision has been made with regard to any of the matters covered by the provisions of the Act and accordingly it cannot be held that the Act is not applicable with regard to milk and milk products.

Point No. VII

65. According to the petitioner the impugned notification is a nullification of the decision of the Supreme Court in Belsund Sugar Co. Ltd. (supra) in the said case the Apex Court held that the two products, namely Lactodex and Raptakos SIF are not the agricultural produce, but even then the Milk products of the petitioner has been included by the impugned notification is worth rejection. From the judgment of the Supreme Court in Belsund Sugar Co. Ltd. (supra) as quoted above it is clear that the sole ground for holding that the aforesaid two products are not agricultural products is that the Milk product, such as baby food etc. were not included in the Schedule and in absence of the same it was held that the said product cannot be said to be agricultural produce as defined under the Act. After the aforesaid judgment to over come the aforesaid situation the State has issued the aforesaid notification and it has included the products of the Milk such as baby food in the same manner as it has included the product of the other basic agricultural produce. There is no question of nullification or bye passing or overriding the judgment of the Apex Court.

66. Thus, in conclusion it is held that the products of the petitioner, namely, Lactogen and Milkmaid are agricultural produce as defined under the Act and the notification u/s 39 of the Act is valid one and it cannot be assailed on any of the

grounds urged on behalf of the petitioner. But as stated above, the inclusion of agricultural produce in the Schedule of the Act itself does not bring the aforesaid agricultural produce within the sweep of the Act for the purpose of licence and levying fees unless steps are taken under Sections 3 and 4 of the Act and a notification is issued u/s 4 of the Act with regard to agricultural produce included in the Schedule with regard to specified market area or areas. Admittedly, no procedure as provided under Sections 3 and 4 of the Act has been taken and no notification has been issued u/s (4) of the Act uptill now with regard to newly added entries under caption "Animal Husbandry products" including the products of the petitioner and in that view of the matter, the products of the petitioner are not subjected to regulatory procedure under the Act. The respondents cannot insist for licence nor demand fee under the Act without compliance of the provisions of Sections 3 and 4 of the Act with regard to products in question.

67. Accordingly, the notices issued directing the petitioner to get licence with regard to the said products as contained in Annexures 2 and 3, are not sustainable in law and quashed. However, it will be open to the State to bring the newly added agricultural produce in the Schedule including the products of the petitioner within the sweep of the regulatory procedure after taking steps under Sections 3 and 4 of the Act.

68. In the result, the writ application is allowed in part as indicated above.

R.S. Garg, J.

69. I agree.