
(1971) 02 PAT CK 0011

In the Patna High Court

Case No : Civil Writ Jur. Cases No"s. 2043 of 1970 and 13 to 16, 18, 19, 27 to 29 and 37 of 1971

Teknarayan Mahesh Prasad and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-02-1971

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 31(2)
Essential Commodities Act, 1955 — Section 3(3B)

Citation : AIR 1972 Patna 250 : (1971) 4 PLJR 223

Hon'ble Judges : S. Sarwar Ali, J;N.L. Untwalia, J

Bench : Division Bench

Advocate : Balabhadra Prasad Singh, Basudeva Prasad, Hari Lal Agarwal, Bishwanath Agarwal, K.D. Chatterjee, Rameshwar Prasad No. 2, M.C. Baruka, Upendra Prasad and B.P. Gupta, for the Appellant; R.P. Katriar, for the Respondent

Final Decision : Allowed

Judgement

Untwalia, J.—In all these eleven writ cases is involved the question of the constitutional validity of the Bihar Rice and Paddy Procurement Order, 1970 (hereinafter called the Procurement Order) and, therefore, they have been heard together and are being disposed of by a common judgment. Counter-affidavits and affidavits in reply could not be filed in all the cases but when some of them came up before us for making an interim order of stay, it was agreed on behalf of the petitioners as also the State that the counter-affidavits and affidavits in reply filed in some would be used in all. There was no difficulty in adopting this course as there are not many questions of fact or any special fact involved in any of them.

2. On the 30th of October, 1970 the Governor of Bihar was pleased to make the Procurement Order which came into force with effect from the 1st November, 1970. The preamble states that the Governor of Bihar being of the opinion that it is necessary and expedient to make the Order for maintaining the supplies of rice

and for securing its equitable distribution and availability at fair prices, has made it in exercise of the powers u/s 3 of the Essential Commodities Act, 1955 (Central Act X of 1955), hereinafter called the Act, read with certain notifications of the Government of India, Ministry of Food, Agriculture, Community Development and Co-operation with the prior concurrence of the Central Government. In Sub-clauses (b) and (c) of Clause 2 of the Procurement Order are defined licensed wholesale dealer" to mean "a person holding a valid licence as a wholesale dealer under the Bihar Foodgrains Dealers Licensing Order, 1967" and a licensed miller* to mean "the owner or other person in charge of a rice mill holding a valid licence under the Rice Milling Industry (Regulation) Act, 1958". I shall do better to quote the whole of Clause 3 of the Procurement Order with all its sub-clauses and provisos, as I shall have to often refer to them for deciding the points at issue-

"(1) Subject to the provisions of Sub-clause (3) every licensed miller shall sell to the State Government at the procurement price at his mill-premises such quantity of rice of common variety as shall be equal in weight to forty per cent of rice of all varieties produced or manufactured in his rice-mill every day beginning with the date of commencement of this order and until such time as the State Government otherwise direct: Provided that a licensed miller shall not be liable to sell rice to the State Government on the stock of rice produced on account of licensed wholesale dealer from the paddy purchased by the licensed wholesale dealer, if the licensed miller produce a certificate from the concerned Sub-divisional Officer to the effect that the licensed "wholesale dealer has already sold to the State Government the quantity of rice or paddy liable to be sold by him on that stock under this order:

Provided further that a licensed miller shall be liable to sell rice to the State Government on the stock of rice produced on account of the persons referred to under Sub-clause (3), only such quantity of rice of common variety as shall be equal in weight to twenty-five per cent of rice of all varieties so produced.

(2) Every licensed wholesale dealer shall deliver to the State Government at the procurement prices at his business-premises such quantity of rice of common variety as shall be equal in weight to-

(a) forty per cent. of all varieties of rice produced or got milled from paddy in stock on the date- of commencement of this Order, or coming into his custody or possession after the commencement of this Order, and

(b) forty per cent, of all varieties of rice purchased by him or coming into his custody or possession for sale or disposal through him on commission basis or in any other manner every day beginning with the date of commencement of this Order and until such time as the State Government otherwise direct:

Provided that a licensed wholesale dealer shall not be liable to sell rice to the State Government on the stock of rice purchased by him from a licensed miller or another licensed wholesale dealer, if he produces a certificate from the concerned Sub-Divisional Officer to the effect that the licensed miller or the other licensed

whole sale dealer has already delivered the quantity of rice liable to be sold by him on that stock.

(3) A person other than a licensed miller or a licensed wholesale dealer, who gets any rice milled in a rice mill shall sell to the State Government at the procurement price through the said miller, such quantity of rice of common variety as shall be equal in weight to twenty-five per cent, of rice of all varieties so milled:

Provided that no levy shall be charged in a respect of rice obtained by an agriculturist who has produced paddy, or a landless labourer who has received paddy as wages getting such paddy up to three quintals in a week, hulled at a rice mill of huller type having not more than one huller.

(4) No licensed miller or licensed wholesale dealer shall sell or otherwise dispose of or remove to any other place than his usual place of business or storage in a particular locality his stocks of rice unless he has sold the prescribed percentage to the State Government under Sub-clause or Sub-clause (2) as the case may be, and obtained a release certificate in token thereof in respect of stocks left in balance with him.

(5) Any person on whose behalf the licensed wholesale dealer holds any stock of rice, the whole or part of which such dealer is required to sell to the State Government under Sub-clause (2) shall, notwithstanding any contract or instrument to the contrary, not be entitled to recover from the licensed wholesale dealer on account of the value of the stock so sold anything more than the price payable to the licensed wholesale dealer under the said clause.

(6) Every person from whom levy is due under this clause shall deliver to the State Government or their agent the stocks of rice required to be sold in such lots, in such manner, and at such times as the State Government or the District Magistrate or the Sub-Divisional Officer concerned, may direct."

Clause 4 deals with levy of paddy and requires every licensed miller and licensed wholesale dealer to sell to the State Government or their agent at the procurement price such quantity of paddy of coarse variety as shall be equal in weight to forty per cent, of all paddy received by him or in stock after the commencement of this Order and remaining unconverted into rice within three months or such extended time as the State Government in special circumstances allow. Under Clause 5 the District Magistrate or any other officer mentioned therein may by order in writing direct any rice miller to convert into rice stock of paddy held by the State Government or their agent in such manner and in such circumstances as may be specified in the direction and at such charge and extraction ratio as may be fixed by the State Government, Power of entry, search and seizure has been given in Clause 6 to the "Enforcement Officer" as defined in Sub-clause (a) of Clause 2. "Procurement Price" has been defined in Sub-clause (i) of Clause 2 to mean the "price as specified in Schedule IV". In Schedule IV the procurement price of paddy is given as Rs. 56.25 and that of rice

at Rs. 95.25 per quintal. Clause 9 has rescinded the Bihar Essential Food-grains Procurement Order, 1969.

3. It would be advantageous in the beginning to refer to the relevant provisions of Section 3 of the Act, under which the Procurement Order has been made. Sub-section (1) of Section 3 in terms only empowers the Central Government to make an order to provide for regulating or prohibiting the production, supply and distribution of any essential commodity, and trade and commerce therein. Without prejudice to the generality of the power conferred by Sub-section (1), Sub-section (2) enumerates the matters which may be provided for in an order made under subsection (1), Clause (f) of which is-

"for requiring any person holding in stock any essential commodity to sell the whole or a specified part of the stock to the Central Government or a State Government or to an officer or agent of such Government or to such other person or class of persons and in such circumstances as may be specified in the order."

Sub-sec. (3) of Sec. 3 of the Act has made provision for payment to any person who sells any essential commodity in compliance with an order made with reference to Clause (f) of Sub-section (2) of the price thereof as provided in Clauses (a), (b) and (c), namely, the agreed price where it can be agreed consistently with the controlled price, if any, or the price calculated with reference to the controlled price and in absence of either the price calculated at the market rate prevailing in the locality at the date of sale. Sub-section (3A) was inserted in Section 3 by Section 2 of the Essential Commodities (Amendment) Act, 1957 (Central Act 13 of 1957). It provides that--

"(1) If the Central Government is of opinion that it is necessary so to do for controlling the rise in prices, or preventing the hoarding, of any foodstuff in any locality, it may, by notification in the Official Gazette, direct that notwithstanding anything contained in Sub-section (3), the price at which the foodstuff shall be sold in the locality in compliance with an order made with reference to Clause (f) of subsection (2) shall be regulated in accordance with the provisions of this Sub-section."

A notification issued under this Sub-section cannot remain in force for a period exceeding 3 months. After an issue of the said notification any person who sells foodstuff of the kind specified therein will be paid the price thereof either agreed or calculated with reference to the controlled price, if any, and failing that, the price calculated with reference to the average market price prevailing in the locality during the period of 3 months immediately preceding the date of the notification. It is to be noticed that whereas under Clause (c) of Sub-section (3) the market rate prevailing in the locality at the date of the sale is the price to be paid to the seller, under Sub-clause (c) of Clause (iii) of Sub-section (3A) is the price to be paid at the average market rate prevailing in the locality during the period of 3 months preceding the date of notification. Sub-section (3B) was

inserted in Section 3 by Section 2 of the Essential Commodities (Amendment) Act, 1966 (Central Act 25 of 1966). It reads as follows--

"Where any person is required by an order made with reference to Clause (f) of Sub-section (2) to sell any grade or variety of foodgrains, edible oilseeds or edible oils to the Central Government or a State Government or to an officer, or agent of such Government and either notification in respect of such foodgrains, edible oilseeds or edible oils has been issued under subsection (3A) or any such notification having been issued has ceased to remain in force by efflux of time, then, notwithstanding anything contained in Sub-section (3), there shall be paid to that person such price for the foodgrains, edible oilseeds or edible oils as may be specified in that order having regard to-

(i) the controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oilseeds or edible oils, and

(ii) the price for such grade or variety of foodgrains, edible oilseeds or edible oils prevailing or likely to prevail during the post-harvest period in the area to which that order applies.

Explanation.-- For the purposes of this Sub-section, "post-harvest period" in relation to any area means a period of four months beginning from the last day of the fortnight during which harvesting operations normally commence."

This Sub-section provides for payment to the seller of such price for the foodgrains as may be specified in the order having regard to the controlled price, if any, and the price for such variety of foodgrain which is prevailing during the post-harvest period if the order is made during such period or if it is issued prior to such period then the price which is likely to prevail during the post-harvest period. Under the explanation "post-harvest period" in relation to any area means a period of 4 months which undisputedly in the case of paddy and rice in Bihar is the period of December to March in any year. Section 5 of the Act empowers Central Government to direct by notified order that the power to make orders u/s 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by such State Government as may be specified in the direction.

4. Annexures M and N are true copies of G. S. R. 1111 attached to the further counter-affidavit filed on behalf of the State of Bihar in C. W. J. C. 2043 of 1970. This is a notification issued by the Central Government in exercise of their power u/s 5 of the Act, which says that the Central Government direct that the powers conferred on them by subsection (1) of Section 3 of the Act to make orders to provide for the matters specified in Clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (j) of Sub-section (2) thereof, shall, in relation to foodstuffs, be exercisable also by a State Government subject to the condition that before making an order relating to any matter specified in the said Clauses (a) and (c) or (f) or in regard to distribution or disposal of foodstuffs to places outside the State or in regard to

regulation of transport of any foodstuff, under the said Clause (d), the State Government shall also obtain the prior concurrence of the Central Government. Thus has come to be exercised the power by the State Government to make the Procurement Order for requiring the millers and the wholesale dealers to sell 40 per cent, of their stock to the State Government at the procurement price which has been fixed in accordance with Sub-section (3B) of Section 3 of the Act. Petitioners who in some cases are the millers and in others the wholesale dealers challenge the constitutional validity of the Procurement Order on several grounds which are more or less common and may be summarised as follows-

- (i) The Procurement Order is beyond the power of the State Government u/s 3 read with Section 5 of the Act and in fixing the procurement price they have contravened the provision of subsection (3B).
- (ii) Various clauses of the Procurement Order and the procurement price fixed therein violate Article 14, Sub-clauses (f) and (g) of Clause (1) of Article 19 and Clause (2) of Article 31 of the Constitution of India.
- (iii) Sub-section (3B) of Section 3 of the Act is constitutionally invalid as it violates the provisions mentioned in point (ii) above.

In support of the broad points aforesaid several sets of arguments were advanced on behalf of the petitioners which will be dealt with hereafter in this judgment. Learned Advocate General appeared on behalf of the Union of India to combat the attack on the constitutional validity of Sub-section (3B) of Section 3 of the Act and Government Pleader II appeared on behalf of the State of Bihar to save the constitutional validity of the various provisions of the procurement order and the price fixed therein.

5. Before discussing and deciding the points at issue a brief reference to a few facts which are generally not in dispute may be made- According to the petitioners, there being no price control in respect of paddy and rice, the people of the State of Bihar are free to sell and purchase the same at the prevailing market price. The prevailing rate of paddy of common variety in December, 1970, which is a month of the post-harvest period was about Rs. 70/- per quintal and of coarse rice was about Rs. 130/- per quintal. The State Government have fixed the procurement price of rice at Rs. 95.25 per quintal for purchase both from the wholesale dealers and millers while they, in their turn, are selling the same at Rs. 118/-, per quintal thereby earning a profit of Rs. 23/- per quintal. The wholesale dealers and the millers do not produce paddy or rice but they purchase in open market at fluctuating prevailing market price, and their cost of purchase is much higher than the procurement price. The Government have fixed the procurement price since the year 1968 at the same rate of Rs. 95.25 per quintal for rice and Rs. 56.25 per quintal for paddy. While the rice millers and wholesale dealers have been brought under the purview of the Procurement Order, the cultivators who produce paddy and rice from whom the petitioners purchase in open market at the prevailing market price are left free to deal with their paddy or rice as they

choose, and hence the Procurement Order violates Article 14 of the Constitution. In the counter-affidavit filed in C. W. J. C. 14 of 1971 and in a few more cases, the State Government have stated reasons for fixing the procurement price at Rs. 95.25 and Rs. 56.25 for rice and paddy per quintal respectively. In a nutshell their case is that on the basis of the average post-harvest wholesale price, which was prevailing in the year 1968-69, and keeping in view the consumers* interest they have fixed the procurement price of paddy and rice in this year. According to their case, the prospect of the crop in the year in question is much better than the last year when the post-harvest prices were high due to drought and failure of crop, and is almost at par with the year 1968-69. According to Annexures H and I the average post-harvest price of paddy in the year 1968-69 was Rs. 59/-, that for the year 1969-70 was Rs. 70-47 and in the month of December, 1970-71, it was Rs. 66-60 per quintal while that of rice of coarse variety in the year 1968-69 was Rs. 103.60 in 1969-70 Rs. 127.20 and in the month of December, 1970-71 Rs. 121.62 per quintal. The contention on behalf of the Government is that the price fixed by them is reasonable and appropriate.

6. In my opinion, the attack on the constitutional validity of Sub-section (3B) of Section 3 of the Act is uncalled for and unsound. We did not ask the learned Advocate-General to reply to the argument put forward on behalf of the petitioners in, that regard. If for the purpose of maintaining supplies of any essential commodity, namely, the foodstuff and for securing its availability at fair price to the public a provision has been made in the Act for requiring any person holding in stock any grade or variety of foodgrains, edible oilseeds or edible oil to sell it to the "Central Government or to the State Government or their officers and agents at a price to be specified in the order to be made for the purpose, the provision by itself neither violates Article 14 nor does it put any unreasonable restriction on such person in regard to his fundamental right under Sub-clause (f) or (g) of Article 19(1) nor by itself does it lay down such principle which can be said to violate Article 31(2) of the Constitution. The guideline is given in Sub-section (3B) to fix the price taking into consideration the control price, if any, and the price which prevails or is likely to prevail during the post-harvest period. The object is to assess the price on the basis of the controlled price, if any, and the post-harvest price. " Subsection (3R) by itself does not fix any compensation but it merely provides for fixing of the amount of compensation in the light of what has been provided in that sub-section. It is difficult to accept the argument put forward on behalf of the petitioners on the basis of the well-known decision of the Supreme Court in the case of Rustom Cavasjee Cooper Vs. Union of India (UOI), , popularly known as the Bank Nationalisation Case, that the principles engrafted in Sub-section (3B) for fixation of the price in case of a forced sale, which may be tantamount to compulsory acquisition of, the foodstuffs, are irrelevant or are no principles in law so as to enable this Court to strike down the provision of law as being violative of Article 31(2) of the Constitution. If there be a controlled price for the commodity, the price fixed in the Order promulgated may be higher than the controlled price or may be lower, depending upon the

post-harvest price either prevailing or likely to prevail, To choose out such persons who may have in their stock only foodstuffs for the purpose of making an order under Clause (f) of Sub-section (2) in terms of Sub-section (3B) of Section 3 of the Act cannot be held to be discriminatory, as it is well known by now that such persons are a class by themselves and can be subjected to comparatively severer restrictions for the purpose of maintaining the supply and making available at fair prices the foodstuffs.

7. The last point urged on behalf of the petitioners, therefore, is rejected as being devoid of any substance.

8. Coming to the first ground of attack, it is to be pointed out first that the State Government having been authorised by the Central Government u/s 5 of the Act to make an order for the purpose of Clause (f) of Sub-section (2) with prior concurrence of the Central Government and they having done so, they are competent to fix the price in accordance with Sub-section (3B). It is difficult to accept the argument of the petitioners that the Procurement Order is ultra vires the State Government. Their main attack seems to be on the fixation of the price and that on two grounds-- (1) that when there was no controlled price for paddy and rice in the State of Bihar, the market price prevailing in October, 1970 when the Order was made or the post-harvest price which was likely to prevail during the post-harvest period ought to have been fixed and (ii) that the State Government have fixed a much lower price. On the basis of the decision in *Queen on the Prosecution of James Smith v. Vestry of St. George's, Southwark* (1887) 19 QBD 533, which was cited by learned Counsel in one of the cases it was argued that the phrase "having regard to occurring in Sub-section (3B) must mean the fixation of the price as enumerated in clauses (i) and (ii) of Sub-section (3B). In reply, Government Pleader II pointed out a passage at page 186, paragraph 7 in the Bench decision of this Court in *Mohammad Sagiruddin Vs. The District Mechanical Engineer, N.E.F. Rlys. and Others*, that "the words "have regard to" in a statutory provision do not mean that there must be very strict compliance with the statutory provision, but that the provision should be taken for guidance only." I am inclined to accept the argument put forward on behalf of the State, and hold that the expression "having regard to" occurring in subsection (SB) of Section 3 of the Act means that great weight and dominant regard must be attached and given to the controlled price, if any, and to the post-harvest price prevailing or likely to prevail, and not the market price at the date of the promulgation of the Order. It does not by necessary implication exclude taking into consideration other factors. Of course, if the price is fixed in disregard of, or by not giving due regard to, the said price, arbitrarily or mala fide the fixation of the price may be knocked down as being in colourable or fraudulent exercise of the power. But if some other factors, namely, the consumers' interest or the like are taken into consideration while fixing the price, it is difficult to hold that the State Government having not fixed the price prevailing during the post-harvest period promulgated the procurement order in violation of the requirement of Sub-section (2B).

9. I may point out one thing in this connection; that the Procurement Order was notified on the 30th October, 1970. It came into force from 1st November, 1970. Naturally, therefore the price of Rs. 70/- for paddy and Rs. 130/- for rice per quintal which was prevailing in the market in December, 1970 cannot be taken to be the price which was likely to prevail during that month had the Procurement Order not been made. It is a matter of common experience that after promulgation of the order of the kind prices in the open market are bound to rise. Wholesale dealers or millers must have been reluctant to purchase paddy or rice at a rate much higher than the one fixed in the Procurement Order. The supply from the agriculturists must, therefore, be scanty, and, thus, for the time being, raising the open market prices. The prices undoubtedly fixed are somewhat low as they are not the average post-harvest prevailing prices -- or are even lower than the post-harvest prices prevailing in the year 1968-69. It would, however, be a matter of assessment and fixation of prices on the basis of the expectation of the crops. It may also be pointed out that the Government were to acquire 40 per cent, of the stock of rice and paddy at a particular price thus enabling the millers and the wholesalers to sell the balance of their 60 per cent, at any price they like. The apparent loss sustained by them in the compulsory sale could and would be amply indemnified by the extra rise in price of the 60 per cent, of the stock.

10. One of the points urged in support of the second ground of attack on the Procurement Order is the fixation of low price in it. The price fixed is not illusory or arbitrarily low so as to enable this Court to say that it has been fixed in a colourable or fraudulent exercise of the power or so low as to be tantamount to be no compensation at all. Undoubtedly, the price fixed is somewhat low. That brings in directly the bar in the second part of Clause (2) of Article 31 of the Constitution which says that the law which provides for compensation for the property acquired if it fixes the amount of compensation then no such law shall be called in question in any Court that the compensation provided by that law is not adequate. Cooper's case was concerned with the principles of compensation, In regard to some items of the property acquired, no principles were laid down; in regard to some, irrelevant principles were laid down. It was not a case of fixation of the amount of compensation. In the Procurement Order the price to be paid for the compulsory sale or acquisition of rice or paddy is fixed. In my opinion, therefore, it is a case of fixation of the amount of compensation which may be said to be inadequate but the law cannot be declared to be invalid merely on that ground. The compensation fixed is not arbitrarily low or so unjust as to enable this Court to strike down the law as being violative of Article 31(2) of the Constitution.

11. It is, no doubt, true that in the Procurement Orders of 1968 and 1969 the State Government of Bihar had imposed levy not only on the millers and wholesale dealers but also on agriculturists. This time no levy has been imposed on them. The reason stated in the counter-affidavit of the State is that from administrative and practical point of view realisation of levy of foodgrains under

levy order was found to be very difficult and, therefore, this time in the Procurement Order no levy has been imposed on the agriculturists. Although one may not agree with the policy of distinction made by the State Government, it is difficult to hold that the distinction is tantamount to discrimination and violates Article 14 of the Constitution. Another discrimination which was pointed out is the liability of a third person to sell only 25 per cent, of the rice of all varieties got milled by him through a miller while the liability of the miller and the wholesale dealer is 40 per cent. Undoubtedly, it is so under Sub-clause (3) of Clause 3 of the Procurement Order and the second proviso to Sub-clause (1). But again I am inclined to think that it is a matter of the policy of the Government and can be justified on the basis of reasonable classification.

12. The main difficulty, however, in upholding the constitutional validity of the Procurement Order comes in because of the unreasonable restriction it puts on the right of the miller or the wholesale dealer to carry on trade or business, restriction which cannot be justified under Clause (6) of Article 19 as putting reasonable restrictions on the exercise of the right conferred by Sub-clause (g) of Clause (1) of the said Article.

13. Under Sub-clause (1) of Clause 8 of the Procurement Order it is imperative for every licensed miller to sell to the State Government at the procurement price at his mill premises such quantity of rice of common variety as shall be equal in weight to 40 per cent, of rice of all varieties produced or manufactured in his rice-mill every day beginning with the date of commencement of the Order and until such time as the State Government otherwise direct. Similarly, under Sub-clause (2) every licensed wholesale dealer has been enjoined to deliver to the State Government at the procurement price at his business premises such quantity of rice of common variety as shall be equal in weight to 40 per cent, of all varieties of rice produced or got milled from paddy in stock on the date of commencement of the Order and 40 per cent, of all varieties of rice purchased by him or coming into his custody or possession for sale or disposal through him on commission basis or in any other manner every day beginning with the date of commencement of the Order and until such time as the State Government otherwise direct. By the first proviso to Sub-clause (1) and the proviso to Sub-clause (2) provision has been made for avoiding double levy on the same quantity of paddy or rice. A person other than a licensed miller or a licensed wholesale dealer, who is not an agriculturist or a landless labourer getting such paddy up-to 3 quintals in a week, hulled at a rice mill of huller type having not more than one huller, has been directed to sell through the miller at the procurement price such quantity of rice of common variety as shall be equal in weight to 25 per cent, of rice of all varieties so milled. The wholesale dealer has been directed to deliver to the State Government such quantity of rice of common variety as shall be equal in weight to 40 per cent, of all varieties of rice purchased by him or coming into his possession as commission agent. Under Sub-clause (5) of Clause 3 any person on whose behalf the licensed wholesale dealer holds any stock of rice, which he has been required to sell to the State

Government under Sub-clause (2) is not entitled to recover from the wholesale dealer on account of the value of the stock so sold anything more than the price payable to the licensed wholesale dealer under the said clause. The provision for sale or delivery to the State Government of such quantity of rice of common variety equal in weight to 40 per cent or 25 per cent., as the case may be, of all varieties of rice dealt with by the miller or the wholesale dealer, in my opinion, is an unreasonable restriction which cannot be supported. The liability arises every day. Every day the miller or the wholesale dealer may not deal with rice of common variety. A third person may not bring to the mill paddy of common variety so as to enable the miller to sell to the State Government as against the dehusked paddy equal in weight to 25 per cent, of rice of common variety. A wholesale dealer dealing with rice of his principal on commission basis may not always have to deal with rice of common variety. As a result of the restriction imposed under Clause 3 on the miller and the wholesale dealer, irrespective of the fact as to which variety of rice has been dealt with by him on a particular day either on his own account or on account of a third person, he has been required to sell or deliver to the Government such quantity of rice of common variety as shall be equal in weight to 40 or 25 per cent, of all varieties of rice dealt with by him. To illustrate the gross unreasonableness of this restriction, I shall give a few examples. If a miller has de-husked, say, 100 quintals of paddy which, on being dehusked, produced, say, 60 quintals of fine rice, I do not know how the miller will discharge his obligation of selling 25 per cent, of 60 quintals of rice. A third person who has got his paddy dehusked may not have paddy of common variety. He will insist on taking delivery of the rice of his fine variety. There is no provision for any adjustment with him. The miller will have to deliver 15 quintals of coarse rice, which is called common variety, to the State Government at the procurement price. Wherefrom and how he will discharge the obligation except if possible, by delivering the rice from his own stock of coarse rice. For dehusking paddy of a third person, an unreasonable burden has been thrown on the miller which at times, apart from resulting in great loss to the miller, may not be capable of being discharged. Similarly, say, a wholesale dealer has got 100 quintals of fine rice in stock on account of a third person who appointed the dealer as his commission agent. He will have to deliver to the State Government 40 quintals of coarse rice as against the 100 quintals of fine rice. The third person cannot be liable under Sub-clause (5) of Clause 3 while the wholesale dealer will have to sell and deliver 40 quintals of coarse rice from his own stock. This, again, is a patently unreasonable restriction on the right of the dealer to carry on his trade. Even dealing with paddy or rice, on then own account, the miller or the wholesale dealer will be confronted with situations where they will not be able to discharge their "daily liability of selling or delivering such quantity of rice of common variety as shall be equal in weight to 40 per cent. of all varieties of rice dealt with, by him. In the earlier two Procurement Orders, similar provisions although less stringent In the matter of percentage were there. Those provisions are under challenge in different cases. I am not called upon to express any opinion in regard to them. But it will not be out of place to point out One

distinction between the previous provision and the present one, in that there was a provision for compounding and delivery on an agreed basis by the miller or wholesale dealer while there is no such provision in the present Procurement Order. I must not be understood to opine that if and when such a provision is there, it will save it from the attack of unreasonableness. To me the provisions in the Madhya Pradesh Rice Procurement (Levy) Order, 1970 and West Bengal Rice Mills (Control and Levy) Order, 1970 are understandable where the provision is for procurement of certain percentage of rice of all varieties on fixing the procurement price of all varieties. I think the Government would have been well advised either to procure by levy certain percentage of common variety of rice only on the stock of rice of common variety dealt with by the miller or the wholesale dealer or certain percentage of all varieties of rice according to the stock dealt with by him. But the provision as it is, to my mind, has got to be struck down as being violative of Article 19(1) (g) of the Constitution and not saved by Clause (6). I may clarify one point here that although in the Cooper's case dissenting from the previous View of the Court it has been held that there may be cases where to hold the constitutional validity of a law it has to be tested not only with reference to Article 31(2) of the Constitution but also with reference to Article 19, strictly speaking I have not tested the provision of Clause 3 of the Procurement Order on that principle. On the basis of the decision in the Bank Nationalisation Case and in view of what has been said in paragraphs 68 to 60 at pages 598 and 597 of the AIR Report, it was argued on behalf of the petitioners that no opportunity was given to them when the procurement price was fixed on the basis of the price likely to prevail during the post-harvest period. I do not think that the law contained in the Procurement Order can be struck down on the ground of violation of Article 19(1) (f) or (g) in regard to the procedural matter when, according to me, it has stood the test of Article 81(2). But that apart, the ground on which I have held the law to be violative of Article 19(1) (g) is altogether different and distinct from the one discussed with reference to Article 31(2).

14. I am also inclined to accept the argument put forward on behalf of the petitioners in one of the cases that u/s 5 of the Act the Central Government had not delegated to the State Government all their general powers to make the Order under Sub-section (1). Only such powers under that section were delegated as were enumerated in some of the clauses of Sub-section (2) including Clause (i). That being so, the State Government could not travel beyond their power under Clause (f) in making the Order in question. Clause (f) in terms can require any person holding in stock any essential commodity, in this case paddy or rice, to sell a specified part of the stock to the State Government. In other words, under Clause (f) a person holding in stock all varieties of rice cannot be required to sell a specified part of the whole by delivering a particular variety of rice. Either the whole must relate to the particular variety of rice or the specified part must relate to the entire variety of rice in stock. It is plain that a person holding in stock wheat cannot be required to sell such quantity of rice as

to be equal in weight to 40 per cent, of the wheat. So also when the entire variety of rice is dissected, the specified part required to be sold must be correlated to the stock of that part. But it is not necessary to decide this point finally in this case.

15. It is also argued on behalf of the petitioners in some cases that requiring the miller of the wholesale dealer to sell to the Government when he is holding in stock any quantity of rice not on his own account but on account of a third person whose paddy has been dehusked by the miller or has been stocked by the miller as commission agent, is also beyond the power conferred on the State Government under Clause (f) of Sub-section (2) of Section S of the Act. I am not prepared to accept this argument as sound. In my opinion, the phrase "holding in stock" in Clause (f) is wide enough to cover such cases provided the ultimate liability to sell has been adequately thrown on such third person, which, in this case, for the reasons stated above, has been adequately thrown.

16. On a parity of reasoning the provision contained in Clause 4 in respect of levy of paddy is also unconstitutional as being violative of Article 19(1) (g) of the Constitution.

17. An attack was made on Sub-clause (6) of Clause 3 that it has given uncontrolled and unbridled power to the State Government or to the District Magistrate or to the Sub-divisional Officer to issue any direction under the said Clause to any person from whom levy is due under Clause 3. In my opinion, this is not so. The power given to the State Government or to the District Magistrate or to the Sub-divisional Officer has got to be within the ambit of the Procurement Order; it cannot travel beyond it. Whatever is done further by them, is not any part of the legislative function but is purely executive. And, as a matter of fact, detailed instructions have been issued as will appear from annexure L (C. W. J. C. No. 14 of 1971) dated the 6th of November, 1970, a letter from the Secretary to the Government to the officers concerned for execution of the procurement plan. It would be seen from these instructions that provision has been made to appoint the Food Corporation of India as the agent of the State Government for accepting the delivery and making payments. I am, therefore, not inclined to hold Sub-clause (6) as being violative of Article 14 of the Constitution.

18. But that brings me to another infirmity in Clause 3 as under Sub-clause (4) of that Clause any miller or wholesale dealer has been restrained from selling or otherwise disposing of his stock of rice unless he has sold the prescribed percentage to the State Government under Sub-clause (1) or Sub-clause (2) as the case may be and has obtained release certificate in token thereof in respect of stocks left in balance with him. From annexure L it would appear that delivery is to be made weekly. But that apart, in my opinion, it is a very unreasonable restriction on the right of the miller or the wholesale dealer not to deal with the balance of his stock of rice unless he has sold the prescribed percentage to the State Government and obtained the release certificate. It is a matter of common experience that sale may not be effected in time and release certificate obtained

for no fault of the miller or the wholesale dealer. The Government agency, not infrequently, may be at fault. To prohibit the miller or the wholesale dealer from dealing with the balance of his stock not only for his fault or failure to sell and obtain the release certificate but also for the failure and fault of the Government or their agent, to my mind, is a very unreasonable restriction on his fundamental right guaranteed under Article 19(1) (f) and (g). In this connection, a comparison with a similar provision in the earlier Levy Orders will be of use. In Clause 14 of the Bihar Essential Foodgrains Procurement Order, 1968 it was provided:--

"Where the Sub-divisional Officer is satisfied that any rice-miller, including the owner of a single huller rice-mill, has refused or failed to sell to the Government at his mill premises, the quantity of rice, due from him under this Order, it shall be lawful for him, after giving the rice-miller including the owner of a single huller rice mill an opportunity of being heard, to order the seizure of the quantity specified to be sold by him to the Government under Clause 13 of this Order from the stock held by him. In such cases also, the rice miller including the owner of a single huller rice-mill from whom the stock is acquired, shall be paid price of rice in accordance with the provisions of Sub-clause (2) of Clause 13".

Similar provision was there in Clause 18 in case of failure of wholesale dealer. Identical provisions were made in clauses 14 and 18 of the Bihar Essential Foodgrains Procurement Order, 1969. Under Sub-clause (4) as it stands, if any miller or a wholesale dealer deals with the remainder of his stock even after he has not been able to sell and procure the release certificate for fault of the Government agency, he will be committing an offence punishable under the law. The restriction becomes all the more onerous and highly unreasonable when it is read in the background of the difficulty created by levy of 40 per cent, in terms of coarse rice or coarse paddy as against the entire stock of rice or paddy of all varieties. Sub-clause (4) could have been made severable from the other sub-clauses of Clause 3 of the Procurement Order and struck down by itself. But no portion of clause 3 or Clause 4 can be saved because of the inherent defect in them as discussed above. Doctrine of severability is not applicable in that situation and when clauses 3 and 4 are struck down as being constitutionally invalid as a whole, it is plain that the whole Procurement Order falls.

19. For the reasons stated above, all the petitions are allowed and the Bihar Rice and Paddy Procurement Order, 1970 is struck down as constitutionally invalid. The State of Bihar and its officers who are respondents in the various applications are restrained from giving effect to any provision in it. On the facts and in the circumstances of the case, I shall make no order as to cost in any of the cases.

Sarwar Ali, J.

20. I agree.