

(1976) 04 PAT CK 0008

In the Patna High Court

Case No : Civil Writ Jur. Case No's. 3296 of 1975 and 111 of 1976

The Belsund Sugar Co. Ltd. and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 20-04-1976

Acts Referred:

Bihar Agricultural Produce Markets Act, 1960 — Section 15, 15(2), 2, 27(2)
Bihar Agricultural Produce Markets Rules, 1962 — Rule 82
Constitution of India, 1950 — Article 246, 254, 254(1), 264
Sales of Goods Act, 1930 — Section 18, 23

Citation : AIR 1977 Patna 136 : (1977) 10 PLJR 8

Hon'ble Judges : Shambhu Prasad Singh, J; Nagendra Prasad Singh, J

Bench : Division Bench

Advocate : K.D. Chatterji, K.N. Gupta, K.D. Prasad and Anup Kumar Verma, in C.W.J.C. No. 3296/75 and Som Nath Chatterjee, K.N. Gupta, K.D. Prasad and Anup Kumar Verma, in C.W.J.C. No. 111/76, for the Appellant; Lalnarayan Sinha, Solicitor General of India, Ram Balak Mahto, Govt. Pleader No. 4, Harendra Prasad and Akhileshwar Prasad Singh, J.C. to G.P. No. 4, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Prasad Singh, J.—In these two writ applications the petitioners are two sugar factories. They challenge the authority of the respondent-Agricultural Produce Market Committees to issue directions to the petitioner-Companies to obtain licences in accordance with the provisions of the Bihar Agricultural Produce Markets Act, 1960 (hereinafter referred to as the "Act") and the Bihar Agricultural Produce Markets Rules, 1975 (hereinafter referred to as the "Rules"), on the ground that the provisions of the Act and the Rules are not applicable to sugar factories, and, if they are applicable, they are ultra vires.

2. According to the Belsund Sugar Company Ltd., (petitioner in C.W.J.C. No. 3296 of 1975), it has its factory at Riga in the district of Sitamarhi, within the State of Bihar, and its registered office at Calcutta in the State of West Bengal, at Riga, the factory is engaged in the manufacture of sugar; but, as neither any

purchase of sugarcane nor sale of sugar takes place within the market area established by the respondent Marke Committee, the provisions of the Act and the Rules are not attracted. According to the petitioner, the purchase of sugarcane for manufacture of sugar is completely regulated by Ordinances passed by the State Government from time to time known as the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, in terms whereof the petitioner has to purchase sugarcane from a particular area at a fixed price, which cannot amount to "sale". So far as the sale of "free sugar" is concerned, according to the petitioner, it takes place at Calcutta and only despatch of sugar is made from the factory site. So far as sale of "levy sugar" is concerned, according to the petitioner, it has to supply it to the persons nominated, by the Central Government under the provisions of Levy Sugar Supply (Control) Order, 1972; and, in such transactions there is complete absence of free volition on the part of the petitioner; and, as such it cannot amount to "sale" in the eye of law. In the aforesaid circumstances, according to the petitioner, even though no sale or purchase takes place within the area of the respondent Market Committees, respondent No. 2 issued a notice, dated the 5th November, 1974, calling upon the petitioner to take a licence from the Committee in accordance with the provisions of the Act and to pay the requisite licence fee. A copy of the said letter is Annexure "2" to the writ application. A reminder was sent by a letter, dated the 11th December, 1974, from respondent No. 2 threatening legal action against the petitioner. A copy of the said letter is Annexure "3" to the writ application. The petitioner, by its Letter, dated the 13th December, 1974, informed the Market Committee that the matter had been taken up for discussion with the State Government. A copy of the said letter is Annexure "4" to the writ application. The respondent Market Committee, by its letter, dated the 13th January, 1975, again insisted that the petitioner should obtain a licence, failing which legal action would be taken against it. A copy of the said letter is Annexure "5" to the writ application. The petitioner prayed for further time till the matter was finally decided by the State Government. But, by letter, dated the 20th November; 1975, the respondent Market Committee directed the petitioner not to purchase sugarcane from the growers in the Market Committee area till the licence was obtained. A copy of the said letter is Annexure "9" to the writ application. According to the petitioner, the aforesaid communications have been issued by the respondent Market Committee without any authority of law and amount to arbitrary invasion on the right of the petitioner to carry on trade and business.

3. Messrs. Motihari Sugar Factory (petitioner in C. W. J. C. No. 111 of 1976) is also a company which manufactures sugar at Motihari in Bihar and its registered office is at Calcutta in the State of West Bengal. This petitioner also has challenged, on more or less similar grounds, the authority of the respondent Market Committee to ask the petitioner to take a licence, and has also questioned the right of the respondent Market Committee to realise the market fee from the petitioner.

4. Counter-affidavits have been filed on behalf of the respondent Market Committees and the respondent Marketing Board. According to the respondents, as the purchase of sugarcane and the sale of sugar by the petitioners take place within the market areas, the petitioners have to obtain a licence and they are liable to pay market fees in accordance with the provisions of the Act and the Rules, which became applicable no sooner the State Government, in exercise of the powers conferred on it by Section 4 of the Act, issued the notifications declaring the areas in question as market areas.

The market fee is payable by the "buyer" in the manner prescribed, when ever there is sale within the market area, in the principal market yards and sub-market yard or yards. Although the fee is payable by the "buyer", yet in cases where the buyer is not a licensee and the seller is a licensee, the seller has to collect the fee from the buyer and to deposit the same with the Market Committee concerned.

5. As common questions of law and fact are involved in these two writ applications, they have been heard together and are being disposed of by this common judgment.

6. Mr. K.D. Chatterji, learned counsel appearing for the petitioner in C. W. J. C. No. 3296 of 1975, has strenuously challenged the claim made on behalf of the respondents that there is sale of sugarcane by the cane growers to the petitioner, on the one hand, and thereafter there is sale of sugar by the petitioner to purchasers, on the other. In this connection learned counsel has drawn our attention to the different provisions of the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, which has been promulgated from time to time in more or less similar language, and it regulates the production, supply and distribution of sugarcane intended for use in sugar factories; and has submitted that the provisions of the said Ordinance completely regulate the transaction in respect of sugarcane, inasmuch as they fix the area from where the sugarcane is to be procured, the person from whom it is to be procured and the price that has to be paid by the petitioner, and, as such, leaving no element of free volition, which is an integral part of sale; and unless there is a sale, there is no question of payment of the market fee. In this connection learned counsel has drawn our attention to Section 31 of the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1976 (Ordinance No. 43 of 1976), which empowers the Cane Commissioner to issue an order by notification in the Official Gazette, declaring any area to be a reserved area for the purpose of supply of sugarcane to a particular factory. Section 32 makes it obligatory on the sugarcane growers and the factory concerned to supply and purchase, as the case may be, quantity of sugarcane fixed by the order of the Cane Commissioner. Section 43 makes it incumbent on the factory to make payment of the price of the sugarcane as may be prescribed. The supply of sugarcane is further controlled by the provisions of the Bihar Sugarcane (Distribution and Movement Control) Order, 1966, an order framed in exercise of the powers u/s 3 of the Essential Commodities Act, where a

licence has to be taken by an unit before making purchase of sugarcane for manufacture of sakkar, khandsari sugar etc., which is to be done in accordance with the direction of the Cane Commissioner. According to the petitioner, in such a situation when there is supply of sugarcane to the factory of the petitioner, this does not amount to "sale" in the eye of law.

7. In support of the assertion that in such a situation no sale takes place, reliance has been placed on the case of New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, . In that case a question arose as to whether the transaction of despatches of sugar by the petitioner-Company, pursuant to the direction of the Controller, amounted to "sale" within meaning of the Sale of Goods Act, 1930. In that connection it was observed in the majority judgment as follows:--

"According to Section 4 of the Sale of Goods Act to constitute a sale of goods, property in goods must be transferred from the seller to the buyer under a contract of sale. A contract of sale between the parties is therefore a prerequisite to a sale. The transactions of despatches of sugar by the assessee pursuant to the directions of the Controller were not the result of any such contract of sale. It is common ground that the Province of Madras intimated its requirements of sugar to the Controller, and the Controller called upon the manufacturing units to supply the whole or part of the requirement to the Province. In calling upon the manufacturing units to supply sugar the Controller did not act as an agent of the State to purchase goods; he acted in exercise of his statutory authority. There was manifestly no offer to purchase sugar by the Province and no acceptance of any offer by the manufacturer. The manufacturer was under the Control Order left with no volition; he could not decline to carry out the order; if he did so he was liable to be punished for breach of the order and his goods were liable to be forfeited. The Government of the Province and the manufacturer has no opportunity to negotiate, and sugar was despatched pursuant to the direction of the Controller and not in acceptance of any offer by the Government."

It was further observed:

"Mere compliance with the despatch instructions issued by the Controller, which in law the assessee could not decline to carry out, did not amount to acceptance of an offer a contract of sale postulates exercise of volition on the part of the contracting parties and there was in complying with the orders passed by the Controller no such exercise of volition by the assessee."

8. A similar view was taken in the case of Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, while examining the provisions of the U.P. Wheat Procurement (Levy Order) 1959, saying that under the said Procurement Order the obligation to deliver wheat arose out of statute and there was no volition of the licensed dealer, and, as such, there was no "sale".

9. On their face, the aforesaid observations of the Supreme Court do help the contention raised on behalf of the petitioner; but I shall immediately indicate that

the ratio of those cases is not applicable to the facts of the present case. In the case of *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, the Supreme Court was examining a statute relating to taxation on sale in which the transaction must conform to the strict definition of "sale". In the present case, the relevant provisions of the Act and the Rules levy fee on the transaction of sale and purchase within the market area. Apart from that, a larger Bench of the Supreme Court in the case of *Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others*, had to consider the question as to when a sugarcane grower supplies sugarcane to a sugar factory in accordance with the terms, conditions and price fixed by different statutory orders, whether a "sale" takes place. In that connection the aforesaid decisions in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, were examined and it was held that nonetheless there is some element of volition even in such transactions to conform to the requirements of "sale". In the case of *Salar Jung Sugar Mills Ltd.*, (supra) the decisions in *Indian Steel and Wire Products Ltd. Vs. State of Madras*, and *Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others*, , which had taken the view that, even when the transactions of sale are governed by statutory provisions, a "sale" takes place, were approved, and it was observed as follows:--

"44. The Control Orders are to be kept in the forefront, for appreciating the true character of transactions. It is apparent that the area is restricted. The parties are determined by the order. The minimum price is fixed. The minimum quantity of supply is also regulated. These features do not complete the picture. The entire transaction indicates that the parties agree to buy and sell. The parties choose the terms of delivery. The parties have choice with regard to obtaining supply of a quantity higher than 95 per cent, of the yield. The parties can stipulate for a price higher than the minimum. The parties can have terms for payment in advance as well as in cash. A grower may not cultivate and there may not be any yield. A factory may be closed or wound up and may not buy sugarcane. A factory can reject goods after inspection. The combination of all these features indicates that the parties entered into agreement with mutual assent and with volition for transfer of goods in consideration of price. Transactions of purchase and sale may be regulated by schemes and may be liable to restrictions as to the manner or mode of sale. Such restrictions may become necessary by reason of co-ordination between production and distribution in planning the economy of the country. The contention of the appellants fails. The transactions amount to sales within the meaning of the Mysore Sales Tax Act."

In my opinion, it is futile on the part of the petitioner to urge that, when it purchases sugarcane from the specified area at the price fixed, for crushing in its factory, it is not a "buyer within the meaning of the Act and liable to pay market fee.

10. It was then submitted that, so far as the sale of "free sale sugar" is

concerned, the situs of sale is not at any part of the market area, but at Calcutta, the registered office of the petitioner, where the transactions are finalised the factory site simply supplies as per order of the Company issued from its registered office. In that connection an application was filed on the 6th March, 1976, giving the details of the sale. In paragraph 7 of the said petition it was stated:--

"7. That on the conclusion of these sales, sale notes or sale memos were issued by the petitioner's Head Office to the said purchaser, who, in turn, issued to the petitioner's Head Office "despatching Advices" mentioning the nominee to whom the delivery was to be given. On receipt of the despatching advices from the purchaser, the Head Office issued delivery orders to the nominee as well as to the factory at Riga. On the basis of the said orders the nominee of the purchaser takes the delivery at the factory."

Assuming that the same procedure is followed in respect of all transactions relating to "free sale sugar", the question is, can it be said that, in such a situation, the sale takes place at Calcutta 1 It is not in dispute that the alleged sale at Calcutta is in respect of an unascertained goods, inasmuch as the sale is in respect of sugar produced or to be produced, but not earmarked at the time the transaction is finalised. In such a situation, the provisions of Sections 18 and 23 of the Sale of Goods Act are attracted. Sections 18 and 23 of the Sale of Goods Act read as follows:--

"18. Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."

"23 (1) Where there is a contract for the sale of unascertainad or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may fee expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract." From paragraph 7 of the application quoted above it appears that at Calcutta there is a contract for sale of unascertained quantity of sugar and the said quantity of sugar is appropriated only at the time of delivery. To be more specific, at that time the quantity of sugar which is to be supplied to the purchaser is not ascertained out of the bulk of sugar which may have been produced or was likely to be produced. They are appropriated to such a contract only at the factory site when they are earmarked for despatch to the purchaser concerned. In view of Sections 18 and 23 of the Sale of Goods Act, no property in goods is to be transferred to the buyer unless and until the goods are ascertained and

unconditionally appropriated to the contract. In my opinion, this appropriation to the contract takes place at the factory site when, in pursuance of the contract, the petitioner delivers goods to the buyers or to any carrier for the purpose of transmission to the buyers. In that view of the matter, the "sale" takes place within the market area making the purchaser of such sugar liable to pay market fee.

11. It was then submitted on behalf of the petitioner that the bulk of sugar produced by it is supplied to the Food Corporation of India, in accordance with the order of the Central Government under the provisions of the Levy Sugar Supply (Control) Order, 1972, and such supply is entirely governed by the directions of the Central Government issued from time to time in respect of the quantity of sugar, the person or organisations or the State Governments to be supplied at a price not exceeding the price determined under the provisions of sugar (Price Determination) Order, 1972 and any such supply cannot amount to "sale" within the market area. In this connection again complete absence of volition on the part of the seller has been urged, as was urged in connection with the purchase of sugarcane. No doubt, similar argument in connection with the U.P. Wheat Procurement (Levy) Order, 1959, was upheld by the Supreme Court in the case of Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, ; but later in the case of Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others, the aforesaid case of M/s. Chitter Mal Narain Das was not followed. Even in such transactions which are governed by the terms of the Levy Order, a transfer does take place for a price, which is a "sale" in the eye of law. In my opinion, whenever the petitioner-Company accepts supply of sugarcane from the canegrowers, a sale takes place in which the petitioner is a buyer, and whenever it delivers sugar to the purchasers, sale takes place no sooner the sugar is earmarked and appropriated to the contract and in such cases; the petitioner-Company is a seller.

12. It was further urged that Sugar industry is an industry under the control of the Union and, in view of Entry 52 of the Union List, Parliament has exclusive jurisdiction over the industries the control of which by the Union has been declared by Parliament by law to be expedient in the public interest, and, as such, the State Legislature is not competent to legislate and make provisions in connection with such industries and any such provision made in respect of such industries has to be declared as void. In this connection learned counsel for the petitioner submitted that, if the provisions of the Act are held to be applicable to sugar industries, then the Act will be deemed to be under Entry No. 24 of the State List, that is, an Act relating to an industry, which, in view of declaration by Parliament referred to above, is not permissible. In my opinion, it is difficult to hold that the Act, in pith and substance, deals with industries as such. The object of the Act is to regulate buying and selling of agricultural produce by establishing markets for agricultural produce in the State" of Bihar, and, while doing so, its incidentally making the purchaser of sugarcane or sugar liable to pay market fee cannot be said to be an Act concerning an industry. A Bench of this Court in B. &

K. Traders v. State of Bihar 1975 BBCJ 1 has considered as to under which entry of the State List the Act in question falls and it has held that it is covered by Entry No. 28 "Markets and Fairs" and, as such, in my opinion, there is no question of legislative incompetence on the part of the State Legislature in enacting the Act in question.

13. Learned counsel for the petitioner then submitted that, if it is held that the provisions of the Act are applicable even to purchase of sugarcane and sale of sugar made by the petitioner, then the Act and the Rules have to be declared void, in view of the fact that there is repugnancy between the provisions of the Act, read with the Rules, and the provisions of the Control Orders made in exercise of the powers conferred by Section 3 of the Essential Commodities Act by the Central Government; and both operate into the same field regarding sale and purchase of sugar. According to petitioner in such a situation, the State Act must be deemed to be void in view of Article 254(1) of the Constitution of India. It is difficult to accept this argument. Article 254 has no application to cases where the conflict is between two Acts made by Parliament and the State Legislature having competence to legislate the same on the principle of pith and substance. The repugnancy referred to in Article 254 of the Constitution is in connection with Acts when Parliament and the State Legislature both are legislating in respect of any of the entries in the Concurrent List (List III). I have already held that the Act in question has been enacted under Entry No. 28 of the State List. As such, there is no question of its provisions being repugnant to the provisions of the Essential Commodities Act, which is a Central Act, to attract the provisions of Article 254. Reference in this connection may be made to the cases of AIR 1947 60 (Privy Council) A.S. Krishna Vs. State of Madras, and Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd., . In the aforesaid case of A.S. Krishna, while interpreting Sub-section (1) of Section 107 of the Government of India Act, 1935, which was similar to Article 254(1) of the Constitution, it was observed as follows:--

"For this section to apply, two conditions must be fulfilled; (1) The provisions of the Provincial law and those of the Central legislation must both be in respect of a matter which is enumerated in the Concurrent List, and (2) they must be repugnant to each other. It is only when both these requirements are satisfied that the Provincial law will to the extent of the repugnancy, become void. The first question, therefore, that has to be decided is, is the subject-matter of the impugned legislation one that falls within the Provincial List, in which case Section 107 would be inapplicable, or is it one which falls within the Concurrent List, in which case the further question, whether it is repugnant to the Central Legislation will have to be decided ?"

The same view was reiterated in the case of Kerala State Electricity Board at page 478 (of SCC) = (at p. 1039 of AIR) (supra) in these words:--

"That the question of repugnancy can arise only with reference to a legislation falling under the concurrent list is now well settled."

14. Learned counsel for the petitioner, however, referred to another decision of the Supreme Court in *State of Jammu and Kashmir Vs. M.S. Farooqi and Others*, . The ratio of that case is not applicable, because in that case the Supreme Court had to deal with Article 254 of the Constitution as it was then applicable to Jammu and Kashmir, there being no Concurrent List. This is apparent from facts stated in paragraphs 9 to 12 of the judgment.

15. It was then urged that, even if it is held that Article 254 of the Constitution has no application in a situation where both the legislatures, in pith and substance, have legislative competence, still if some provisions of the two Acts are repugnant and conflicting, then the provisions of the State Act have to be held void as it will amount to unauthorised encroachment over the territory of the Union in view, of Article 246 of the Constitution. In my opinion, there is no substance in this contention. Once it is held that the State Legislature had legislative competence to enact the law in question any incidental conflict with any Central Act will not make the provisions of the State Act ultra vires. In this connection again a reference may be made to the aforesaid judgment in *Prafulla Kumar Mukherjee* and the judgment in the case of *A.S. Krishna Vs. State of Madras*, . In the case of *A.S. Krishna*, the Supreme Court observed:--

"When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence."

Learned Solicitor-General, however, submitted that, on the facts of the present case, the only conflict that has been pointed out on behalf of the petitioner is between Section 15 of the Act, on the one hand, and the provisions of the Sugar (Price Determination) Order, 1972 and the Sugar (Restriction on Movement) Order, 1972, on the other. According to him, Section 15 of the Act is not such an integral part of the Act that, even if it is held to be void or not applicable so far as the petitioner is concerned, the whole Act will become unworkable.

16. Section 15 of the Act reads as follows:--

"15 (1) No agricultural produce specified in the notification under sub-section (1) of Section 4 shall be bought or sold by any person at any place within the market area, other than the principal market yard or sub-market yard or yards established therein, except such quantity as may in this behalf be prescribed for retail sale or personal consumption.

(2) The sale and purchase of such agricultural produce in such areas shall notwithstanding anything contained in any law be made by means of open auction or tender system except in cases of such class or description of produce as may be exempted by the Board."

Sub-section (1) of Section 15 requires sugar, which is an agricultural produce, to be brought to the principal market yard or sub-market yard or yards for being sold, and Sub-section (2) prescribes that the sale and purchase shall take place by means of open auction. According to the petitioner, it is not permissible for it to sell the sugar by public auction, because the price of such sugar has been fixed by the Sugar (Price Determination) Order, 1972, or by similar orders made from time to time. Similarly, neither is it permissible nor is it possible to carry all the sugar produced by the factory of the petitioner to the principal market yard or sub-market yard or yards. Learned counsel for the petitioner has submitted that this provision is the very soul of the Act inasmuch as it makes a provision for sellers and buyers to come to the market yard and sell and purchase articles by open, auction. In my opinion, it is difficult to accept that, if this section is held to be inoperative so far as sugar is concerned, the whole Act will have to be held to be void and unworkable. Sub-section (2) of Section 15 itself says that the said condition regarding sale by open auction can be exempted by the Board in cases of particular description of produce. Apart from that, it has been stated on behalf of Respondents that the State Government has issued notification in exercise of the powers conferred by Section 42 of the Act exempting sugar from applicability of sub-section (2) of Section 15. Section 42 vests such power in the State Government. So far as Section 15 (1) regarding sale of sugar at the principal market yard or sub-market yard is concerned, during the course of hearing a notification, dated the 31st July, 1974, published in an extraordinary issue of the Bihar Gazette of that date, was brought to our notice to show that the premises of the Belsund Sugar Co. Ltd., have been declared as sub-market yard. It is stated that similar notifications have been issued so far as the other sugar companies are concerned. In that view of the matter, even if the petitioner-Company purchases sugarcane or sells sugar in the premises of the factory, which has been declared as sub-market yard, there is no question of violating the provisions of sub-section (1) of Section 15 of the Act.

17. It was also faintly submitted by the learned counsel for the petitioner that the petitioner cannot be said to be a "trader" within the meaning of the Act, and as such it is not incumbent on it to have a licence. According to the learned counsel, when the petitioner purchases sugarcane from the cane growers, it has to do it as commanded by the provisions of the Ordinance referred to above (Ordinance No. 43 of 1976). In view of the fact that I have already held that whenever there is supply of cane by the canegrowers to the petitioner-Company, there is a "sale", the petitioner will be deemed to be a "trader" inasmuch as the petitioner is ordinarily engaged in the business of buying agricultural, produce from the cane growers. In the aforesaid judgment of the Supreme Court in Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others, , while considering as to whether such sugarcane factories shall be deemed to be "dealer" within the meaning of the Mysore Sales Tax Act when they purchase sugarcane from the cane growers, it was held that they will be deemed to be "dealers" within the meaning of that Act. In that Act "dealer" had been defined to mean a person

who carries on the business of buying, selling, supplying or distributing goods for cash or for deferred payment. The definition of "dealer" is more or less similar to the definition of "trader" in the present Act and, as such, there should not be any difficulty in holding that the petitioner will be deemed to be a "dealer" and as such it has to take a licence in accordance with the provisions of the Act.

18. Mr. Som Nath Chatterjee, who appeared for the petitioner in C. W. J. C. No. 111 of 1976, while adopting the arguments made on behalf of the petitioner in C. W. J. C. No. 3296 of 1975. raised another point that, even if the amount realised as market fee is held to be a "fee", which he was not challenging in view of the aforesaid Bench decision of this Court in the case of M/s. B. and K. Traders 1975 BBCJ 1 (supra), there was no co-relationship between the amount realised as market fee and the services rendered by the Market Committee in question to the petitioner-Company. When objected to by learned Solicitor-General that there was no statement of facts in that context and only a ground had been taken in the main writ application, a prayer was made on behalf of the petitioner during the course of the hearing, to amend the main writ application and to state that the petitioner-Company was not receiving any service from the Market Committee in lieu of the huge amount of market fee payable over the transactions entered into by the petitioner-Company. After hearing the parties, the prayer for filing an amendment petition was allowed. Thereafter, a petition was filed on behalf of the petitioner and a reply thereto on behalf of the respondent-Market Committee. Learned counsel appearing for the petitioner submitted that the fact that there is no correlation between the amount of fee charged and the nature of services rendered is a matter justiciable before this Court and in such a situation the onus is on the Market Committee to prove to the satisfaction of this Court that the market fee charged from the person concerned is not excessive or arbitrary and that can be co-related to the extent of services rendered. In this connection reference was made to the decisions of the Supreme Court in *Indian Mica Micanite Industries Vs. The State of Bihar and Others*, ; *The Secretary, Government of Madras, Home Department and Another Vs. Zenith Lamp and Electrical Ltd.*, , *The State of Maharashtra and Others Vs. The Salvation Army, Western India Territory, and The Government of Andhra Pradesh and Another Vs. Hindustan Machine Tools Ltd.*, . Learned counsel laid great stress on the observation in the case of *The Government of Andhra Pradesh and Another Vs. Hindustan Machine Tools Ltd.*, to the following effect-

"20. One cannot take into account the sum total of the activities of a public body like a Gram Panchayat to seek justification for the fees imposed by it. The expenses incurred by a Gram Panchayat or a Municipality in discharging its obligatory functions are usually met by the imposition of a variety of taxes. For justifying the imposition of fees the public authority has to show what services are rendered or intended to be rendered individually to the particular person on whom the fee is imposed. The Gram Panchayat here has not even prepared an estimate of what the intended services would cost it."

It is well settled that fee is a sort of return or consideration for services rendered and as such there has to be an element of quid pro quo in the imposition of fee and if necessary the authority realising the fee may be called upon to show the co-relationship between the fee levied and the services rendered by it to the person who is required to pay the fee and in this respect it differs from "tax" where the amount realised merges into the general fund. However, it is not possible to show with mathematical exactitude the co-relationship between the amount realised as fee from one particular person and the services rendered to him. Fee is realised from hundreds and thousands of persons and corresponding services are also rendered to hundreds and thousands. In that situation in many cases it may be impossible to show any direct co-relationship except that the person who has paid the fee has derived benefit in return.

19. Now I propose to examine the materials on record to find out as to whether any such co-relationship exists between the amount of market fee to be paid by the petitioners and the corresponding benefits received by them. In this connection, as already pointed out above, a supplementary affidavit was filed on behalf of the petitioner on the 20th March, 1976, saying that no service whatsoever is rendered by the Market Committee for the market fee realised by it. According to petitioners the Zonal Development Council prepares the programme for development of communication, irrigation and other agricultural facilities relating to sugar. No additional facilities whatsoever are received by the petitioner from the Market Committee in connection with the purchase of sugarcane. It was further submitted that, in view of the declaration of the factory area of the petitioner itself as a market yard, now there is no question of establishment of any market yard or sub-market yard for sale or purchase of sugarcane or sugar by the respondent Market Committee. Section 15 (2) of the Act which makes provision for fixation of price by auction being not applicable to the sale and purchase of sugarcane and sugar, the petitioner does not derive any benefit on that account also. According to the petitioner, at the rate of Re. 1/- for Rs. 100/- worth of agricultural produce, the petitioner will have to pay about Rs. 5,00,000/- annually to the Market Committee; but the same has no co-relationship with the facilities contemplated, end in that sense the amount realised will cease to be "fee" and will become "tax". An affidavit on behalf of the Marketing Board has been filed in reply to the aforesaid affidavit of the petitioner in which it has been stated that sugarcane farmers are spread over different villages and they are faced with the problem of transport from those villages to the factory site and due to lack of good roads they have to suffer inasmuch as the sugarcane loses its weight due to drilage. On account of lack of proper arrangement within the factory premises the bullock-carts have to stay overnight. Keeping all these difficulties in consideration, the Market Committee has taken up the work of construction of link roads from the villages to the factory site which will benefit the sugarcane farmers as well as the factory concerned. The scheme has been finalised for construction of these link roads with the approval of the World Bank International Development Agency which is

providing advances for meeting-part of the cost of construction of the market and the link roads. It has also been stated that lands needed for execution of the plan have been acquired. Details of ten link roads of ten kilometres each to serve every market have been also mentioned. According to the respondent-Market Committee, proper Marketing facilities provided near the factory site of the petitioner will be an incentive to the fanners of unreserved areas also which may supply sugarcane to the petitioner's factory. In that connection it has also been suggested that the development is at its initial stage and full benefit can be derived only after the same is fully implemented. A reply on behalf of the petitioner to the affidavit filed on behalf of the Marketing Board was filed on the 2nd April, 1976. In that even the claim about construction of the link roads to provide facilities to the farmers or to the petitioner-Company has also been challenged,

20. From the affidavits filed on behalf of the petitioner as well as the reply thereto filed on behalf of the Marketing Board it is obvious that for the present the petitioner is not being provided with such facilities which may be held to have co-relationship with the amount of fee which the petitioner is paying or is liable to pay. Any benefit provided to the sugarcane growers is of no consequence, so far as the petitioner is concerned. But in this connection one thing has to be kept in view that, although the Act was passed as early as in the year 1960, it is being implemented only recently. The provisions of the Act themselves conceive of development of market areas which can provide adequate facilities to purchasers and sellers of the agricultural produce. In usual course, it is bound to take some time when full benefit of the scheme can be derived by all concerned. In this connection another aspect was emphasised by the learned Solicitor-General that the Market Committee has no other source of income for development of its projects and any fee realised by the Market Committee is to be spent for the development of the market area and in this respect the facts of the present case differ from the facts of some of the cases of the Supreme Court referred to above, where the authorities concerned, who were collecting the fees, were also getting some grants from Government or some other bodies and they were enjoined by the provisions of the Act to provide those facilities out of the amount received by them. Under those circumstances, it was pointed out that there was no proper explanation as to how the amounts realised as fees were being spent by them for the benefit of the persons from whom such fees were realised. However, if within a reasonable time the Market Committees concerned are not able to provide corresponding benefits to the petitioner-Companies, they will be justified in moving the proper authorities or this Court on the ground that there is no co-relationship between the amount of fee realised from them and the facilities provided to them.

21. It was then submitted by Mr. Som Nath Chatterjee that Rule 82 of the Rules is ultra vires as it is beyond the scope of the Act. Relevant clauses of Rule 82 read as follows:--

"82. (i) The Market Committee shall levy and collect market fee on agricultural produce bought or sold in the market area at the rate of Re. 1/- per Rs. 100 worth of agricultural produce.

(ii) If the buyer is a licensee, he shall, within a week of the purchase, deposit the market fee with the Market Committee.

(iii) If the seller is a licensee and the buyer is not a licensee, the seller shall realise the market fee from the buyer and shall within a week deposit the same with the Market Committee.

(iv) If neither the buyer nor the seller is a licensee, the buyer shall deposit the market fee with the Market Committee or to its authorised officer or to staff or to any person authorised by the Market Committee.

According to learned counsel, Rule 82 (iii) imposes a duty on the petitioner-Company, while selling sugar to the buyer, who is not a licensee, to realise the market fee from such buyer and to deposit the same with the Market Committee within a week, whereas u/s 27 (2) of the Act the liability to pay the fee is on the buyer. According to learned counsel, the rule making authority cannot shift the liability from the buyer to the seller under a particular contingency, without there being a provision in the Act itself. In ray opinion, there is no substance in the contention of the learned counsel. Sub-section (2) of Section 27 of the Act itself says that the market fee chargeable under Sub-section (1) of Section 27 shall be payable by the buyer in the manner prescribed. Rule 82 (iii) of the Rules prescribes the manner in which the buyer, who is not a licensee, shall pay the market fee. In other words, Rule 82 (iii) only prescribes the machinery for realisation of the market fee from a buyer who is not a licensee but is purchasing the agricultural produce from a seller who is a licensee. In my opinion, at no stage the liability to pay the market fee shifts from the buyer to the seller. In such a situation the seller is merely a collecting agent. Such provisions are not uncommon where in the exigencies of the situation an Act or a rule appoints a collecting agent for a tax or fee. Under the Bihar Taxation on Passengers and Goods (Carried by Pubic Service Motor Vehicles) Act, 1961 and the Sales Tax Acts of different States taxes are realised by appointing collecting agents. Market fee, although not a tax in that sense, belongs to genus of tax; and merely because under certain contingencies the seller of such agricultural produce has been made the collecting agent of such fee from the buyer, in my opinion, the rule cannot be held, to be ultra vires. Reference in this connection may be made to the well known case of The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, and the case of Sir Byramjee Jeejeebhoy, Kt. Vs. The Province of Bombay, . The rule-making authority has simply carried out the purposes of the Act by making the rule in question for the purposes of restricting the evasion of market fee by such buyers who are not licensees. It Is well known that where a charging section is to be interpreted it should be interpreted strictly

in favour of the subject But the same principle does not apply while construing a section which only provides the machinery for collection. In such a situation Courts have leaned in¹ favour of the revenue so that the provisions of a valid Act are not frustrated due to some lacuna in the provision relating to the machinery for collection of such taxes and fees. In this connection reference may be made to the following observation in the case of *India United Mills Ltd. Vs. Commissioner of Excess Profits Tax, Bombay*, :--

"That section is, it should be emphasised, not a charging section, but a machinery section and a machinery section should be so construed as to effectuate the charging sections."

Similarly, in the case of *Gursahai Saigal Vs. Commissioner of Income Tax, Punjab*, certain words were read into the section, so as to make the provision workable. In the aforesaid case the provision in question laid down the machinery for assessing the amount of interest for which the liability was clearly created. The liability to pay the fee on the buyer has been created by Sub-section (2) of Section 27 of the Act. Rule 82 (iii) simply provides the machinery for collection of such fee, and I do not find any ground for holding that the said machinery is in any manner arbitrary or not sanctioned by law,

22. In the result, both the applications fail and they are dismissed; but, in the circumstances, there will be no order as to costs.

Shambhu Pbasad Singh, J.

23. I agree. Undoubtedly some of the questions arising for decision in these two writ applications are interesting, but they appear to have been settled by the decisions of the Supreme Court which have been referred to in the judgment of my learned brother N. P. Singh, J. Of course, there are observations in the decision of the Supreme Court in the case of *State of Jammu and Kashmir Vs. M.S. Farooqi and Others*, which may support a contention that in Article 254(1) of the Constitution the words "with respect to one of the matters enumerated in the Concurrent List" qualify only the expression "to any provision of any existing law"" and not "to any provision of law made by Parliament which Parliament is competent to enact". But these observations, as has rightly been pointed out by my learned brother, were made with reference to Article 254 as applicable to Jammu and Kashmir. In interpreting Article 254(1) of the Constitution with reference to other States of the country the interpretation given to that Article by the Supreme Court in *A.S. Krishna Vs. State of Madras*, and in *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*, has to be followed. It is remarkable that in *Kerala Electricity Board's* case the interpretation given to Article 254 of the Constitution in *A.S. Krishna's* case in 1957 has been reiterated in spite of decision of the Supreme Court in *State of Jammu and Kashmir v. M. S. Farooqi*. Further, the repugnancy, if any, in the provisions of the Bihar Agricultural Produce Markets Act, according to the petitioners, is with the provisions of the Control Orders made by the Central Government in exercise of the powers

conferred by Section 3 of the Essential Commodities Act: Article 254(1) refers to repugnancy between provisions of a law made by the Legislature of a State and that of a law made by Parliament and not by the Central Government in exercise of powers conferred upon it under some law made by Parliament. Control Orders made by the Central Government under the delegated powers are undoubtedly laws binding on the citizens, but they cannot be said to be laws made by Parliament and unless such Control Orders are existing laws they ought not to prevail over laws made by Legislatures of the State, if there be any repugnancy in the provisions of the two on account of Article 254(1) of the Constitution.