(2004) 10 AHC CK 0227

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No''s. 26291, 29684, 29702, 35680, 35696, 37860 and 37861 of 2004

West UP Sugar Mill Association and Others APPELLANT

Vs

State of UP and Others RESPONDENT

Date of Decision : 07-10-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 141
Essential Commodities Act, 1955 — Section 3(2)(i)
Uttar Pradesh General Clauses Act, 1904 — Section 4, 4(29A)

Citation : (2004) 10 AHC CK 0227

Hon'ble Judges : Yatindra Singh, J;V.S. Bajpai, J

Bench : Division Bench

Advocate : Shanti Bhushan and Bharat Ji Agrawal, s, Yashwant Verma, Sanjai Kumar Pathak, Ashutosh Khaitan, Piyush Agrawal and Bharti Sapru, for the Appellant; Sudhir Agarwal, AAG UP , Shashi Nandan , C.S. Singh, SC, Subhash Rathi, SC, Ravindra Singh and K.R. Sirohi, for the Respondent

Judgement

Yatindra Singh, J.—The question--whether the State government has power to fix state advised price of sugar cane (SAP)--has been answered in affirmative by the Supreme Court in U.P. Co-operative Cane Unions Federations Vs. West U.P. Sugar Mills Association and Others etc. etc., (the SAP case). The questions involved in these writ petitions are offshoot to the decision in the SAP case and relate to the validity of the GO dated 30th June 2004 (the impugned GO) providing SAP for the crushing season 2003-04.

THE FACTS

At present, following Acts/Rules/Order are relevant for purchase, sale, and fixing price of sugar cane.

I. The UP Sugarcane (Regulation of Supply & Purchase) Act, 1953 (the 1953 Act).

II. The UP Sugarcane (Regulation of Supply and Purchase) Rules, 1954 (the 1954 Rules).

III. The UP Sugarcane Supply & Purchase order, 1954 (the 1954 Order).

IV. The Essential Commodities Act, 1955 (The EC Act).

V. The Sugarcane Control Order, 1966 (Central) (the 1966 Order).

2. The legislative history prior to aforesaid enactments has been narrated in Ch. Tika Ramji and Others etc. Vs. The State of Uttar Pradesh and Others, (the Tika Ram case). It explains that initially Central legislature enacted Sugar Cane Act, 1934. It was repealed by the UP Sugar Factories Control Act 1938. These acts had conferred power on the State Government to issue minimum price to be paid to the cane growers. However Indian Legislature enacted Essential Supplies (Temporary Powers) Act, 1946; it remained in force till EC Act was enacted. Section 3(2)(i) of this Act gave power to the Central government to fix price of sugar cane. Subsequently Sugar and Gur Control Order 1950 was framed and it also gave power to Central government to fix price of sugar cane. The central government had been fixing minimum price for sugarcane (SMP) under these provisions till the EC Act was enacted when the Central Government started fixing SMP under it.

3. After enactment of the EC Act, Sugar and sugarcane were declared essential commodities under this Act. Initially, the Central Government had framed Sugarcane Control Order, 1955 (the 1955 order). It was replaced by the 1966 order. At present clause 3 and 5-A of the 1966 order provide for determination of SMP and additional price for sugarcane (AdP) respectively.

4. The State Government started fixing SAP under the 1953 Act since 1973. it is to be paid by the sugar mills to the sugarcane growers and is always higher than SMP. The sugar mills started paying SAP to the sugarcane growers.

5. The State Government issued SAP for the crushing season, 1996-97 on 15.11.1996. Sugar mills associations as well as sugar mills filed writ petition No. 36889 of 1996 praying for quashing this GO on the ground that

? The State Government has no power to issue SAP

? They are liable to pay only SMP and AdP determined under the 1966 order.

6. This Court, by order dated 11.12.1996, allowed the writ petition and quashed the GO dated 15.11.1966 on the ground that after enactment of the EC Act and the 1966 Control Order, the State government has no right to fix SAP.

7. There were two other writ petitions touching this controversy for the same crushing season i.e. 1996-97; they were before the Lucknow bench.

(i) Writ petition No. 775 (M/B) of 1997 was filed by a private sugar mill challenging the recovery certificate of unpaid sugarcane price (based on SAP) on the ground that as fixation of SAP was illegal, recovery of sugarcane price on its basis was illegal.

(ii) Writ petition No. 2086 of 1997 VM Singh vs. State of UP was filed by cane growers for direction to ensure payment of sugarcane price agreed by the sugar mills.

8. The aforesaid two writ petitions were decided together by the Lucknow Bench on 1.2.1999. WP No. 775 (M/B) of 1997 for quashing recovery was dismissed but WP No. 2086 (M/B) of 1997 for direction to ensure payment of the agreed price--that was same as SAP--was allowed.

9. The State government filed an appeal against the order of this Court dated 11.12.1996. The appeal was admitted however stay application was rejected on 22.1.1997. The aggrieved private sugar mill filed an appeal against the order dated 1.2.1999 of the Lucknow Bench. The appeal was admitted and an interim order dated 22.3.1999 was granted staying the operation of order of the Lucknow bench dated 1.2.1999.

10. The State government continued to fix SAP for the cooperative and government owned sugar mills despite this Court''s order dated 1.12.1996. However, no such SAP was fixed for the private sugar mills. Associations of sugar mills and private sugar mills individually have filed writ petition No. 48159 of 2002 for direction to the State government not to fix SAP even for the cooperative and state owned sugar mills. In this writ petition this court passed an interim order dated 13.11.2002 restraining the state government from issuing SAP even for the cooperative and state owned sugar mills. This order was partly modified on 10.1.2003, granting liberty to the UP State Sugar Corporation and the UP Co-operative Sugar Federation Ltd. to enter into any negotiation with cane grower unions and to make payment according to the price agreed upon. However the rest of the order, restraining the State from fixing SAP even for the cooperative and state owned sugar mills, was maintained.

11. The appeals against the judgment of this Court dated 11.12.1996 as well as against the judgment of the Lucknow Bench dated 1.2.1999 were decided in the SAP case. The Supreme Court by majority decision dated 5.5.2004 of 3:2 reversed the order of the Allahabad High Court dated 11.12.1996 and upheld the order of the Lucknow bench dated 1.2.1999. The Supreme Court held that:

? The EC Act and the 1966 Order cover the field for determination of minimum price for sugarcane.

? This minimum price is, SMP fixed under clause 3 plus AdP determined under clause 5-A of the 1966 order.

? The EC Act and the 1966 order cover the field of minimum price only; they neither cover the field for fixing higher SAP nor prohibit it.

? The power to regulate u/s 16 of the 1953 Act also includes power to fix price for the sugarcane i.e. SAP.

12. The private sugar mills filed a review application against the decision of the SAP case. It was dismissed on 24.8.2004. We are informed by the petitioners

that a curative petition is in process of being filed before the Supreme Court.

13. The State government had issued a GO dated 16.12.2003 fixing SAP for the cooperative and State owned sugar Mills for crushing season 2003-04. After the decision in the SAP case by the Supreme Court, the State government issued the impugned GO fixing SAP for the private sugar mills also for crushing season 2003-04 it is same as the one for the cooperative and State owned sugar mills. This has been challenged in the present writ petitions by the associations of the private sugar mills as well as by the private sugar mills individually.

POINTS FOR DETERMINATION

14. We have heard counsels for the parties. The following points arise for determination in this case.

(i) Whether section 16 of the 1953 Act is unconstitutional.

(ii) Whether the impugned GO is invalid or unenforceable as it has not been published in the official gazette.

(iii) Whether it is legal to determine SAP, without advice of the sugarcane board.

(iv) What is the meaning of the word ''government'' in the agreements (form B or C of the 1954 Order) for the crushing season 2003-04 or in the condition stamped on the parchas issued under rule 96 of the 1954 Rules?

(v) In some agreements and condition stamped on the parchas, the word SMP or the Central government has been used. Is it permissible?

(vi) Whether the State government has power to issue retrospective order fixing SAP.

(vii) In the circumstances of the case, whether the impugned GO can be termed as retrospective or held to be illegal on this ground.

(viii) Whether the petitioners are precluded from challenging SAP on the ground that they had agreed to pay it.

(ix) Whether the impugned GO (providing SAP) is illegal on the ground that it is arbitrary, or takes into account irrelevant factors, or ignores relevant factors.

(x) Whether the petitioners are entitled to any relief.

POINT I: SECTION 16--NOT ULTRAVIRES

15. The petitioners submit that section 16 of the 1953 Act is ultravires of the Constitution on the ground that:

? The section does not provide any guidelines for fixing price of the sugarcane.

? The determination of guidelines for fixing price of the sugarcane is essential legislative function; it cannot be delegated to the State Government

? The section confers arbitrary powers on the State Government and is violative of Article 14 of the Constitution.

? SAP is always higher than SMP and AdP. In case the State government is permitted to fix SAP then this makes clause 3 and 5-A of the 1966 Order redundant. This is neither permissible under the law nor could it be the intention of the 1953 Act.

16. This Court had held on 11.12.1996 that the State government had no power to fix SAP. This judgment was overruled by the Supreme Court in appeal in the SAP case. The majority decision has held that the State government has power to fix SAP. This shows that the Supreme Court has not only held that the State Government is empowered to fix SAP, but section 16 is intravires: otherwise there was no question of holding that the State Government has power to issue SAP.

17. The petitioners submit that the grounds now raised questioning the validity of section 16 of the 1953 Act are not specifically dealt with in the SAP case; we can and should decide the validity of section 16 of 1953 Act.

18. We are afraid; we cannot do so. The grounds now raised might not have been specifically dealt with by the majority judgment in the SAP case, nonetheless this does not mean that we can go into validity of section 16 of the 1953 Act or the decision is not binding on us. It is not open to us to consider the vires of section 16 or to consider that it does not empower the state government to issue SAP: this is mandate of Article 141 of the Constitution.

POINT II: NOT NOTIFIED IN THE GAZETTE--NOT UNENFORCEABLE

19. The petitioners submit that:

? Sugarcane growers and cane cooperatives enter into an agreement with sugar mills. This agreement is prescribed in form B or form C in the 1954 Order. Clause 1 of these forms indicates that the sugar mills are required to pay the price as notified by the Government.

? The world ''notified'' should be read in light of sub-section (29-A) of section 4 {Section 4(29-A)} of the UP General Clauses Act 1904. This means that price has to be published in the official gazette of the State

? The impugned GO has not been published in the official gazette.

? It is invalid and cannot be enforced.

20. It is admitted that the impugned GO has not been published in the official gazette. However, according to the respondents,

? SAP is neither published in the official gazette nor is it required to be published there (see below for ruling).

? Its non-publication in the gazette neither makes it invalid nor unenforceable (see below for rulings).

21. The respondents--in support of their submission that SAP does not require publication in the official gazette--point out the following different phraseology used in the 1953 Act.

(i) Section 27 of the 1953 Act itself states that it is to be published in the official gazette.

(ii) Sections 19 and 20 of the 1953 Act state that it is to be done by notification.

(iii) Some sections like 12, 15 or 16 of the 1953 Act are silent.

22. The respondents submit the sections 12, 15 and 16 are not worded like sections 19, 20 or 27 and the orders passed under these sections (12, 15 and 16) are not required to be published.

23. It is correct that section 12, 15, and 16 are differently worded than 19, 20 and 27 and there is no mention regarding publication. However the petitioner are raising this submission on the basis of the word ''notified'' used in the statutory form B/C and not on the interpretation of section 16. This makes the case of SAP different than the orders passed u/s 12 or 15 and even other kinds of orders passed u/s 16. However it is not necessary to probe further: the petitioners are not entitled to any relief even if we accept that SAP requires publication in the official gazette.

24. The purpose of publishing in the official gazette is that the person affected should know about it or if it is published in the official gazette then there is a presumption that everyone has information about it. SAP has never been published, yet the sugar mills knew about it on the earlier occasions when they were paying SAP and even today. They themselves filed writ petition in the year 1996 challenging SAP for crushing season 1996-97. This time also, though SAP has not been published in the official gazette, they have filed the writ petitions against the same. It can not be said that the petitioners have no knowledge about the same: the impugned GO can neither be invalidated, nor held to be unenforceable on this ground.

25. We have refused to quash the impugned GO on the ground that SAP was not published in the official gazette, however we would like to say a few words in this regard under the heading ''SOME OBSERVATIONS''.

POINT III: ADVISE OF THE BOARD--NOT MANDATORY

26. Section 3 of the 1953 Act contemplates constitution of a sugarcane board (the Board) and section 4 prescribes functions of the Board. It advises the State government on the matters mentioned in section 4. The petitioners submit that:

? One of the functions of the Board is to advise regarding regulation, supply, and purchase of sugarcane. In case section 16(1)(a)--which is similarly worded--includes the power to fix price of the sugarcane then section 4(a) will also include the power to advice about the price of the sugarcane.

? The State government has determined SAP without taking any advise of the Board.

? It is illegal to determine SAP without advise of the Board.

27. The respondents concede that neither the Board is in existence nor was it ever constituted and its advise was not taken but they submit that:

? The point regarding non-consultation with the Board has not been raised in the writ petitions and the petitioners should not be permitted to argue it for the first time during hearing of the writ petitions.

? It is not mandatory to seek advise of the Board (for ruling see below)

? SAP can not be invalidated merely on the ground that the advise of the Board was not taken.

28. There is force in the submissions of the respondents. The petitioners are not entitled to raise this plea for the first time during hearing of the writ petitions. Apart from it, the role of the Board is advisory; it is not mandatory. In case the Board is not in existence, then the State Government can neither take its advice nor the impugned GO can be invalidated only on the ground that no advise was taken. However as the respondents have informed us that the Board has never been constituted, we would like to say a few words regarding its non-constitution under the heading ''SOME OBSERVATIONS''

POINTS IV & V: GOVERNMENT--MEANS THE STATE GOVERNMENT

29. Sugarcane grower and sugarcane cooperatives are also required to enter into an agreement with sugar mills. This agreement is provided in the 1954 order. It is form B or form C as the case may be. Paragraph 1 of forms B/C is similar and relevant for our discussion. The relevant part of paragraph 1 of the form is mentioned in Appendix-1 to this judgment. It states that cane cooperative society agrees to sell to occupier of sugar factory sugarcane ''at the minimum price notified by the government from time to time''. The petitioners have executed these agreements. In most of the cases there are modifications. Samples of these modifications are also mentioned in Appendix-1 to this judgment. In some cases agreements have not been modified but a condition has been stamped on the parcha issued under rule 96 of the 1954 Rules. Some of these conditions are also mentioned in Appendix-1. The question is, what is the meaning of the word ''government'' in the agreements for the crushing season 2003-04.

30. The petitioners submit that government in form B/C means the Central government as has been observed in the Tika Ram case. They submit that:

? Central legislature enacted Sugar Cane Act, 1934. It was repealed by the UP Sugar Factories Control Act 1938. These Acts had conferred power on the State

Government to issue minimum price to be paid to the cane growers. However Indian Legislature enacted Essential Supplies (Temporary Powers) Act, 1946, which remained in force till EC Act was enacted. Section 3(2)(i) of this Act gave power to the Central government to fix price of sugar cane. Subsequently Sugar and Gur Control Order 1950 was framed and it also gave power to the Central government to fix price of sugar cane. It was the Central government that not only had the power to fix price of sugar cane but in fact was fixing minimum price of sugar cane.

? When the 1953 Act was enacted only Central government had power to issue and was fixing price for sugarcane. The use of the word minimum price fixed by the government in Form B/C means minimum price fixed by the Central government.

? The use of the word minimum in the agreement shows that it refers to SMP as only the Central government determines the minimum price and not the State government.

? The Supreme Court in the Tika Ram case had held that the government in this agreement means the Central government. The parties understood this word accordingly and it should be so construed so far as this agreement for 2003-04 crushing season is concerned.

31. The majority decision of the Supreme Court in the SAP case (paragraphs 27-29, 39) has explained the observations of the Tika Ram case and has held that the word ''government'' used in this form means the State government. We are bound by it. This is how the word government is to be construed in the agreements.

Modification--Subject to the Decision of the Court--Refers to SAP

32. The petitioners point out the words used in the modified agreements and the condition stamped on the parchas of 2003-04 to the effect that price will be subject to decision of the court. According to them, as these words relate to the decision on SMP and not on SAP, the parties understood the word ''government'' in the agreements to mean the central government. They--in order to show that these words refer to the decision on SMP and not on SAP--submit,

? SMP for the crushing season 2002-03 for the basic recovery was Rs. 64.50. It was illegally increased by five rupees on 9.1.2003.

? This was challenged by the petitioners before the Delhi High Court (WP 897 of 2003). This WP was transferred by the Supreme Court to itself on 22.3.2004 and is pending there. Similar other writ petitions from other High Courts were also transferred to the Supreme Court.

? The modified part of the agreements or the condition stamped on the parchas refers to the aforesaid dispute regarding SMP, and not to the dispute regarding SAP.

33. We are afraid; we do not agree.

34. SMP was increased by five rupees on 9.1.2003 and was for the crushing season 2002-03. It was challenged in the year 2003. In case the modified version or condition stamped on the parcha related to the litigation regarding SMP then it would have been confined to the agreements or the parchas issued subsequent to the GO dt. 9.1.2003. However, it is not so; but it is there in the agreements and on the parchas prior to that date.

35. Apart from above, the state government was issuing SAP for the cooperative and state owned sugar mills and they never challenged it. Only, the private sugar mills had challenged SAP. The dispute of five rupees in SMP is for all sugar mills in the sense that if it is quashed then it would be for all sugar mills and benefit would not be confined to the private sugars mills only. Some modified version of the agreements and the condition stamped on the parchas use the words ''subject to price as may be decided by the Supreme Court for the private sugar mills'' i.e. according to this condition, the dispute is confined to the private sugar mills in the Supreme Court. This shows that this condition refers to dispute regarding SAP which was for the private sugar mills and was pending before the Supreme Court.

36. SAP is being issued since 1973 by the State government. The sugar mills were paying it. This shows that earlier everyone understood the words, ''the minimum price notified by the government'' in the form of B/C to mean SAP and not SMP. SAP was challenged in 1996-97 crushing season and was declared ultravires by this court on 11.12.1996 but the State filed an appeal before the Supreme Court; the question was pending there; everyone had knowledge about it; the petitioners were parties to it. It is for this reason that some of the sugar mills modified the agreement; some have stamped it as a condition on the ''Parcha''. The modified version or the condition that the parties will abide by the court decision on the government price refers to the litigation in the SAP case. The word ''government'' in the agreements 2003-04 means--what it always meant--namely the ''State government''

Modification by Adding--Central or SMP--Illegal

37. The petitioners point out that in a few agreements or parchas the word ''''SMP'' or ''central government'' has been used. According to them atleast in these cases government will mean central government.

38. The aforesaid sugar mills can not claim any benefit from the same: any modification or substitution in the agreement or the parch so as to suggest that the word ''government'' in the form B/C means ''''Central government'' is not permissible.

39. Form B/C is a statutory form. It has mandatory as well as directory part. The directory part may be modified but not the mandatory part: any change in mandatory part would be illegal. The word ''government'' has been interpreted to

mean ''State government''. It is integral and mandatory part of the agreement. In case it is changed, the entire meaning changes. Neither any modification can be made in the agreement nor can any condition be stamped on the parcha so as to change the meaning of the word ''''government'' in form B/C from ''''State government to ''central government''. It is illegal and liable to be ignored.

POINTS VI & VII: THE IMPUGNED GO--NEITHER RETROSPECTIVE NOR ILLEGAL

40. The petitioners submit that (see below for rulings):

? Executive Orders or subordinate legislation under any statute can not be retrospective unless the statute specifically confers such power or it can be inferred by necessary implication.

? Section 16 of the 1953 Act neither specifically confers power to fix SAP retrospectively nor can it be inferred by necessary implication.

? SAP has to be fixed before start of the crushing season and can not be fixed retrospectively so as to affect the purchases of sugarcane already made.

? The impugned GO fixing SAP has been issued on 30.6.2004; it can not affect the transaction already completed.

41. The respondents submit that:

? While fixing SAP/SMP the State government or the Central government take many factors into account; many of which are not known at the start of crushing season and are ascertained during crushing season. SAP/SMP can not be fixed at the start of the season.

? Previously, every time SAP/SMP had been fixed during the crushing season and not before its start.

? The impugned GO fixing SAP is for the crushing season 2003-04 and has been issued in that crushing season.

? The impugned GO is not retrospective, as the controversy was alive till the SAP case was decided by the Supreme Court.

? The sugar mills have been entering into agreements with the sugarcane growers or cane cooperatives to pay them according to SAP; it can neither be termed as retrospective nor could the transaction be treated as closed or completed.

? The State government was restrained from issuing SAP due to judgment of the High Court and now after green signal by the Supreme Court, the State government can not be prohibited from exercising its powers on the ground that it is retrospective: neither an act of the court prejudices any one, nor can any one take advantage of the court''s order that has been set aside (see below for rulings).

? It was because of the petitioners that the State government could not issue SAP. They cannot take advantage of a situation created by them (see below for rulings).

42. Principles of Statutory Interpretation by Justice GP Singh (9th edition page 862) correctly sums up the law regarding retrospective subordinate legislation as follows: ''Power may be conferred to make subordinate legislation in the shape of rules, by-laws, etc., which have retrospective operation. Such a power may be either conferred in express words or may be inferred by necessary implication [see below for rulings]. In the absence, however, of an express or necessarily implied power to that effect, subordinate legislation, be it a rule, a bye-law or a notification, cannot have retrospective operation [see below for rulings]. Even in cases where there is a power to make rules with retrospective effect, a retrospective rule may not be valid if it infringes the Constitution.

...

It need hardly be emphasised that even when there is power to make a retrospective rule or notification, the well accepted rule of interpretation is that in the absence of express words or necessary implication a rule or notification takes effect from the date it is issued and not from any prior date.

...

Further, a rule or any other delegated legislation, in the absence of express words or necessary implication, is not construed to affect existing rights.''

Let''s consider the powers conferred u/s 16 of the 1953 Act.

SAP--During Crushing Season--Legal

43. Clause 3 and clause 5-A of the 1966 Order empower the Central and State governments to fix SMP/AdP. Clause 5-A (read with second schedule) of the 1966 Order shows that AdP can be fixed only after the crushing season is over and previously, has always been so fixed.

44. Clause 3 of the 1966 Order indicates relevant factors for determining SMP. They can not be known at the start of the crushing season. Similar is the case with section 16 of the 1953 Act that empowers the State government to fix SAP.

45. The State government has filed Supplementary counter affidavit and has indicated following factors while determining SAP:

(i) The cost of cultivation of sugarcane.

(ii) The cost of transport of sugarcane by cane growers from the field to purchase centre or to mill gate as the case may be.

(iii) A reasonable return to cane growers for their produce.

(iv) Availability of the cane area, demand of sugarcane by industries, profitability of the industries by selling sugar, and other by-products etc.

(v) The price of sugar cane paid by sugar factories in the preceding year.

(vi) The factors necessary to avoid diversion of sugarcane from sugar industries to others including Kolhu and Khandsari Units.

(vii) The SAP of neighbouring States particularly States of Haryana and Punjab.

(viii) SMP determined by the Central government (SAP can not be below SMP). All of the aforementioned factors can not be ascertained before start of the crushing season; some of them would be known during, and some times even after end of, the crushing season.

46. If all factors for determining SMP/SAP can not be ascertained before start of the crushing season, then obviously it can not be announced before its start. It is for this reason that SMP/SAP was never announced before start of, but always during, the crushing season. The chart of SMP/SAP for different years (Appendix-2 to this judgment) confirms it. These provisions (clause 3 of the 1966 order and Section 16 of the 1953 Act) by necessary implication empower the Central/State governments to issue SMP/SAP during the crushing season; it could be even after the crushing season if the circumstances so permit. Crushing season is defined in section 2(i) of the 1953 Act. It means the period beginning on the 1st October in any year and ending on the 15th July next following year. In this case impugned GO was issued on 30th June 2004. It is within the crushing season of 2003-04. It cannot be invalidated on this ground.

''time to time''--No Affect on the Power

47. The petitioners place reliance on the words ''time to time'' in clause 1 of the agreement of form B/C. They submit that:

? SAP can be issued more than once in a crushing season.

? SAP issued at any time governs only future transactions.

? The fact that quantity and rate is required to be mentioned in the parcha shows that contract is complete and subsequent announcement of SAP will not effect transactions already over.

? All transactions for crushing season 2003-04 were already over before 30.6.2004 and the impugned GO cannot affect them.

48. The fact that form B/C uses the words ''time to time'' does not mean that SAP has to be issued before start of the crushing season or can not govern the transaction gone into. Normally in the agreements/parchas no specific price is mentioned. In substance they indicate that parties will abide by the price determined by the government. This shows that the parties contemplate that government will announce the price subsequently and that price will govern transactions of that crushing season. So is the case here.

49. In the agreements or the condition stamped in the parcha of 2003-04, it is generally mentioned that parties will abide by the minimum price notified by the government subject to the decision of the court (See Appendix-1). Neither in the agreement nor in the parcha any amount has been specified; atleast none has been shown to us. This shows the intention of the parties that price was to be indicated subsequently, covering the transactions of 2003-04 crushing season.

50. Apart from above, the facts of this case justify issuing of SAP at this stage. But before we talk about them, let''s consider Supdt. of Taxes, Dhubri and Others Vs. Onkarmal Nathmal Trust and Others, (the ON Trust), the alleged trump card in the petitioners'' hand.

The ON Trust Case

51. The petitioners, on the basis of the ON Trust case, submit that the respondents (for not issuing SAP) cannot take refuge in the restraint order of the court as they ought to have,

? issued SAP subject to the decision of the Court; or

? taken permission of the court to issue SAP; or

? brought to the notice of the court that unless they are permitted to fix SAP, they would be prejudiced in issuing it later.

52. There are some observations in the ON Trust case that support the submissions of the petitioners. However this case is distinguishable on facts. The facts of this case are as follows:

(i) The Assam High Court had declared the Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act, 1954 (the old Assam Act), to be ultravires the Constitution. The legislature enacted a new law titled Assam Taxation (On Goods Carried by Road or on Inland Waterways) Act, 1961 (the new Assam Act). The validity of the new Assam Act was also challenged. The Assam High Court stayed further proceeding under the new Assam Act on 28.7.1968 and subsequently the new Assam Act was also held to be ultravires the Constitution. The State of Assam went up in appeal and the Supreme Court granted stay order on 18.10.1963. This appeal was subsequently allowed by the Supreme Court on 1.4.1968 and the new Assam Act was held to be intravires.

(ii) During pendency of the appeal before the Supreme Court, notices were issued in 1965 to the assessees for assessment of the taxes u/s 7(2) of the new Assam Act. The notice u/s 7(2) of the new Assam Act could be issued only within two years. The notices were beyond period of limitation of two years mentioned under the new Assam Act. These notices were challenged on the ground that they were beyond limitation. The Assam High Court accepted this ground and quashed the notices.

53. The State of Assam went up in appeal to the Supreme Court and submitted that:

(a) The period from 28.7.1961 to 28.10.1963 ought to be excluded while calculating limitation.

(b) Nothing could be done as initially the Assam High Court had granted interim order staying the proceeding on 28.7.1961 and then the new Assam Act was declared ultravires.

(c) It is only after the Supreme Court granted the stay orders on 28.6.1963 that the relevant authorities in State of Assam could issue notice to the assessees.

(d) In case this period (for which no action could be taken) is excluded, the notice would be within limitation of two years.

54. In the background of the aforesaid facts the Supreme Court by majority of 3:2 held the State was guilty of inactivity (paragraphs 17, 63-65 of the report) and rejected the contention of State of Assam. The appeal was dismissed.

55. The facts of the ON Trust case are different from the facts of the present case.

(i) The ON Trust case was a case under a taxing statute with statutory limitation for taking action. The present case is neither a case relating to taxing statute, nor there is any statutory limitation for fixing SAP. It is another question that SAP has to be fixed within a reasonable time.

(ii) This Court had set aside the SAP for crushing season 1996-97 on 11.12.1996. The State filed an appeal and also filed an application for interim order. This interim application was rejected. The order rejecting the application shows that the Supreme Court at that time prima facie felt that the order of this Court was correct.

(iii) The Lucknow bench decided the case in favour of the State government however it was stayed by the Supreme Court.

(iv) The State was restrained by the High Court to issue SAP even for the cooperative and state owned sugar factories on the writ petitions filed by the private sugar mills.

56. The State here--unlike the ON Trust case--did its level best to fix SAP however it could not do so. It cannot be said that the State was inactive or did not do everything to fix SAP. The law enunciated or the observations in the ON Trust case are not applicable to the facts of this case.

The Facts--Justify SAP at This Stage

57. Odgers'' Construction of Deeds and Statutes (5th ed. Page 280) explains when a statute can be regarded as retrospective. It says,

A statute is to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past.

Craies on Statute law (6th edition page 386) says the same thing. The observations are in regard to statutes but are equally applicable here.

58. SAP for the year 1996-97 was quashed by this Court on 11.12.1996. The State Government had taken the matter in appeal and the question, ''whether the State Government has power to issue SAP'' was pending before the Supreme Court. Almost all private Sugar mills modified the agreements (form B/C); some stamped a condition on the parchas. This has been already discussed in detail while deciding points IV and V. In substance the modified version or the condition stamped indicates that price to be paid to the cane growers is, the one notified by the State government and the price is subject to the decision of the court. It shows that the sugar factories were agreeable to pay the price notified by the State government or in other words SAP.

59. The entire transaction of payment was not closed between the parties. This was kept alive and was to be finalised after the decision by the court. The controversy did not come to an end till the Supreme Court decided the question about the power of the State government to issue SAP. The impugned GO neither takes away nor impairs any vested rights; it also neither creates a new obligation nor imposes any new duty nor attaches a new disability in respect of past transactions: in fact transactions were not closed. In view of this, it cannot be said that fixing of SAP--after the green signal was given by the Supreme Court--is retrospective or affects any transaction duly completed or is not permissible. The agreement between the parties itself shows that transactions were never treated to be close; they were tentative; and final decision on sugarcane price was to be taken after decision by the Supreme Court (in the SAP case).

60. It is neither the case of the petitioners nor any instance has been pointed out that agreements were not modified or parchas did not have a condition stamped on them. Even if this were so, it would have made little difference and the result would still be the same.

61. No specific price has been mentioned in any agreement; atleast none has been pointed out to us. The agreements merely state that they will pay the price fixed by the government. The State government could not fix SAP due to the order of this court. Now the Supreme Court has held in favour of the State; the State government has fixed SAP: it is applicable.

POINT VIII: THE PETITIONERS ARE NOT PRECLUDED

62. The respondents submit that:

? The petitioners had agreed to pay SAP.

? They have taken rebate granted by the State government.

? They are precluded/estopped from challenging it.

63. The State government issues SAP u/s 16 of the 1953 Act; it is an exercise of statutory powers; it cannot be arbitrary. The legislature does not confer powers

to be exercised arbitrarily; powers are conferred to be exercised reasonably. In case SAP is arbitrarily fixed or ignores relevant considerations or takes into account irrelevant factors then it would be beyond the powers conferred u/s 16 of the 1953 Act and illegal. But will an agreement between the parties make any difference? Will it preclude any party from challenging it? Will it bind them?

64. The respondents had submitted and accepted by us (while discussing points vii and viii) that SAP can not be fixed at the start of the crushing season. Generally, the agreement is executed at the start of the crushing season; it does not refer to any specific price but to a price to be notified (later) by the government. In such a situation, it can not be presumed that parties intended to be bound by an illegal price: it would be unfair to bind anyone to a later announced SAP that is arbitrary or unreasonable.

65. It is correct that sometimes agreements, or parchas are executed after the SAP is notified by the government. In such a situation, an amount equivalent to SAP is mentioned. In this case--unless any specific reservation is made in the agreements or the parchas--SAP is final; the parties are precluded: no one can challenge it.

66. Sometimes specific price is mentioned in the agreements and the parchas even before SAP is fixed. Should in such a case, the parties be bound by that price? In our opinion, it will bind the parties only if the indicated price is equivalent to or higher than the later announced SAP. If it is lower then the cane growers can always claim that it is illegal.

67. In our opinion--except in the aforementioned circumstances (explained in paragraphs 66 and 67 of this judgment)3/4 the parties are not precluded from challenging SAP.

68. Here neither any specific price is mentioned in the agreements nor in the parchas; it would be wrong on our part to presume that parties had intended to pay a later announced SAP even if it was arbitrary or illegal exercise of powers conferred u/s 16 of the 1953 Act. The petitioners are not liable to pay SAP for 2003-04 crushing season if it is illegal in the sense that it is arbitrary, or ignores relevant considerations, or considers irrelevant factors. But is it arbitrary or illegal?

POINT IX: SAP--NOT ARBITRARY

69. The petitioners--in order to show that SAP is arbitrarily fixed--submit that:

? SMP is fixed on the basis of juice recovery. This is the only rational basis for calculating price of sugar cane and this factor cannot be ignored in fixing SAP.

? The cost of production of sugarcane considered by the respondents is high and arbitrary.

? The State sugar mills have become sick due to high pricing of sugarcane.

? SMP together with AdP form fair and reasonable price for sugarcane and anything higher is unreasonable.

70. The petitioners in order to show that SAP is arbitrarily fixed have placed reliance on the following part of the report of the Commission for Agricultural Costs and Prices, Report on Price Policy For Sugarcane for the 2003-04 season (the CACP 2003-04 Report):

The Commission is happy to note that a number of states have realised the folly of arbitrary pricing of sugarcane unrelated to realisations from sugar sales. For example, the Government of Tamil Nadu had issued instructions to work out an advance price that could be paid against clause 5A of the Sugarcane Control Order over and above the SMP, instead of SAP, since the 2001-02 season. Similarly, Andhra Pradesh had given up SAP w.e.f. 2001-02 season; presently they ask the mills to pay a price linked to recovery, although this tends to be unreasonably high. In Karnataka also a SMP plus formula is being followed, although the final price tends to be higher than that is justifiable by realisation from sugar. The problem in States however, continue to be Uttar Pradesh, Uttaranchal, Punjab and Haryana, where SAPs were historically fixed at levels much higher than those implicit in the Sugarcane Control Order. These are now clearly unsustainable. Indeed, back of hand calculations show that currently realisation from sugar is such that it can absorb only a cane price derived from recovery linked-SMP. As a matter of fact, both ISMA and NFCSF have suggested that status quo should be maintained in respect of SMP, until sugar prices improve.

71. The petitioners have also brought to our notice projected cost of production of sugarcane for the year 2003-04 for Uttar Pradesh, as indicated in the CACP 2003-04 Report. It is estimated to be Rs. 67.41 per quintal after including 10% profit to the cane growers. It is on its basis, they submit that the cost of production of sugarcane (Rs. 80.60 per quintal) taken by the State Government is high and arbitrary.

72. The petitioners also place reliance on the report of Controller and Auditor General of India (the CAG Report) for the year ending 31st March 2000 regarding Cane Development Department of State of UP. They submit that it is due to high price of the sugarcane that these government mills are not viable and are being sold. According to them, sugarcane price should be realistic and ought to be reduced otherwise all private sugar mills will become sick. The relevant part of the CAG report is as follows:

Out of the above 35 mills, 5 mills at Bareilly, Maholi, Nawabganj, Barabanki and Nandganj were closed down in 1998-99 and 6 more mills were closed in 1999-2000. As per the information (Nov. 2000) received from the UP Sugar Corporation and UP Cooperative Sugar Factories Federation their accumulated losses were amounting to Rs. 2460.28 Crores (Rs. 1507.35 Crores in respect of the UP State Sugar Corporation and Rs. 952.93 Crores in respect of UP

Cooperative Sugar Factories Federation). The aforesaid losses are being faced by the Corporation and Federation from their establishment whereas a sizeable amount is being given to them by the State Government year after year, amounts for this purpose have been withdrawn even from the contingency Fund. This fact clearly indicates that mismanagement is at large scale in these Bodies/ sugar Mills and the State Government failed to take necessary steps for betterment of the same and no system of working succeeded to revive these units economically.

73. The State government has filed supplementary counter affidavit detailing factors taken into account while fixing SAP. We have already detailed them in paragraph 46 of this judgment. In the SAP case the Supreme Court had also made observations regarding factors determining SAP. The Supreme Court has held that (see paragraphs 44, 46 and 48 of the SAP case):

? The reasoning of the High Court--that if price of sugarcane were higher than SMP then it would disturb the levy price--is wrong.

? The by-products from manufacture of sugar are profit-making ventures and ought to be taken into account for fixing SAP.

? The State government understands local conditions and is in better position to fix SAP.

? Fixing uniform price (as in SAP) is better than fixing factory wise price (as in SMP).

74. There is some difference in criteria for determining SMP and SAP. Both of them are for different purposes. One is the minimum price the other isn''t. SAP cannot be faulted merely because criteria for fixing it are different than criteria for determining SMP. Juice recovery is relevant factor in determining SMP; it is not directly relevant in fixing SAP though SMP is taken into account. SMP provides factory wise price as juice recovery is different in different factories. In the SAP case, the Supreme Court has approved area wise price (as in SAP) over factory wise price. In these circumstances absence of juice recovery while fixing SAP does not make it arbitrary: surely not after the observations of the Supreme Court in the SAP Case.

75. The cost of production of sugarcane is taken by the State government to be Rs. 80.60 per quintal. It is on the basis of the report submitted by the UP Council of Sugarcane Research (The Council). It is higher than the production estimated by the CACP 2003-04 Report. The CACP submits a report every year. The report submitted by the CACP for crushing season 2002-03 (the CACP 2002-03 report) explains the difference:

However, in the States of Haryana, Tamil Nadu and Uttar Pradesh the actual costs are more than the projected costs. The differences could possibly be explained by the fact that the fixed cost in 1999-2000 over the previous year was too high in the case of Tamil Nadu and Uttar Pradesh.

...

As has been reported in the earlier reports of the Commission, the state governments also provide cost of production/cultivation data based on their own surveys. However, the cost estimates are found to differ conceptually and methodologically from one another as also from that of the Comprehensive Scheme. It is not advisable, therefore, for the Commission to straight away take these estimates for making its own projections. Nonetheless, these estimates are useful in their own right inasmuch as they provide some data for states not covered under CS; moreover, often these pertain to more recent years.

76. The State government has not based cost of production of sugarcane on ipse dixit of anyone, but on the basis of data provided by the Council. To some extent, the CACP-2002-03 report also explains the reason for the difference. Considering the price of the sugar cane taken by the State government in its entire perspective, it cannot be termed as wrong; at least not to such an extent so as to call for interference by us.

77. The paragraph pointed out by the petitioners from the CACP 2003-04 Report is important, but it is for the purpose of minimum price of sugarcane and not for the fair price of sugarcane. Admittedly, it does not take into account profits from the by-products that are taken into account while calculating SAP. Profits from by-products are also relevant: they cannot be ignored. SAP takes into account profits from the by-products; it cannot be termed as arbitrary on this account.

78. So far as the CAG Report is concerned, the respondents submit that majority of the mills considered in the CAG report were sick units that were taken over and are being run by the State government in public interest to generate employment. Their condition is not a reflection of the price of the sugarcane but rather on their mismanagement and whether the State government should run them or not. There is justification in the submission of the respondents.

79. The method of calculating SMP does not take into account profit from sugar, however AdP considers the profits from sugar. It is for this reason that AdP is calculated after the crushing season. Once AdP is calculated then sugar mills are under statutory duty to pay AdP also; symbolically SMP and AdP becomes minimum price to be paid by the sugar mills. SAP is higher than the SMP and AdP taken together but this does not mean that SAP is arbitrary. AdP does take into account profits from sugar but does not consider profits from by-products. In view of this, if SAP turns out to be higher then SMP and AdP together; it cannot be termed as arbitrary.

80. A chart, indicating base and range of SMP, and SAP for most common variety of sugarcane, is Appendix-2 to this judgment. It shows the difference between the two. It is mainly due to,

? Different cost of production of sugarcane taken by the State and Central government; and

? Consideration of profits from by-products in SAP and its non-consideration in SMP.

81. The appendix-2 shows that the difference between SAP and SMP in the crushing season (1996-97) was much more than the difference this time (crushing season 2003-04). The Supreme Court has upheld SAP for the crushing season 1996-97 in the SAP case. We fail to understand, if the difference was valid at that time then how can it become arbitrary or illegal this time.

82. Apart from above, considering the observations of the Supreme Court in the SAP case and the factors enumerated by the State government (reproduced in paragraph 46 of this judgment), we don''t think that the State government has ignored relevant considerations, or considered irrelevant factors: SAP is neither arbitrary nor unreasonable.

POINT X: RELIEF TO THE PETITIONERS!

83. Isn''t it paradoxical that we have decided all points against the petitioners yet in the end we are talking about relief to the petitioners? Shouldn''t we, just, dismiss these writ petitions? Isn''t this more in line with our judgment? Here is the reason why are we discussing it and granting some relief to the petitioners.

84. Don''t kill the goose that lays the golden eggs--a metaphor from Aesop''s fables: if you can not bear to wait for wealth to come gradually in small quantities and kill the goose to get all the golden eggs at once then you cut off your future supply.

85. Sugarcane growers and sugar mill are geese that lay golden eggs for each other. The State government has to see that one does not kill another; it has to balance the interest of both; future supply is not to be cut off for immediate gains. And it is for this reason that we are talking about relief to the petitioners.

86. We are informed that arrears for the year 2003-04 are to the tune of about 250 crores. This is not disputed. On average, the arrears are 5 crores per sugar mill for this season. The petitioners say that it is impossible for them to pay: they will all become sick and close down. According to them, this is only possible if subsidy is given by the State government.

87. It is not in our realm to say anything in regard to the aforementioned contention: we don''t have figures to come to any firm conclusion. Nevertheless, it is probable that the sugar mills may not be in a position to pay the amount promptly: they may require some time.

88. For the aforementioned reasons, we grant liberty to the petitioners to submit a time schedule for payment of their dues to the Cane Commissioner by 28th of October 2004. In case any proposal is submitted then the Cane Commissioner--considering the difficulties of both sides--may finalise the time schedule for payment of arrears and no recovery may be made straight away. The recovery shall be made according to the time schedule finalised by the Cane

Commissioner. It is only when no time schedule is submitted within the stipulated time, or the time schedule finalised by the cane commissioner is not adhered to that the recovery may be started.

SOME OBSERVATIONS

89. While deciding point No. (ii), we have not invalidated SAP, even if it was not published in the official gazette. Nevertheless, we would like to point out section 4(29-A) of the UP General Clauses Act. It is as follows:

Notification'' or ''public notification'' shall mean a notification published in the Gazette of the State, and the word ''notified shall be construed accordingly;

90. Section 4(29-A) of the UP General Clauses Act states that the word ''notified'' shall be construed accordingly. It means that if something is to be notified then it should be published in the official gazette. The form B/C is statutory; it does talk about price to be notified. The State government would be well advised to consider this provision while issuing SAP in future; lest it becomes unnecessary bone of contention between the parties.

91. While deciding point (iii), we were informed that the Board was never constituted. In this light we would like to point out that Section 3 of the 1953 Act contemplates constitution of the Board. It is a legislative mandate. Its function is to advise the state government on the matter mentioned in section 4 of the 1953 Act. It is a part of the statute; the State government cannot ignore it till it is in there. After all, the legislature has enacted this provision to be followed and not to be treated as a dead letter. The State government would do well to constitute the Board or repeal these provisions.

CONCLUSIONS

92. Our conclusions are as follows:

(a) Section 16 of the 1953 Act is not ultravires the constitution.

(b) SAP can be issued during crushing season.

(c) In the circumstances of this case, sale transactions were not final. The impugned GO does not affect the vested rights or completed transactions. It cannot be invalidated on the ground that it is retrospective.

(d) SAP is announced in exercise of statutory powers conferred u/s 16 of the 1953 Act: this power can not illegally exercised. SAP can be challenged if it is arbitrary, or ignores relevant considerations, or is based on irrelevant factors.

(e) If SAP is illegally fixed after execution of the agreements (form B/C) or parchas (as in the present case) then the parties are not precluded from challenging it merely on the ground that they have executed the agreements (form B/C) or parchas.

(f) SAP for the crushing season 2003-04 is neither arbitrary, nor illegal.

(g) There may be some difficulty in paying arrears promptly.

In view of our conclusions, the impugned GO dated 30.6.2004 is upheld. However, the writ petitions are disposed with observation that the petitioners may file their proposal of time schedule for payment arrears by 28th of October 2004 before the Cane Commissioner. He--considering the difficulties of both sides--may finalise it. The recovery shall not be started straight away but shall be made according to the time schedule finalised by the Cane Commissioner. The recovery may be started only, when no time schedule is submitted within the stipulated time, or the time schedule finalised by the cane commissioner is not adhered to.

Dated: October 7, 2004 BBL Appendix-1

The relevant part of clause 1 of the form C of the 1954 order

The first party in the agreement is Cane grower or a Co-operative Society and second party is the occupier of a factory.

The first party agrees to sell during the season... for.... quintals of sugarcane of the members of the society standing on.... hectares as detailed below with an approximate yield of.... quintals to the second party at the minimum price notified by the Government, from time to time, provided that the price payable by the second party to the first party shall not in any case be lower than that paid generally by the Second Party to other growers of the villages in which Co-operative Societies operate. ''

Different versions of relevant part of clause 1 of the modified agreements where part of a sentence has been added is as follows. The added part is typed in italics. Rest of the agreement is same.

...to the second party at the minimum price notified by the Government, from time to time subject to final decision of the court provided that the price payable by the second party to the first party shall not in any case be lower than that paid generally by the second party to other growers of the villages in which Cooperative Societies operate.

...to the second party at the SMP (Statutory Minimum Price) notified by the Government, subject to final decision of the court in respect of private sector factories, provided that the price payable by the second party to the first party shall not in any case be lower than that paid generally by the second party to other growers of the villages in which Cooperative Societies operate.

...to the second party at the minimum price notified by the Government, from time to time: subject to the price as may be decided by the Honourable Supreme Court for the private sugar mills, provided that the price payable by the second party to the first party shall not in any case be lower than that paid generally by the second party to other growers of the villages in which Cooperative Societies operate.

Samples of condition appended to the Parcha

''Minimum legal price of sugar cane whatever legal price is fixed''.

''SMP is subject final decision of the court''

''SMP is subject to final decision of the Supreme Court''.

Appendix-2

Details of SMP and SAP

Crushing Season Date of SMP notification of GOI Base SMP and its Range in Rupees

Date and order of GO UP Price of SAP for the most common variety in Rupees

1991-92 04/01/92 2626/--32.12 14/11/91 (For All) 45

1992-93 01/03/92 31.0031/--38.29 26/12/92 (For All) 46

1993-94 13/10/93 34.5034.5--43.84 1/10/93 (For All) 58

1994-95 3-5/1/95 39.1039.10-47.20 18/11/94 (For All) 66

1995-96 15/5/96 42.5045.74-53.30 6/11/95 (For All) 70

1996-97 04/02/97 45.9045.90-55.02 15/11/96 (For All) 72

1997-98 03/10/97 48.4548.45-6045 15/11/97 (For Coop & Govt. Mills) 75

1998-99 29/12/98 52.7053.32-66.96 20/11/98 (For Coop & Govt. Mills) 80

1999-00 09/12/99 56.1056.10-68.64 3/12/99 (For Coop & Govt. Mills) 85

2000-01 29/11/00 59.5059.50-73.50 8/11/2000 (For Coop & Govt. Mills) 90

2001-02 27/11/01 62.0564.57-81.76 27/10/01 (For Coop & Govt. Mills) 95

2002-03 12/12/029/1/03 64.5069.5073.60-87.54 13/11/02 (For Coop & Govt. Mills) 95

2003-04 14/1/04-I8/7/04-II 73.0074.70-92.55 16/12/03 (For Coop & Govt. Mills)

30/6/04 (For Pvt. Mills) 95

