Mohammadbhai Khudabux Chhipa and Another

Vs

The State of Gujarat and Another (and Connected Petitions)

Petitions Nos. 226 to 229 and 233 of 1961

(P. B. Gajendragadkar, A. K. Sarkar, K. N. Wanchoo,

K.C. Das Gupta, N. Rajgopala Ayyangar JJ)

15.03.1962

JUDGMENT

WANCHOO, J. -

These five petitions under Art. 32 of the constitution, which are connected and will be dealt with together, raise questions as to the constitutionality of the Bombay Agricultural Produce Markets Act, Bombay Act No. XXII of 1939, (hereinafter referred to as the Act), as amended by the Bombay and Saurashtra Agricultural Produce Markets (Gujarat amendment and validating Provisions) Ordinance, No. 1 of 1961 (hereinafter referred to as the Ordinance), and the Rules and the bye-laws framed thereunder. They are a sequel to the judgment of this Court in Gulam Mohammed v. The State of Bombay ((1962) 2 S.C.R. 659.), which was delivered on May 2, 1961. One of petitioners before us in these petitions was also a party in that petition, which was with respect to a market established in Ahmedabad. In that petition the challenge to the constitutionality of the main provisions of the Act failed but the provisions of certain Rules, namely rr. 53, 65, 66 and 67 were held to be ultra vires the provisions of s. 11 and s. 5A of the Act. In consequence, a direction was issued prohibiting the respondents in that petition from enforcing the provisions of the Act, Rules and Bye-laws against the petitioners in that petition till a market was established in law for that area under s. 5AA and from levying any fee under s. 11 till the maximum was prescribed under the Rules. Consequent on that decision, the State of Gujarat amended r. 53 by notification dated June 23, 1961. Further the Ordinance was promulgated on June 26, 1961, by which certain amendments were made in certain sections of the act and a new s. 29-B was inserted in the Act validating certain acts or things done prior to the promulgation of the ordinance. The present petitions were filed thereafter.

Four of the petitions (namely, Nos. 226 to 229) are with respect to Ahmedabad while the fifth petition (No. 233) is with respect to Nadiad. Two of the petitioners of Ahmedabad are wholesale dealers while the other two claim to be retail dealers. The contentions on behalf of the Ahmedabad petitioners are that the notification amended s. 53, offends Art. 14 of the Constitution and is therefore bad. It is further contended that though s. 5AA has been amended, the amendment is prospective; therefore the infirmity noticed in the earlier judgment of this Court still remains and s. 29-B which has been inserted in the Act is insufficient to validate what had been done before the Ordinance came into force. It is further contended that the bye-law under which the market committee issues licences to A Class and B class dealers indiscriminatory and imposes unreasonable restrictions on the fundamental right to carry on trade and business and is therefore bad. Lastly it is contended that the market committee insists on issuing licences for retail trade and this it cannot do

for control of retail trade is not within the provisions of the Act as held by this Court in the earlier judgment, and further in consequence the market, committee is using r. 64 in a manner in which it was not intended to be used and therefore that rule though it was upheld in the earlier judgment should be declared ultra vires.

The majority of the petitioners in the Nadiad case are wholesale dealers but a few of them claim to be retail dealers. These petitioners further challenge the constitutionality of the Act after its amendment by the Ordinance, and their contention is that the Ordinance makes radical changes in the main provisions of the Act and the basis on which these main provisions were upheld by this Court earlier, no longer applies, and therefore the Act as it now stands after the amendment is violative of the fundamental right to carry on trade and business guaranteed under Art. 19(1)(g) of the constitution as the restrictions placed by it on the said right are unreasonable. Further it is contended that rr. 65, 66 and 67 were struck down by this Court in the earlier judgment as beyond the power conferred on the State under s. 26 of the Act. These rules therefore cannot be held to be a part of the Rules in force now and in consequence it was not open to the market committee to Act as provided in these Rules. Lastly it is urged on behalf of one of the petitioners that he had paid licence-fee to the market committee and was entitled to a refund of that after the earlier judgment of this Court; but s. 29-B newly inserted in the Act which in effect deprives this petitioner of getting refund is invalid and illegal as it is against the provisions of Art. 31(1). Some other points have also been raised by the Nadiad petitioners; but as they are not pressed, we shall not refer to them.

The petitions have been opposed on behalf of the State and it has traversed all the points raised on behalf of the petitioners. It is not necessary to set out the grounds on which it is urged on behalf of the respondents that the contentions of the petitioners have no force. These grounds will appear when we deal with the contentions raised on behalf of the petitioners one by one. Nor do we think it necessary to set out the previous history as to the establishment of the market in Ahmedabad as that will be found in the earlier judgment; nor is it necessary to set out the previous history as to the establishment of the market in Nadiad, for it is not in dispute that that history is similar to the history in the case of the Ahmedabad market. We shall therefore proceed to indicate the points which alone have been pressed on behalf of the petitioners and then consider them one by one. Some of the points are not common; but as they have been raised in one petition or the other and these petitions have been dealt with together and the decision on any point will effect even other petitions in which it has not been raised, we shall proceed on the basis that all the points have been raised in all the petitions particularly as the learned counsel appearing in the various petitions adopted the arguments of one another during the hearing. The points therefore which call for decision are as below -

(1) Is the notification dated June 23, 1961 fixing the maximum fee to be charged hit by Art. 14 of the Constitution ?

(2) Does the insertion of s. 29-B in the Act suffice to validate acts or things done before the promulgation of the Ordinance ?

(3) Are the by-laws by which the market committee issues licences to A class and B class dealers discriminatory and thus offend Art. 14, and do they amount to an unreasonable restriction on the fundamental right to carry on trade and business under Art. 19(1)(g) ?

(4) Is the market committee acting beyond its power under the Act in requiring retail

dealers to take out licences and is r. 64 bad on account of the manner in which it is being enforced by the market committee ?

(5) Are the main provisions of the Act after its amendment by the Ordinance liable to be struck down as an unreasonable restriction on the fundamental right to carry on trade and business under Art. 19(1)(g) ?

(6) Was it necessary to re-frame rr. 65, 66 and 67 under power conferred on the State Government under s. 26; if so, what is the effect of its not having been done ?

(7) Is s. 29-B bad in view of Art. 31(1) of the Constitution insofar as it prevents refund of licence-fee collected before the Ordinance came into force ?

Re (1).

The notification is in these terms :-

"No. APM/060/30797-F - In the exercise of the powers conferred by section 26 of the Bombay Agricultural Produce Market Act, 1939 (Bom. XXII of 1939), the Government of Gujarat hereby amends the Bombay Agricultural Produce Market Rules 1941 as follows namely :-

"In the said rules in rule 53, for sub-rule (1) except in explanation thereto the following shall be substituted, namely :-

(1) 'The Market Committee shall levy and collect fees on agricultural produce bought and sold in the market area at such rates as may be specified in the by-laws, subject to the following maximums, namely :-

(1) Rate when levied according to cart load shall not exceed 40 naya paise per cart load.

(2) Rate when levied ad valorem shall not exceed 40 naya paise per Rs. 100.

(3) Rate when levied according to weight shall not exceed.

#(1) per quintal 15 naya paise(2) per Bengali Maund 5 naya paise##

(4) Rate when levied according to the number of containers containing the agricultural produce shall not exceed,

#(a) per bale of cotton 40 naya paise(b) per gunny bag or 5 naya paiseany other container,##

(5) Rate when levied in respect of cattle, sheep and goat shall and exceed per animal Rs. 2.'

By order and in the name of Governor of Gujarat."

The contention on behalf of the petitioners is that the notification is discriminatory in two ways : in the first place, because it allows fees to be collected by different modes, i.e., by cart load, by value,

by weight and by containers. It is urged that it is open to the market committee to levy fees on certain agricultural produce by (say) cart load and on certain other agricultural produce by (say) weight; and this is very likely to result in discrimination. In the second place, it is urged that the notification gives power to the committee to levy fees on the same commodity by even two of the methods mentioned therein. For example, it is urged that the same commodity, say, potatoes may be charged under the notification by the market committee both by weight and by car load depending upon whether they are brought into the market area in a cart, or for example, in a basket. It is said that there is nothing in the rule which prevents the market committee from doing so, and this may result in discrimination.

We may however point out that the notification by itself does not impose any fee on any commodity. What it does is to carry out the terms of s. 11 which require the maxima to be prescribed subject to which the market committee can levy fees on Agricultural produce. The imposition of the fees still remains to be made by the market committee under the power conferred on it by s. 11 subject to the maxima prescribed in the notification and therefore the notification by itself cannot be said to be discriminatory.

Let us, however, examine the two contentions raised on behalf of the petitioners on the basis that though the notification may not actually impose fees on any commodity, it still allows discrimination to be practised by the market committee, when it proceeds under s. 11 to levy fees within the maxima prescribed by the notification. Taking the first contention, it may be that by using one method in the case of one agricultural produce and another method in the case of another agricultural produce, there may be some difference in the incidence of the fees charged, if one were to judge that incidence on the basis of only one of the modes prescribed in the notification. But that in our opinion cannot be said to result in discrimination for each produce must for this purpose be treated to be a class by itself. Therefore, so long as the market committee uses one method of levying fee with respect to one kind of agricultural produce, it cannot be said that it is discriminating if it uses another method for levying fee on another kind of Agricultural produce. It is well known even in systems of taxation that taxes are levied with different incidence depending upon the nature of the article, taxed, and a fee levied under s. 11 is only the exercise of the power of taxation using that word in its widest sense. Therefore, the fact that under this rule, the market committee may levy fees by one method on one agricultural produce and by another method on another agricultural produce will not be a ground of discrimination, for each commodity must be treated as a class by itself.

Turning now to the second contention, it is true that there is nothing in the rule expressly to prevent the market committee from using two of the modes prescribed therein for the purpose of levying fees on the same agricultural produce. It must be remembered however that the rule is a general provision for levying fees within the maxima prescribed on the agricultural produce by market committees in the market areas all over the State. Various methods of levying fees have been included in the rule, for we assume that the rule making authority knew that there were various ways in which things are brought into various market areas. The rule is meant to apply to all situations that may arise in the State and there may be different ways in which things may be brought to the market areas in different parts of the State. That is why the rule has a wide sweep and allows the market committee to levy fees other by cart load, or by value, or by weight or by containers. It may be that if for the same agricultural produce fees are levied subject to the maxima two different modes, the rates fixed may result in discrimination. It would however not be improper to assume that in framing the bye-laws in which per rates for any particular agricultural produce shall be fixed the market committee shall pay due wigard to the prohibition against discrimination

rentained in Art. 14 of the Constitution. The practical consequence of this is likely to be that for one agricultural produce the market committee will fixed rate only in one of the four modes. If that is one no discrimination can be said to arise. It will not also in our opinion be unreasonable to think that in issuing the notification the Government proceeded on the assumption that for any particular agricultural produce one mode of fixing fees - whether according to cart load or according to value or according to weight or according to the number of containers - will be adopted. Nor would it be difficult if the rate is fixed in one of the modes, say according to cart load, to calculate the fees to be levied where the produce is brought in any other manner, say in baskets, for then the proportional fee can be charged on each basket on the basis of so many basket-fuls being equal to one cart load. Similarly where the bye-law fixes the fees according to containers and a dealer brings the produce in cart load, it will be possible to calculate the fee due on the basis of containers, by calculating how many containers would be equal to one cart load. Where the fee is fixed by weight or value there would be no difficulty in any case. Therefore one may reasonably conclude that the market committee when acting under s. 11 read with the notification will levy the fees on a single commodity in one only of the permitted modes. If that happens in actual practice there will be no question of any discrimination.

But assume that a market committee chooses to adopt two modes for levying fees on the same agricultural produce, say one according to cart load and another according to weight. In such a case a question may arise whether there is discrimination in the incidence of fees. That question may have to be considered if and when it arises and whether discrimination actually arises in such a case will depend upon the rates fixed by the market committee for levying of fees on the same agricultural produce in the two modes that it might choose. If the rates are so fixed that the incidence is substantially the same whether the fees are levied on the basis of cart load or on the basis of weight, there will be no discrimination. On the other hand if the rates are so fixed that the incidence works out substantially differently there will be a case of discrimination and in such a case it is the bye-law that will have to be struck down as being discriminatory for the actual imposition of fees will be made by the bye-law framed by the committee and not by the impugned notification. The chances however of fixing two modes for the levy of fees even on the same agricultural produce in such a way as to result in discrimination are in our opinion so remote that the notification cannot be struck down on that account as discriminatory. In such a case it is not the notification which will have to be struck down but the actual bye-law if it prescribes rates of fees in two modes in such a way as to result in discrimination.

Turning now to the facts of the present case we find that the bye-laws framed by the market committees have fixed only one mode of levying fees in these cases for one kind of produce. It is not the petitioners' case that the market committees with which we are concerned in the present cases have used more than one mode for levying fees on the same agricultural produce. There is therefore no case for discrimination made out on the basis of the actual bye-laws which have been framed by the market committees under the power conferred on them under s. 11 read with the notification. In these circumstances, the attack on the notification on the ground of discrimination must fail.

Re. (2).

Sub-section (1) of s. 29-B provides that in the case of a market area declared before the commencement of the Ordinance, a market for such market area shall be deemed always to have been established for the purposes of the Act with effect from the date on which a market yard for such market area was declared for the first time under the Rules or the Act and such market shall

include and shall be deemed always to have included the said market yard. By this provision the defect that was pointed out in the earlier judgment with respect to the establishment of a market is intended to be validated. The sub-section further provides that any action taken or anything done by a market committee or any other authority after the establishment of a market therein as aforesaid but before the commencement of the Ordinance, which but for the provisions of this clause would have been invalid, shall be and shall be deemed always to have been valid and shall not be called in question merely on the ground that no market was established for such market area when such action was taken or thing done. Sub-section (2) then provides that any fees levied and collected on agricultural produce bought and sold in a market area before the commencement of the Ordinance by a market committee at the rates specified in its bye-laws shall be deemed to have been validly levied and collected and such levy and collection shall not be called in question merely on the ground that at the time of such levy and collection no maxima were prescribed as required by s. 11. The intention of this provision is to cure the defect which was noticed in the earlier judgment inasmuch as no maxima had been prescribed under s. 11 by the State Government. Sub-section (3) finally provides that all licences issued to operate in a market area or any part thereof and fees charged therefor before the commencement of the Ordinance by a market committee under the Rules and bye-laws and any action taken or thing done relating to licensing of persons, or obtaining of a licence, to operate in the market area or any part thereof, taken or done by a market committee or any other authority or person under the Rules and bye-laws before the commencement of the Ordinance shall be and shall be deemed always to have been valid and the validity thereof shall not be called in question merely on the ground that when such action was taken or thing done, the power right or obligation therefor was not duly conferred or imposed by the Act on such market committee, authority or person. This provision is intended to cure the defect arising from rr. 65 and 67 being declared ultra vires by this Court in its earlier judgment.

The contention on behalf of the petitioners is that these provisions are insufficient to validate the defects which were noticed in the earlier judgment of this Court inasmuch as the relevant provisions of the Act and the Rules have not been retrospectively amended. We see no force in this argument, for the provisions as they stand certainly validate the defects pointed out in the earlier judgment of this Court. It is true that the relevant sections and the Rules have not been retrospectively amended by the Ordinance, but this in our opinion was unnecessary. Retrospective amendment may be necessary when it is desired to change the law; but it seems that so far as s. 11 is concerned, the legislature did not intend that the control of the State Government over levy of fees should be done away with for the future also. Therefore, all that was necessary in that respect was to validate the past actions and this is specifically provided for by sub-ss. (2) and (3) of s. 29-B. As for the establishment of market committees, an amendment has been made in s. 5-AA of the Act deleting the provision by which a market could be established only if so required by the State Government. This amendment is prospective. It could have been made retrospective also and in that case sub-s. (1) of s. 29-B may not have been necessary. The legislature, however, adopted the method of amending s. 5-AA prospectively and making a separate provision for validating the establishment of markets in sub-s. (1) of s. 29-B. We see no reason why it should be held that the validation made by sub-s. (1) is not sufficient because the legislature has adopted one method rather than the other for carrying out its purpose. We are therefore of opinion that s. 29-B is sufficient to cure the defects pointed out in the earlier judgment of the Court and to validate actions taken and things done before the promulgation of the Ordinance which would otherwise have been invalid in view of the earlier judgment of this Court. The contention on this head must also be rejected.

Re. (3).

Under the bye-laws as they now stand two classes of traders are mentioned, namely A class traders and B class traders. A class traders are those who hold licences to buy and/or sell agricultural produce in quantities not below 10 lbs. in the market yard, and the licence-fee which they have to pay per year is Rs. 75. B class traders are those who have licences to buy agricultural produce in quantities not below 10 lbs. in the market yard and to sell in retail to consumers anywhere in the market area. They have been divided into three classes, namely, (a) shop-keepers, (b) lariholders, and (c) Toplawala (hawkers), with a licence-fee of Rs. 12, Rs. 6 and Rs. 3 respectively. It is urged that this amounts to discrimination between A class and B class traders inasmuch as A class traders are charged much higher fees than the B class traders. It is however clear that there is a basis for classification between the two classes of traders. A class traders are those who can both buy and sell agricultural produce in the market yard while B class traders can only buy in the market yard but cannot sell there. It is submitted on behalf of the State Government that B class traders are those persons who generally sell in retail to consumers after buying wholesale in the market yard from A class traders or producers. The reason why B class traders have been permitted to buy in the market yard is to allow for competition, as otherwise there would have been a monopoly of the few A class traders who operate in a particular market yard. This classification in our opinion is reasonable. A class traders are wholesale traders who are permitted both to buy and sell in the market yard and are thus charged a higher licence-fee. B class traders are ordinary retailers who in order to carry on their retail trade are permitted to buy in the market yard but they are not permitted to sell there. They are small traders and are therefore charged lower licence fees. It appears to us that in order to avoid the monopoly of A class traders, who are a few in number, with the result that prices might be depressed by such traders, B class traders are permitted only to buy in the market yard on payment of a small licence fee in order that the producer who brings his produce in the market yard may have a fair price. We see no reason therefore to hold that there is any discrimination in creating the two classes of traders, for there is a fair basis of classification of traders into A class and B class. Nor can this restriction be deemed to be an unreasonable restriction on the right to carry on trade and business, for such regulation is obviously envisaged by the Act in order to carry out its purposes and this Court has already held in the earlier judgment that the Act is a valid piece of legislation. It is unnecessary to repeat the reason given in the earlier judgment, where it was held that the restrictions placed by the Act, Rules and Bye-laws framed thereunder are reasonable restrictions in the interest of general public.

It is however urged that B class traders are allowed to sell to consumers anywhere in the market area whereas A class traders are not so allowed. It has already been held in the earlier judgment that retail trade is not controlled under the Act. Therefore, the fact that the bye-law has added the words "to sell in retail to consumers anywhere in the market area" in the case of B class traders is of no consequence, for B class traders, as they are retailers, would be entitled in any case, without being controlled under the Act, to sell to consumers anywhere they like. It is not the addition of these words which gives that right to B class traders, for that right of theirs is not controlled by the Act and they would be entitled to exercise it without the addition of these words, which we consider as surplusage in the circumstances. As for A class traders they are admittedly wholesalers and there is no question of their selling in retail. We are therefore of opinion that the addition of the words mentioned above with respect to B class traders is a mere surplusage and makes no difference to the basis of classification. There is no force therefore in the contention under this head and it must be rejected.

Re. (4).

It is next urged that the market committee is attempting to control retail dealers and requires them

also to take out licences, and this it is not authorised to do, as this Court has already held in the earlier judgment that retail trade is not within the ambit of the Act. This argument is based on the use of the words "to sell in retail to consumers anywhere in the market area" in connection with B class traders. It is said that in this way the market committee is controlling retail trade also under the Act which it cannot do. We are of opinion that this contention has no force. B class traders are required to take out licences in order to buy agricultural produce in quantities not below 10 lbs. in the market yard. The licence in our opinion is not meant to permit them to carry on retail sale any where in the market area. As we have said already these words are a mere surplusage and the real purpose of the licence granted to B class traders is to permit them to buy in the market yard and thus control their activity in connection with wholesale trade. It is urged, however, that no provision has been made under s. 2(ix a) of the Act to define the limit of retail sale under any bye-law. It is true that no specific provision for that purpose has been made but when the limit of 10 lbs. is fixed below which no transaction can take place in the market yard it is some indication of what is the limit of retail sale. In any case the bye laws which provide for A class and B class traders, indicate the limit below which they cannot trade in the market yard and this clearly shows that the intention of the market committee was not to control retail trade by the issue of licence to traders for the large proportion of retail trade may well be below 10 lbs. for each transaction. We cannot therefore accept the contention of the petitioners that the bye-laws by providing for A class and B class traders are really providing for control of retail trade. It is clear that B class traders can only buy in the market yard but cannot sell there and as for sale, they will be entitled to sell in retail wherever they like, for the Act does not control retail trade.

As for r. 64, it merely provides for incidental powers in connection with the regulation of market yards and it has already been held valid in the earlier judgment. We see no reason to hold that that rule is invalid on the ground that the market committee is using that rule to control retail trade. We have already pointed out that the market committee cannot be said to control retail trade by providing for A and B class licences and there is no question therefore of r. 64 being used in a manner not intended thereunder.

Lastly, it seems that there is some dispute by some petitioners in Petitions Nos. 228 and 229 as to whether they hold certain shops in the market yard from the municipal committee or must be deemed to hold them from the market committee and what rights the market committee has over those petitioners in that connection. It appears that there have been suits in courts with respect to that dispute. That is a matter which in our opinion has to be decided by the courts where the suits are said to be pending and cannot be the subject of adjudication in a petition under Art. 32. In any case r. 64 cannot be declared bad because of any dispute between the market committee, the municipal committee and stall holders as to their respective rights over the stalls in the market yard. There is therefore no force in this contention either and it must be rejected.

Re. (5).

The main contention under this head is that the main provisions of the Act have been so amended by the Ordinance that the basis on which this Court upheld the provisions as constitutional no longer exists and therefore the Act as it now stands after its amendment by the Ordinance is an unreasonable restriction on the right to carry on trade. This contention requires a consideration of the provisions of the Act as they stand after the amendment by the Ordinance and it will have to be seen whether there has been any radical departure from the scheme of the Act as it was before the amendment. If there has been no radical departure after the amendment and the control envisaged by the Act as amended is still the same, as it was before the amendment, the basis on which the

earlier judgment of this Court upheld the main provisions of the Act would still apply, and the Act as amended would be constitutional. Let us therefore see if there has been any radical departure from the main provisions of the Act as they stood before the amendment. The Act still deals with the regulation of purchase and sale of agricultural produce and establishment of markets for such produce. Section 3 stands unamended and provides for the constitution of market areas and market committees and gives power to the Commissioner by notification to declare his intention of regulating the purchase and sale of such agricultural produce and in such area as may be specified in the notification. Section 4(1) is also unamended and gives power to the Commissioner after holding such inquiry as may be necessary and considering the objections and suggestions if any made after the notification under s. 3 to declare a particular area as a market area for the purposes of the Act. There has been some amendment in s. 4(2) but it is not of a radical character and does not make any difference to the main provisions of the Act. Section 4-A has also been amended by providing for declaration of a market proper and consequential changes necessary due to such provision. This amendment only brings into the Act what was formerely in r. 51. This amendment also therefore makes no radical change in the Act. Section 5-AA has also been amended and the provision which made it necessary for the State Government to require a market committee to establish a make that been deleted. Section 5-AA as it now stands makes it the duty of the market committee to enforce the provisions of the Act etc. and when a market is established thereunder to provide for such facilities in the market as the State Government may from time to time direct in connection with the purchase and sale of agricultural produce with which it is concerned. The change in s. 5-AA therefore is also of an incidental character and does not in any way affect the scheme of the Act as it was before the amendment. Section 5A has also been amended and it now reads as follows :-

> "Where a market is established under section 4A, the market committee may issue licences in accordance with the rules to traders, commission agents, brokers, weighmen, measurers, surveyors, warehousemen and other persons to operate in the market area or any part thereof."

The main argument of the petitioners is based on this amendment. It is urged that under the unamended Act after a market was established the market committee had to issue licences for operation in the market so that the business of sale and purchase of agricultural produce was concentrated in the market which consisted of a principal market yard and one or more sub-market yards with the consequent advantage to the agricultural producer that they had a place or places where they could find a large number of buyers for their produce and could thus secure fair prices under regulated conditions. Now, however, it is urged that under s. 5A it is open to the market committee, after the market is established under s. 4A to give licences to traders and other to operate in the market area or any part thereof with the result that it would not be necessary to have a principal market yard or sub-market yards. There would be some force in this argument if we were to ignore the rules framed under the Act. But the rules which were framed by the State Government are still the same. Rule 51 provides for the declaration of market yards and market proper by the State Government. Rule 60 provides that all agricultural produce brought into the market shall pass through the principal market yard or sub-market yards and shall not subject to the provisions of sub-r. (2), be sold at any place outside such yards. The only exception to this is sub-r. (2), which provides that proceed agricultural produce may be sold either in the principal market yard, or sub-market yard, or in the market proper, or in the market area in accordance with the provisions of the bye-laws. The reason for this distinction is clear, for where produce is to be processed, as for example, ginned cotton, it has to be taken to a ginning factory in which case it would be most inconvenient to bring the produce to the market yard for sale and that may also add to the price by further transport charges. Reading s. 5A therefore along with the Rules, it is clear that the present

provisions are materially the same as the agricultural produce (except that which is processed) shall have to pass through the principal market yard or sub-market yards and be sold there. The only difference that the amendment has made is that whereas formerly under s. 5A traders could only operate in the market by virtue of the provisions of the Act, now they will operate in the market by virtue of the provisions of the Act read with the Rules. The rules, however, are still the same and therefore in effect the provisions of the Act and the Rules read together still provide for the same kind of regulation which was intended under the unamended Act. It is urged that it will be open in the future for the market committee to do away with the necessity of having market yards and sub-market yards and concentrating wholesale trade only in market yards and sub-market yards in view of the provisions in the amended s. 5A, for the market committee would be entitled to issue licences in accordance with the Rules in case they are changed to traders etc. to trade in the market area or any part thereof. It will be seen however that the power to change the Rules is not in the market committee and until the Rules are changed the position as it was under the unamended Act would remain the same. We have no reason to suppose that the State Government intends to change the Rules as they are now and to permit the market committee to grant licences under s. 5A for trade anywhere in the market indiscriminately. It is true that such a possibility can arise if the State Government changes the Rules as they exist at present. But there is no reason to suppose that such a change is intended. So long therefore as the Rules stand as they are, there is no radical departure from the scheme of the Act as it was before its amendment and the reasons which impelled this Court to uphold the Act and the Rules framed thereunder would still hold good. If and when the Rules are so changed as to make a radical departure from the present position, a question may well arise whether the scheme of control envisaged under the Act has failed in its purpose. It may then be necessary to decide whether the Act and the rules framed thereunder are unconstitutional; but so long as the rules stand as they are, we have to read s. 5A along with the Rules, for licences are issued under that section in accordance with the Rules, and reading s. 5A and the present Rules together it must be held that there has been no radical departure from the scheme of the act as it was before the amendment and therefore the reasons which impelled this court to uphold the Act, Rules and bye-laws framed under it in the earlier judgment still stand.

Besides this main argument certain subsidiary contentions are also urged on behalf of the petitioners to challenge the constitutionality of the act, and the Rules framed thereunder on the ground that it was an unreasonable restriction on the fundamental right to carry on trade or business. It is urged that a trader who has business all over the State may have to take 80 or more licences to trade in different market areas and that will mean a heavy burden on him resulting in increase in price of agricultural produce. This in our opinion is a theoretical consideration and in any case if a trader is so big as to carry on trade in all the 80 or more market areas established in the State we see no reason why he should not take licence in each market area. He will be in a position to bear the burden and it need not necessarily affect the price of agricultural produce seriously. Then it is urged that the Act affects transactions between traders outside the market area. We have not been able to understand what exactly is meant by this. It is only when the sale takes place within the market area that the produce has to pass through the principal market yard or sub-market yard, but if a trader gets something from outside the market area and the sale takes place outside the market area and the thing is brought in to the market area by the trader after the purchase, such transaction will not be subject to any fees, for fees have only to be charged on agricultural produce bought and sold in the market area under r. 53 read with s. 11. But where the sale takes place outside the market area and the commodity is merely brought into the market area by the wholesale trader, there will be no question of any fee being charged on that transaction; of course, if there is a further sale in the market area or in the market yards by the wholesale trader to some one locally that may be liable to

fee. We do not see how in the circumstances it can be said that this is a case of unreasonable restriction on the right to carry on trade and business.

Next it is urged that the provisions in the Act also affect transaction between traders and traders, and also affect produce not grown within the market area if it is sold in the market area. That is undoubtedly so. But if control has to be effective in the interest of the agricultural producer such incidental control of produce grown outside the market area and brought into the market yard for sale is necessary as otherwise the provisions of the Act would be evaded by alleging that the particular produce sold in the market yard was not grown in the market area. For the same reasons transactions between traders and traders have to be controlled, if the control in the interest of agricultural producers and the general public has to be effective. We are therefore of opinion that the Act and the Rules and Bye-laws thereunder cannot be struck down on this ground. The contention under this head therefore must fail.

Re. (6).

The next contention is that rr. 65, 66 and 67 were struck down by this Court in the earlier judgment and have neither been reframed nor validated by the Ordinance. Therefore, these rules do not exist. Consequence of this, it is alleged, is that it is not open to the market committee to issue licences which were provided by these rules. Rules 65 provides that no person shall do business as a trader or a general commission agent in agricultural produce in any market area except under a licence granted by the market committee under this rule. Rule 67 provides that no person shall do business as a trader, commission agent, broker, weighmen, measurer, surveyor, warehouse-man or operate in any other manner in any market area except under licence granted by the market committee. It is urged that licences are granted under these rules read with s. 5A, which now provides that where a market is established the market committee may issue licences in accordance with rules to traders, commission agents, brokers etc. to operate in the market area or any part thereof. Section 5A, it is urged, is a mere enabling provision and becomes effective when the rules are framed and that licences under the enabling provisions of s. 5A are to issue in accordance with the rules; and if there are no rules as to issue of licences the enabling provisions of s. 5A cannot be availed of by the market committee to require the taking out of licences. It is rr. 65 and 67 which prohibit business in the market area without taking licences and provide for the manner in which applications for licence shall be made, the period for which the licence shall remain valid and other incidental matters. It is urged that as these rules were struck down by this Court and have neither been re-framed nor validated under the Ordinance there is no power in the market committee to require traders to take out licences merely because s. 5A enables it to issue licences. The argument on behalf of the State is that even though these rr. 65 and 67 were struck down because they were inconsistent with s. 5A as it stood before the amendment, now that s. 5A has been amended these rules must be held to have revived and reliance in this connection is placed on certain decisions of this Court where it was held that an Act which was valid when it was passed before the Constitution came into force and some provisions of which became invalid for certain purposes in view of the provisions in the Constitution relating to fundamental rights and Art. 13 thereof, became wholly effective again when the Constitution was amended and the inconsistency with the fundamental rights removed. This principle was laid down by this Court in Bhikaji Narain Dhakras v. The State of Madhya Pradesh ((1955) 2 S.C.R. 589.), in these words :

> "The true effect of Art. 13(1) is to render an Act inconsistent with the fundamental right inoperative to the extent of the inconsistency. It is over-shadowed by the fundamental right and remains dormant but is not dead. With the amendment made in

> clause (6) of Art. 19 by the First Amendment Act, the provisions of the impugned Act were no longer inconsistent therewith and the result was that the impugned Act began to operate once again from the date of such amendment with this difference that, unlike amended clause (2) of Art. 19 which was expressly made retrospective, no rights and obligations could be founded on the provisions of the impugned Act from the date of the commencement of the constitution till the date of the amendment."

This matter was further considered in Deep Chand v. The State of Uttar Pradesh ((1955) Suppl. 2 S.C.R. 8.) and it was held by majority that "there was a clear distinction between the two clauses of Art. 13. Under cl. (1), pre-constitution law subsisted except to the extent of its inconsistency with the provisions of Part III whereas under cl. (2) any post Constitution law contravening those provisions was a nullity from its inception to the extent of such contravention," and therefore a law which was bad ab initio under Art. 13(2) either wholly or to the extent of the contravention could not be revived by the application of the doctrine of eclipse and the doctrine could only apply in the case of a law that was valid when made but was rendered invalid for certain purposes by a supervening constitutional inconsistency. The argument on behalf of the State is that if rr. 65 and 67 were valid when they were first framed and became invalid on the introduction of s. 5A in the Act, they became effective again when s. 5A was amended by the Ordinance.

It has not been disputed in this case that the doctrine of eclipse applies to cases of rules. The only dispute was whether rr. 65 and 67 in the present form were in existence before 1953 when s. 5A was inserted in the Act and if so whether they were valid in that form before 1953. Time was taken by the parties to trace the history of the Act and these two rules and the form in which the Act and these rules stood before 1953. Investigation in this matter shows that rules were framed for the first time in 1941 after the Act came on the statute book. Rule 65(1) was in the same form as it existed when it was struck down by the earlier judgment. Rule 67(1) was also substantially in the same form except that it did not originally include a trader or a commission agent or warehouseman as it did at the time when it was struck down. The addition or the words "the traders and commission agents" in r. 67(1) is however not material, for these classes were already covered by r. 65(1). As for the warehousemen which were added sometime later to r. 67(1), that addition need not detain us because we are not concerned in these petitions with warehousemen. So it seems that r. 65(1) and r. 67(1) were practically the same when they were first framed in 1941 as they existed when they were struck down. The Act as originally passed in 1939 did not contain a section like s. 5A. The scheme of the Act then was that under s. 4(2), the Government alone could grant licences for setting up any place for the purchase and sale of agriculture produce notified under the Act and thereafter under s. 5 it was the duty of the market committee established under the Act for every market area to enforce the provisions of the Act the conditions of the licence granted by the Government setting up a place as above and to establish a market therein, if so, required by the Government. Section 26 gave power to the Government to frame rules for the purposes of carrying out the provisions of the Act. Sub-section (2)(e) and (f) were as below :-

> "(2) In particular and without prejudice to the generality of the foregoing provisions such rules may provide for or regulate :-
>
> #.....##
>
> (e) the maximum fees which may be levied by the market committee in respect of licences granted to traders and on the agricultural produce bought and sold in the

market area and the recovery of such fees;

(f) the issue of licences to brokers, weighmen measures and surveyors the form in which and the conditions subject to which such licences shall be issued or renewed and the conditions subject to which the licences shall carry on their business and the fees to be charged therefor."

It will be seen that these provisions by which rules could be framed for grant of licences did not confer power for issuing licences only for the market established under s. 5 as it originally stood. These powers were general in terms and the Government could frame rules empowering the market committee to issue licences for carrying on business throughout the market area. Rules 65(1) and 67(1) therefore would be within the power granted to the State Government under s. 26 when they were originally framed in 1941 and would thus be valid then.

Then we come to the amendment of the Act in 1948. By this amendment, clauses (e) and (f) of s. 26(2) were combined in one and were numbered as sub-s. (2)(f), which runs as follows :-

(2) In particular and without prejudice to the generality of the foregoing provision such rules may provide for or regulate :-

#.....##

(f) the issue of licences to traders, commission agents, warehousemen and other persons operating in the market, brokers, weighmen, measurers and surveyors, the form in which, and the conditions subject to which such licences shall be issued or renewed and the fees to be charged therefor;".

It will be seen that though the words "market area" do not appear in this provision, it is still of a general nature and does not restrict the operation of the licence only to the market. So rr. 65 and 67 would not be inconsistent with it.

Then we come to the amendment of 1953 which introduced s. 5A (as it was before the amendment by the Ordinance) in the Act and that provided that "where a market is established under s. 5, the market committee may issue licences in accordance with the rules to traders, commission agents, brokers, weighmen, measurers, surveyors, warehousemen and other persons to operate in the market." This section was considered in the earlier judgment and it was held there on the basis of this section that rr. 65 and 67 when they gave power to the committee to issue licences for operation in the market area as distinguished from the market were bad after the enactment of s. 5A.

It is however clear from the above narration of facts that r. 65(1) and r. 67(1) were valid when they were originally framed and remained valid till s. 5A was enacted in 1953 and became bad on the insertion of s. 5A in the Act. Now that s. 5A has been amended by the Ordinance, rr. 65 and 67 are obviously in conformity with it, r. 66 being merely consequential. Therefore they will revive by the application of the doctrine of eclipse as they are no longer overshadowed by s. 5A as it was before the Ordinance. The contention under this head must therefore fail.

Re. (7).

The argument under this head is that sub-s. (3) of s. 29-B which validates the collection of licence-fees by market committees is bad inasmuch as it makes it impossible for refund to be made of

licence-fees collected at the time when the market committee had no power to collect it. We have not been able to understand this contention, for it is not disputed that the legislature has power to legislate retrospectively even with respect to taxation (see M.P.V. Sundararamier & Co. v. The State of Andhra Pradesh ((1958) S.C.R. 1422.), where Sales Tax Laws Validation Act, 1956, was held constitutionally valid. Fees are also included within the taxing power of the legislature in the broadest sense. Article 31(1) therefore has no application in the present case and we have to look to Art. 265 which says that "no tax shall be levied or collected except by authority of law". Sub-section (3) of s. 29-B is the law which retrospectively authorises the levy of licence-fees collected in this case. Retrospective power of the legislature to make a law being there even in the case of taxation, we fail to see how the provisions of sub-s. (3) of s. 29-B which validate the levy and collection of licence-fees can be held to be invalid under Art. 31(1). We may add that the same will apply to fees collected under s. 11 and validated by sub-s. (2) of s. 29-B. There is therefore no force in this contention. It is hereby rejected.

In the result, the petitions are dismissed with costs. One set of hearing fee.

Petitions dismissed.

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