

M/S. Prag Ice & Oil Mills and Another

Vs

Union of India

Writ Petitions Nos. 712, 715-739, 760-764, 765-770, 779-780, 781-784, 838-855, 861-873 and 874-892 of 1977

Nav Bharat Oil Mills and Another

Vs

Union of India

Writ Petitions Nos. 896-898 and 899-901 of 1977

(CJI M. H. Beg, Y. V. Chandrachud, P. N. Bhagwati, Syed M. Fazal Ali, P. N. Shinghal, Jaswant Singh, D. A. Desai JJ)

05.05.1978

JUDGMENT

BEG, C.J. (on behalf of himself and Desai, J.) -

The ninety-one writ petitions before us for delivery of our reasons in support of our order dated November 23, 1977 dismissing them, raised a common question of the validity of an order (hereinafter referred to as 'the Control Order'), passed on September 30, 1977, by the Ministry of Civil Supplies and Co-operation of the Government of India, which runs as follows :

ORDER

New Delhi, the 30th September, 1977.

S.O. Whereas the Central Government is of opinion that it is necessary and expedient so to do for securing equitable distribution and availability at fair prices, of mustard oil;

Now, therefore, in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby makes the following orders namely :

1. Short title, extent and commencement - (1) This order may be called the Mustard Oil (Price Control) Order, 1977.
- (2) It extends to the whole of India.
- (3) It shall come into force at once.

2. Definition - In this Order, "dealer" means a person engaged in the business of the purchase, sale or storage for sale of mustard oil.

3. Price at which a dealer may sell - No dealer shall, either by himself or by any person on his behalf, sell or offer to sell any mustard oil at a retail price exceeding Rs. 10 per kilogram, exclusive of the cost of container but inclusive of taxes.

Sd. T. Balakrishnan Joint Secretary to the Government of India [File No. 26(16)/77-ECR]##

2. The Control Order was passed in exercise of the powers conferred upon the Central Government by Section 3 of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act'). This provision lays down :

Section 3. (1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, or for securing any essential commodity for the defence of India or the efficient conduct of military operations it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), an order made thereunder may provide :

##(a) * * * *(b) * * * ##

(c) for controlling the price at which any essential commodity may be bought or sold;

(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity;

(e) for prohibiting the withholding from sale of any essential commodity ordinarily kept for sale;

(f) for requiring any person holding in stock, or engaged in the production, or in the business of buying or selling, of any essential commodity,

(a) to sell the whole or a specified part of the quantity held in stock or produced or received by him, or

(b) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him, to the Central Government or a State Government or an officer or agent of such Government or to a Cooperation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the matter.

Explanation 1 - An order made under this clause in relation to foodgrains, edible oilseeds or edible oils, may, having regard to the estimated production, in the concerned area, of such foodgrains, edible oilseeds and edible oils, fix the quantity to be sold by the producers in such area and may also fix, or provide for the fixation of, such quantity on a graded basis, having regard to the aggregate of the area held by, or under the cultivation of, the producers.

Explanation 2 - For the purpose of this clause, "production" with its grammatical variations and cognate expressions includes manufacture of edible oils and sugar;

We are not concerned here with other provisions of Section 3(2).

3. Section 3(3), which will be relevant for the purposes of interpretation, runs as follows :

3. (3) Where any person sells any essential commodity in compliance with an order made with reference to clause (f) of sub-section (2), there shall be paid to him the price therefor as hereinafter provided :

(a) where the price can, consistently with the controlled price, if any, fixed under this section, be agreed upon, the agreed price;

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any;

(c) where neither clause (a) nor clause (b) applies, the price calculated at the market rate prevailing in the locality at the date of sale.

Again, Section 3A lays down :

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

(ii) Any notification issued under this sub-section shall remain in force for such period not exceeding three months as may be specified in the notification.

(iii) Where, after the issue of a notification under this sub-section, any person sells foodstuff of the kind specified therein and in the locality so specified, in compliance with an order made with reference to clause (f) of sub-section (2), there shall be paid to the seller as the price therefor -

(a) where the price can, consistently with the controlled price of the foodstuff, if any, fixed under this section, be agreed upon, the agreed price;

(b) where no such agreement can be reached, the price calculated with reference to the controlled price, if any;

(c) where neither clause (a) nor clause (b) applies, the price calculated with reference to the average market rate prevailing in the locality during the period of three months immediately preceding the date of the notification.

(iv) For the purpose of sub-clause (c) of clause (iii), the average market rate prevailing in the locality shall be determined by an officer authorised by the Central Government in this behalf, with reference to the prevailing market rates for which

published figures are available in respect of that locality or of a neighbouring locality, and the average market rate so determined shall be final and shall not be called in question in any court.

4. Additional Sections 3B and 3C will also require consideration in order to arrive at the correct meaning of Section 3(2). They read as follows :

3B. Where any person is required, by an order made with reference to clause (f) of sub-section (2), to sell to the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government, any grade or variety of foodgrains, edible oilseeds or edible oils in relation to which no notification has been issued under sub-section (3A), or such notification having been issued has ceased to be in force, there shall be paid to the person concerned notwithstanding anything to the contrary contained in sub-section (3), an amount equal to the procurement price of such foodgrains, edible oilseeds or edible oils, as the case may be specified by the State Government, with the previous approval of the Central Government having regard to -

- (a) the controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oilseeds or edible oils;
- (b) the general crop prospects;
- (c) the need for making such grade or variety of foodgrains, edible oilseeds or edible oils available at reasonable prices to the consumers, particularly the vulnerable section of the consumers; and
- (d) the recommendations, if any, of the Agricultural Prices Commission with regard to the price of the concerned grade or variety of foodgrains, edible oilseeds or edible oils.

3C. Where any producer is required by an order made with reference to clause (f) of sub-section (2) to sell any kind of sugar (whether to the Central Government or a State Government or to an officer or agent of such Government or to any other person or class of persons and either no notification in respect of such sugar has been issued under sub-section (3A) or any such notification, having been issued, has ceased to remain in force by efflux of time, then, notwithstanding anything contained in sub-section (3), there shall be paid to that producer an amount therefor which shall be calculated with reference to such price of sugar as the Central Government may, by order, determine, having regard to -

- (a) the minimum price, if any, fixed for sugarcane by the Central Government under this section;
- (b) the manufacturing cost of sugar;
- (c) the duty or tax, if any paid or payable thereon; and
- (d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar and different prices may be determined from time to time for

different areas or for different factories or for different kinds of sugar.

Explanation - For the purposes of this sub-section, "producer" means a person carrying on the business of manufacturing sugar.

5. It is necessary to keep other clauses of Section 3 also in one's mind to get a true picture of the statutory context of the power of price control. The drastic measures which the Central Government may adopt, extending to virtually taking over of management by appointing Authorised Controllers of particular undertakings, so as to carry out the objects stated in Section 3(1) of the Act, and the mechanism of control visualised to ensure due and proper exercise of the statutory powers are also very significant. The provisions containing these are :

3. (4) If the Central Government is of opinion that it is necessary so to do for maintaining or increasing the production and supply of an essential commodity, it may, by order, authorise any person (hereinafter referred to as an authorized controller) to exercise, with respect to whole or any part of any such undertaking engaged in the production and supply of the commodity as may be specified in the order such functions of control as may be provided therein and so long as such order is in force with respect to any undertaking or part thereof,

(a) the authorized controller shall exercise his functions in accordance with any instructions given to him by the Central Government, so, however, that he shall not have any power to give any direction inconsistent with the provisions of any enactment or any instrument determining the functions of the persons in charge of the management of the undertaking, except in so far as may be specifically provided by the order; and

(b) the undertaking or part shall be carried on in accordance with any directions given by the authorized controller under the provisions of the order, and any person having any functions of management in relation to the undertaking or part shall comply with any such directions.

3. (5) An order made under this section shall -

(a) in the case of an order of a general nature or affecting a class of persons, be notified in the Official Gazette; and

(b) in the case of an order directed to a specified individual be served on such individual -

(i) by delivering or tendering it to that individual, or

(ii) if it cannot be so delivered or tendered, by affixing it on the outer door or some other conspicuous part of the premises in which that individual lives, and a written report thereof shall be prepared and witnessed by two persons living in the neighbourhood.

3. (6) Every order made under this section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made.

6. It has also to be remembered that if the mechanism of price control of some essential commodities fails, there is under our Constitution, with its socialistic orientation and objectives, the provision in Article 19(6)(ii) for "the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise".

7. The petitioners assail the control order on four grounds : firstly, that it violates the fundamental rights of the petitioners to property under Article 19(1)(f) and to carry on their trade and business guaranteed by Article 19(1)(g) of the Constitution; secondly, that the petitioners are denied the benefits of Article 14 of the Constitution; thirdly, that the order is hit by Article 301 of the Constitution; and, fourthly, that the Central Order is outside the scope of Section 3 of the Act.

8. We need not consider Article 301 of the Constitution as the petitions do not, beyond citing the provision, set out any facts to show how this article is involved. This article is meant for protecting inter-State as well as intra-State "freedom of trade, commerce, and intercourse". But, Article 302 provides :

Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest.

9. Although, Article 302 does not speak of "reasonable" restrictions, yet, it is evident that restrictions contemplated by it must bear a reasonable nexus with the need to serve "public interest". If the tests of Section 3 of the Act are satisfied by an order, it could not fail to serve public interest. Hence, from this point of view also it is enough if we consider whether the Control Order falls within Section 3 of the Act. It was evidently for this reason that, beyond mentioning Article 301, Counsel for the petitioners did not, quite rightly, advance much argument to show how Article 301 is involved here. We will, therefore, not consider it any more here.

10. It was, however, vehemently urged on behalf of the petitioners that the Control Order is assailable for violating Articles 14 and 19(1)(f) and (g) despite the fact that the Act itself was placed in 1976 in the Ninth Schedule of the Constitution. The result of placing it there by a constitutional amendment is that Section 3 of the Act became free from any limitations based on the provisions of Part III of the Constitution. Article 31B, providing for a removal of the protection to fundamental rights given by Part III of our Constitution, lays down :

31B. Validation of certain Acts and Regulations - Without prejudice to the generality of the provisions contained in Article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

11. It is evident that Article 31B protects only Acts and Regulations specified in the Ninth Schedule from the vice of invalidity for inconsistency with provisions of Part III of the Constitution but not anything done or to be done in future under any of the provisions of any Act so specified, such as an

order passed under Section 3 of the Act.

12. If Section 3 of the Act, which was held in *Shri Harishankar Bagla v. State of Madhya Pradesh* ((1955) 1 SCR 380 : AIR 1954 SC 465 : 1954 Cri LJ 1322) to pass the tests of validity imposed by Articles 14 and 19(1)(f) and (g), read with Article 19(5) and (6), a Control Order Passed under Section 3 would also be required to pass these tests as its scope could not be wider than that of the provisions which authorises its promulgation. A delegated or derivative power could not rise higher or travel beyond the source of that power from which it derives its authority and force. If Bagla's case is good law (no party has questioned its correctness) Articles 14 and 19(1)(f) and (g) could be deemed to be, if one may so put it, "written into" Section 3 of the Act itself. They would control the scope of orders which could be passed under it. That is, undoubtedly, the way in which guarantees of fundamental rights could and should function if the Act containing Section 3 itself had not been placed in the Ninth Schedule so as to take away the guarantees of fundamental rights from the substance of it.

13. The question of interpretation before us is : What is the effect of putting the Act in the Ninth Schedule upon Control Orders passed under Section 3 of the Act ? The answer to this question must necessarily depend upon the effect of such a change of the legal position upon the provisions of Section 3 itself which authorise control orders passed under it. If the effect was to widen the orbit of Section 3 of the Act or to remove the limitations put by Articles 14 and 19 upon the exercise of powers under it, the logical and natural result would be to enlarge also the scope or sweep of the orders passed under it. But, if it has no such effect upon Section 3 of the Act itself, orders passed under it would continue to be subject to provisions of Section 3 of the Act as controlled by Articles 14 and 19 of our Constitution so that they will have to satisfy what may be described as a "dual test" : firstly, that of provisions of Section 3 of the Act itself; and, secondly, that of provisions of Chapter III of the Constitution containing fundamental rights.

14. Learned Counsel for the petitioners suggested that the placing of the Act in the Ninth Schedule protected only the grant of powers under Section 3 of the Act but not their exercise. Article 31B, no doubt, speaks of "specified" Acts and Regulations. But, it makes no distinction whatsoever between any grants of powers and their exercise. Powers are granted or conferred so as to be exercised and not to be kept in cold storage for purposes of some kind of display only as though they were exhibits in a show-case not meant for actual use. The whole object of a protection conferred upon powers meant for actual use is to protect their use against attacks upon their validity based upon provisions of Part III. If this be the correct position, it would, quite naturally and logically, follow that their use is what is really protected.

15. In practice, it is the exercise of power which is generally assailed and not the mere conferment of it which raises the somewhat different question of legislative competence. Indeed, the Ninth Schedule does not provide any protection at all against attacks based upon either the vice of excessive delegation or want of legislative competence, defects which could be said to vitiate the grant of powers despite their place in the Ninth Schedule. But, questions of conflict with fundamental rights and of transgression of legitimate or reasonable limits upon their exercise arise when citizens complain of unreasonable impediments to the exercise of their fundamental rights. The distinction between protection to a mere grant of powers and to their exercise, therefore, seems specious in the context of the protection. It cannot explain why, if Section 3 is protected by the Ninth Schedule, the exercise of power granted by, which manifests itself in control orders, is not protected. It would be so protected, if at all, not because the orders to be made in future, as such, are protected, but because the power actually conferred and found in existence in Section 3 is protected.

The protection is given to a power which is specified and in existence which has to be used for certain purposes and not to what may be specified in future.

16. If orders passed under Section 3 of the Act also get a protection it would be what may be described as a "derivative" protection so long as the orders are covered by Section 3 of the Act. It is available only so long as and because the source of their authority - Section 3 of the Act - is protected by the Ninth Schedule. Orders purporting to be made under Section 3 of the Act must, however, satisfy the tests found in Section 3 itself in every case. They can never escape the basic tests whether Section 3, the source of their authority, is protected by the Ninth Schedule or not. The further tests imported by Articles 14 and 19 of the Constitution into Section 3 could be applied to these orders only so long as these added tests are attached to or can be read into Section 3 of the Act, but not after they have been deliberately delinked or removed from Section 3, if one may so describe the effect of the inclusion of the Act in the Ninth Schedule.

17. The Solicitor-General contended that Section 3 of the Act constituted what he described as "skeleton" legislation, over which the exercise of powers given by Section 3 built, so to say, a body of "flesh and blood". The term "skeleton" legislation is used sometimes for denoting the broad outlines of a particular scheme found in an Act of which details are to be filled in later by administrative orders of experts. It is doubtful whether the Essential Commodities Act, 1955, could be spoken of as a piece of "skeleton" legislation. Section 3, sub-section (1) of the Act provides for delegation of powers to the Central Government in order that it may carry out certain purposes by framing appropriate schemes and evolving policies which may meet the purposes of the Act. These schemes and policies to serve the stated purposes may differ as regards the nature of means adopted and even in the particular objectives sought at particular times to accord with changing circumstances.

18. Orders passed under Section 3 of the Act, in pursuance of such schemes or policies, do not become parts of the Act for the purposes of the Ninth Schedule of the Constitution. On the strength of the views expressed by this Court in *Godavari Sugar Mills Ltd. v. S. B. Kamble* ((1975) 3 SCR 885 : (1975) 1 SCC 696), with which we respectfully agree, the most one can say is that orders passed under the Act, before its inclusion in the Ninth Schedule, could also be said to be protected directly by the Ninth Schedule if mentioned there. But, there could be no independent and direct protection of this Schedule conferred upon orders passed under the Act before us just as none could be given to either the amendments of an Act or to regulations passed under the Act which were considered in *Godavari Sugar Mills* case.

19. As already indicated above, the impugned control order is assailed mainly on the ground that it violates Articles 14 and 19(1)(f) and (g) of the Constitution. It is alleged that the manufacturers of oil having invested a great deal of capital in mustard oil manufacturing industry and having purchased oil seeds at higher rates than those which have entered into the calculation of the Government in fixing the price of mustard oil for the consumer cannot be made to sell oil, into which mustard seed is converted, at prices below those at which they could themselves produce oil. It is submitted that to require them to do so amounts to confiscation of property contrary to law as well as a restriction upon the right guaranteed by Article 19(1)(g) of the Constitution upon them to carry on an industry or business free from unreasonable restrictions. Valid restrictions, it is submitted, can only be reasonable and in the interests of the general public. It was suggested that the protection of Article 31(1) against deprivation of property contrary to law was also involved here. The main question to be decided, therefore, is whether Part III of the Constitution is available at all to test the validity of the impugned control order.

20. In *Latafat Ali Khan v. State of U. P.* (1971 Supp SCR 719, 720 : (1971) 2 SCC 355), a Constitution Bench of this Court decided such a question quite rightly in our opinion as follows (at p. 720) (SCC p. 356, para 2) :

It seems to us that if a statutory rule is within the powers conferred by a section of a statute protected by Article 31B, it is difficult to say that the rule must further be scrutinised under Articles 14, 19 etc. Rule 4(4) seems to us to be a rule which does not go beyond the powers conferred under Section 6(xvii), read with Section 44 of the Act. At any rate, Section 6(xvii) and Rule 4(4) are part of a scheme of land reform in U.P. and would be protected from attack under Article 31A of the Constitution.

In that case, the rule made under the provisions of the Imposition of Ceiling on Land Holdings Act 1960 of U.P. was under attack. The section under which the rule was made enjoyed the protection of both Articles 31A and 31B of the Constitution. Hence, it was held that the rule was not to be questioned if it fell within the empowering provision of the Act. The position before us is very similar. The control order passed under Section 3 of the provisions of the Act before us, included in the Ninth Schedule, is assailed on the ground that, although Section 3 of the Act may be protected by the Ninth Schedule of the Act, yet, an order passed under this provision is not so protected. Although, we agree that the impugned order is not protected for this reason, yet, if the section under which it was passed is protected from any attack based on the provisions of Part III of the Constitution, the only question which survives is whether the control order is covered by the protected empowering provision. If it falls outside the empowering provision it would be invalid in any case. If it falls within the empowering provision but could be found to be struck by the provisions of Article 19(1)(f) and (g) of the Constitution, an attack on the control order, by reason of Article 19(1)(f) or (g), would be really one against the empowering provision itself which is protected. The control order, therefore, enjoys what may be called a derivative protection. All that has to be shown by the Central Government is that it falls within the empowering provision. No further test, based on fundamental rights in Chapter III of the Constitution, can be applied to it in such a case.

21. All the tests of validity of the impugned price control or fixation order are, therefore, to be found in Section 3 of the Act. Section 3 makes necessity or expediency of a control order for the purpose of maintaining or increasing supplies of an Essential Commodity or for securing its equitable distribution at fair prices the criteria of validity. It is evident that an assessment of either the expediency or necessity of a measure, in the light of all the facts and circumstances which have a bearing on the subjects of price fixation, is essentially a subjective matter. It is true that objective criteria may enter into determinations of particular selling prices of each kilogram of mustard oil at various times. But, there is no obligation here to fix the price in such a way as to ensure reasonable profits to the producer or manufacturer. It has also to be remembered that the object is to secure equitable distribution and availability at fair prices so that it is the interest of the consumer and not of the producer which is the determining factor in applying any objective tests at any particular time. Hence, the most important objective fact in fixing the price of mustard oil, which is consumed generally by large masses of people of limited means, is the paying capacity of the average purchaser or consumer.

22. Statistics of rise in prices of mustard oil throughout the country indicated a very sharp rise during the period preceding the control order. It was no longer available at a reasonable price to the average consumer. It is difficult to understand how the average consumer could buy mustard oil at more than Rs. 10 for each kilogram of mustard oil unless his purchasing capacity was increased by

pumping money into his pocket artificially. This would necessarily imply a general rise in wages of the working classes and salaries of middle classes which do not share the profits of an inflationary economy. In other words, a fixation of price above Rs. 10 per kg. of mustard oil could have contributed to push the country down the slippery slope of inflation towards economic crises and disaster.

23. Price control and planning may have been forced upon all nations of the world due to the needs and exigencies of modern "total" warfare. But, as has been observed, the problems of the aftermath or of the peace and reconstruction, which follow (according to some they "break out") are no less demanding. In addition, it is common knowledge that the population explosion, unemployment, and rising prices in our country, due to the inflationary spiral, pose problems with no less grave implications for the whole country than a war. It would be no exaggeration to say that the fate of every Government depends ultimately upon a satisfactory solution of these problems, and, particularly, on its capacity to check rise in prices of essential commodities.

24. We have listened to long arguments directed at showing us that producers and sellers of oil in various parts of the country will suffer so that they would give up producing or dealing in mustard oil. It was urged that this would, quite naturally, have its repercussions on consumers for whom mustard oil will become even more scarce than ever ultimately. We do not think that it is the function of this Court or of any Court to sit in judgment over such matters of economic policy as must necessarily be left to the Government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly by differ. Courts can certainly not be expected to decide them without even the aid of experts.

25. It is impossible for any Court to take evidence from all over the country to determine whether particular concerns or parties which have come up before this Court or (sic) could not reasonably produce mustard oil at a cost which could make it reasonable for them to sell it at Rs. 10 per kg. Learned Counsel before us have tried to perform this impossible task. We think that it should not even have been attempted in a case of this kind because the price at which mustard oil was sold commonly in the market not very long ago and the price which prevailed at the time when the control order of September 30, 1977, was passed are matters of common knowledge. All that the Government need have done was to take a policy decision based on what could reasonably be the paying capacity of the average buyer of mustard oil and the likely effects of the intended price fixation. It seems to us to have done that. It is true that sufficient material, from these points of view, was not placed before us by the Union of India. Nevertheless, the matter is so obvious and glaring that we do not think that detailed statistics are needed. We deliberately do not go into the great mass of materials which have been sought to be placed before us from the point of view of present cost of producing mustard oil and the fixation of a reasonable price based on a determination of that. The more essential questions to answer, from the point of view of provisions of Section 3 of the Act were :

Can the mass of ordinary consumers pay more than Rs. 10 per kg. ? Even if the price of mustard oil is fixed at less than the cost price to the producers, is it not necessary to take such a measure in order to break the vicious inflationary spiral and bring down prices ?

The last question could only be answered by waiting and watching the ultimate effects of a particular price fixation on prices of mustard seed and cost of production of mustard oil ultimately.

If the object of price fixation suggested by this question is very necessary to take into account, from the point of view of availability of mustard oil at fair prices to consumers, as we think it is, the actual cost of production to the purchasers could certainly not be the sole or the decisive factor. It could only be one out of a number of relevant facts and circumstances.

26. The net result of the mass of statistics placed before us on behalf of the petitioners is that the price fixed should have been about Rs. 3 per kg. more, that is to say, about Rs. 13 per kg. Even if we accept this to be a correct estimate for normal times, when fair and reasonable profits to the producers could be an important consideration, we think that a price fixed at Rs. 10 per kg., as a part of an attempt to break the vicious inflationary circle, is not at all an unreasonable step.

27. Students and observers of economic systems tell us that inflation is no problem in socialist countries because the whole economy is so completely controlled that there is no question of a rise in prices. Under our what is known as a "mixed economy" planning and price fixation are part of that social control which becomes inevitable under certain conditions. Indeed, it seems often quite unavoidable under any system which adopts socialistic measures to achieve the common good. The argument on behalf of the Union is that the result of this fixation, even below cost price, will necessarily produce desired effects upon the free sector in which price of mustard seed is still not controlled. The control imposed will make it impossible for producers to offer excessive prices for mustard oil seed demanded by the growers. Hence, it was argued that the cost of production was bound to come down in course of time if petitioners could only wait a little. Fixation at even uneconomic selling price implied temporary loss to the producers, so as to serve their own ultimate interests and those of general welfare. Such sacrifices ought, it was suggested, be readily borne by producers of mustard oil in a system like ours. If they were not able to bear them, they could close down their factories. They could not claim a right to carry on business or manufacture on their own terms. Such is not the right granted even by Article 19(1)(g) of the Constitution. However, as we have already indicated, it seems that the Act was put in the Ninth Schedule to prevent the invocation of Articles 14, 19 and 31 for obstructing measures so necessary as price fixation of essential commodities is for promoting the objectives of a socialist welfare economy. This, in our opinion, would be a sufficient answer to all the arguments which had been put forward at considerable length before us on the unconstitutionality of fixing the price of mustard oil below what is claimed to be the cost price.

28. It may be mentioned, en passant, that even during the interval between the passing of our order dismissing writ petitions for the enforcement of fundamental rights protected by Part III of Constitution and the delivery of these reasons, so beneficial was the effect of the order of September 30, 1977, that price of mustard oil has fallen in the neighbourhood of Rs. 7 per kg. Apparently, this is enough to cover reasonable profits of producers as well as middlemen. We are informed that the impugned Control Order has itself been withdrawn by the Central Government. We can take judicial notice of these facts which illustrate the extreme inadvisability of any interference by any court with measures of economic control and planning directed at maximising general welfare. It is not the function of the Courts to obstruct or defeat such beneficial measures devised by the Government of the day. Courts cannot pass judgments on the wisdom of such actions, unless actions taken are so completely unreasonable that no law can be cited to sanction them.

29. If the impugned order of September 30, 1977, falls within this provision, as we think it does, no question of violating a fundamental right could arise. If an impugned order were to fall outside Section 3 of the Act, no question of applying any test of reasonableness contemplated by Article 19(6) need arise because it would then be a purely illegal restriction upon the right conferred by

Article 19(1)(g) which would fail for lack of authority of any law to support it.

30. We have also heard considerable argument on principles of fair fixation of price which, it was submitted, must take into account the cost of production as well as a reasonable amount of profit to the manufacturer and the middleman. As indicated above, such principles apply only in those cases where there is an obligation upon the price fixing authority to take certain matters into account which have a bearing on cost of production and are designed to secure fair share of profits to the producers. Section 3 of the Act set out above, as already indicated, had very different purposes in view. It may be that the cost of production and reasonable amount of profits to the manufacturers have an indirect bearing on matters set out in Section 3(1) of the Act. But, in cases where the effects of a policy or a measure adopted in achieving purposes set out in Section 3(1) are matters of guesswork, after experimentation, the actual consequences can be indicated with a fair amount of certainty only by giving some time for a policy to work and reveal its results. Presence of such features in a case cannot invalidate price fixation of which the direct objects are set out in Section 3(1) of the Act.

31. Mr. Kacker, learned Solicitor General has rightly drawn our attention to a distinction between merely regulatory orders and those of price fixation or price control under Section 3(2)(c) of the Act. A price fixation to meet the general purposes set out in Section 3(1) of the Act, aims at reversing the vicious inflationary spiral of rising prices, may appear arbitrary or unreasonable judged by standard applicable to price fixation aimed at giving reasonable profits to producers which is not the object of Section 3(1) of the Act. The whole evidence of the petitioners is misdirected inasmuch as it proceeds on the assumption that what could be no more than a relevant consideration is the whole and sole object of Section 3(1) of the Act. About other matters there is practically no evidence so that we are left in the region of guesswork.

32. No case has been cited before us to show that an order meant to serve a purpose the execution of which may, as indicated above, require fixation of price even below cost price for the time being, is outside Section 3(1) of the Act. It was rightly urged on behalf of the Union that the Central Order is a temporary and experimental device for achieving a particular purpose, covered by Section 3(1) of the Act at a particular time, in a particular state of affairs. It was submitted that, after the purpose is achieved, the order could be and will be withdrawn by the Government of India. As already stated above, that order has been withdrawn because the purpose has been achieved. Even if that purpose had not been achieved, the order could be withdrawn if it became evident to the Government that such control would not achieve the desired object. It is extremely hazardous for Courts to enter the sphere of experimentation in matters of economic policy which must be left to the Government of the day.

33. It will be seen from the provisions of Section 3(3) of the Act that price fixation on certain given principles is enjoined only when there is an order under Section 2(f) of the Act compelling the sale of a whole stock or a specified part of it to the Central or a State Government or to authorities or persons as directed by them. Again, Section 3(a)(iii) provides a machinery for price fixation in special cases. Similar is the position with orders under Sections 3B and 3C. The whole machinery of control of supplies with a view to their equitable distribution and securing their availability at fair prices, it will be seen, is much more comprehensive than the machinery for price fixation in special cases on given principles.

34. The cases cited before us on price control relate to the sphere in which the criteria for fixation of prices were indicated either by a statutory provision or by orders made thereunder. In Panipat Co-

operative *Sugar Mills v. Union of India* ((1973) 2 SCR 860 : (1973) 1 SCC 129), this Court said (SCC p. 133) :

Two principal questions arise in these appeals : (1) what is the true interpretation of Section 3(3C) and (2) whether the price of Rs. 124.63 was in accordance with the provisions of Section 3(3C).

Thus, statutory principles for price fixation were under consideration there. Again, in *Shree Meenakshi Mills Ltd. v. Union of India* ((1974) 2 SCR 398 : (1974) 1 SCC 468), there were directions given under the Cotton Textiles Control Orders Prescribing sales through certain channels. The principles on which the sale prices of textiles were to be fixed, in accordance with relevant rules, were explained by this Court.

35. In *Meenakshi Mills' case* Ray, C.J., disapproved of the decision of this Court in *Premier Automobiles Ltd. v. Union of India* ((1972) 2 SCR 526 : AIR 1972 SC 1690), in the following words (SCC p. 490, para 64) :

The premier *Automobiles* (supra) decision does not consider that the concept of fair prices varies with circumstances in which and the purposes for which the price control is sought to be imposed. This decision because of the special agreement there does not consider that the fixation of fair price with a view to holding the price line may be stultified by allowing periodic increase in price.

It was also observed there (SCC p. 490, para 63) :

In premier *Automobiles* case this Court said that the concept of fair price fixed under Section 18G "takes in all the elements to make it fair for the consumer leaving a reasonable margin of profit to the manufacturing activity". These observations were made on the basis of the agreement of the parties there that irrespective of technical or legal points the Court should base its judgment on examination of correct and rational principles and should direct deviation from the report of the Commission of Inquiry appointed by it with the concurrence of the parties only when it is shown that there has been a departure from the established principles or the conclusions of the Commission are shown to be demonstrably wrong or erroneous.

In other words, that judgment was not to provide a precedent for anything similar to be done by courts in other cases.

36. In *Saraswati Industrial Syndicate Ltd. v. Union of India* ((1975) 1 SCR 956 : (1974) 2 SCC 630), the cases mentioned above were discussed by this Court in the context of Sugar Control Order, 1966, where clause (7) laid down certain matters to be considered in determining fair price. It was held there (SCC p. 636, para 13) :

Price fixation is more in the nature of a legislative measure even though it may be based upon objective criteria found in a report or other material. It could not, therefore, give rise to a complaint that a rule of natural justice has not been followed in fixing the price. Nevertheless, the criterion adopted must be reasonable.

The guiding factors laid down in clause (7) of the Sugar Control Order, 1966, were held to afford only indicia to help the Government in fixing prices on the lines

indicated in the Control Order.

37. We think that unless, by the terms of a particular statute, or order, price fixation is made a quasi-judicial function for specified purposes or cases, it is really legislative in character in the type of control order which is not before us because it satisfies the tests of legislation. A legislative measure does not concern itself with the facts of an individual case. It is meant to lay down a general rule applicable to all persons or objects or transactions of a particular kind or class. In the case before us, the Control Order applies to sales of mustard oil anywhere in India by any dealer. Its validity does not depend on the observance of any procedure to be complied with or particular types of evidence to be taken on any specified matters as conditions precedent to its validity. The test of validity is constituted by the nexus shown between the order passed and the purposes for which it can be passed, or, in other words by reasonableness judged by possible or probable consequences.

38. It is true that even executive or legislative action must be confined to the limits within it can operate. It must fall reasonably within the scope of the powers conferred. The scope of the powers conferred depends upon the terms of the empowering provisions. As we have already mentioned, the empowering provision in the instant case is widely worded. The validity of Section 3 has not been challenged before us. As indicated above, it could not be challenged by reason of Article 31B after its inclusion in the Ninth Schedule of the Constitution. The result necessarily is that, in a case in which the Central Government is the judge of expediency and necessity to the extent that even the protection of guaranteed fundamental rights cannot stand in the way of its view or opinion of such necessity and expediency, a challenge on the grounds on which it was attempted before us could not succeed.

39. We may also mention that the view we have taken of the dominant purpose of Section 3(1) of the Act is in accordance with the following elucidation of its purpose in Meenakshi Mills case (supra) (SCC p. 490, para 65) :

The question of fair price to the consumer with reference to the dominant object and purpose of the legislation claiming equitable distribution and availability at fair price is completely lost sight of if profit and the producer's return are kept in the forefront. The maintenance or increase of supplies of the commodity or the equitable distribution and availability at fair prices are the fundamental purposes of the Act.

40. We do not think that we need deal with American cases on price fixation such as *Leo Nebbia v. People of the State of New York* (291 US 502), where the guarantee of due process against capricious action was involved. In this country, such guarantees in regard to rights of property or to carry on industry or trade or business could only arise by reason of Articles 14 and 19 of the Constitution which are excluded here because of the protection conferred upon Section 3 of the Act by the Ninth Schedule of the Constitution. I may, however, mention that in *Permian Basin Area Rate Cases* (20 L Ed rd 312), where the majority of learned Judges of the U.S. Supreme Court laid down, inter alia, with regard to price fixation by a body of experts of Federal Power Commission required to proceed quasi-judicially, that in order to "overturn the Commission's judgment" the petitioners must "undertake the heavy burden of making a convincing showing that it is invalid, because it is unjust and unreasonable in its consequences". That was a case in which a Commission was charged with a duty to fix rates in accordance with certain principles after taking evidence and hearing parties affected. Nevertheless, the duty of the petitioners was held to extend to demonstrating the unreasonableness and injustice of the consequences. A fortiori, patent injustice and unreasonable injury to the interests of consumers must be shown if a measure of price control,

in the nature of either legislative or purely administrative action is assailed. So long as the action taken is not so patently unjust and unreasonable as to lead to the irresistible conclusion that it could not fall within Section 3(1) of the Act it cannot be set aside or declared invalid. The test has to be that of consequences on objects sought by Section 3(1) of the Act. Judged by this test we think that the Order of September 30, 1977, fell within the purview of Section 3 of the Act and it has served its purposes.

41. For reasons given above, the order of dismissal of writ petitions already passed by us on November 23, 1977 is, in our opinion, fully justified.

Order dated February 21, 1978 on behalf of Chandrachud, Bhagwati, Fazal Ali, Shinghal and Jaswant Singh, JJ.

42. We will give our reasons later since as at present advised, with great respect, we are not disposed to agree with a part of the reasoning of the learned Chief Justice.

The following judgment was then delivered on May 5, 1978 by Chandrachud, C.J. on behalf of himself, Bhagwati, Fazal Ali, Shinghal and Jaswant Singh, JJ.

CHANDRACHUD, C.J. (concurring) ❖

On September 30, 1977, the Government of India in its Ministry of Civil Supplies and Co-operation issued the Mustard Oil (Price Control) Order, 1977, in exercise of the power conferred by Section 3 of the Essential Commodities Act (10 of 1955). The Price Control Order provides by clause 3 that no dealer shall either by himself or by any person on his behalf sell or offer to sell any mustard oil at a retail price exceeding Rs. 10 per kilogram, exclusive of the cost of container but inclusive of taxes. Clause 2 defines a 'dealer' to mean a person engaged in the business of purchase, sale or storage for sale of mustard oil.

44. The price Control Order was challenged in this Court by several dealers on the ground, mainly, that it violates Articles 14, 19(1)(f) and 19(1)(g) of the Constitution. Article 301 was cited but not argued with any seriousness.

45. The argument that the Price Control Order offends against the right to property and the right to carry on trade or business requires for its appreciation and decision the awareness that by the Fortieth Amendment passed in 1976, the Essential Commodities Act was placed in the Ninth Schedule to the Constitution as item 126. One of the main contentions of the Union Government in answer to the petitioners' challenge to the constitutionality of the Price Control Order is that since the Act, by reason of its being placed in the Ninth Schedule, is immune from attack on the ground that its provisions violate the fundamental rights guaranteed by Part III of the Constitution, the Price Control Order which is but a creature of the Act must enjoy the same immunity. This contention has found favour with the learned Chief Justice Shri M. H. Beg but, with respect, we are unable to share his view.

46. Article 31A of the Constitution saves laws which provide for matters mentioned in clause (a) to (e) thereof from a challenge under Articles 14, 19 or 31 notwithstanding anything contained in Article 13 of the Constitution. Article 31B which was introduced by the Constitution (First Amendment) Act, 1951, validates certain Acts and Regulations by providing that without prejudice to the generality of the provisions contained in Article 31A, "none of the Acts and Regulations

specified in the Ninth Schedule nor any of the provisions thereof" shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of Part II. On a plain reading of this article it seems to us impossible to accept that the protective umbrella of the Ninth Schedule takes in its everwidening wings not only the Acts and Regulations specified therein but also Orders and Notifications issued under those Acts and Regulations. Article 31B constitutes a grave encroachment on fundamental rights and doubtless as it may seem that it is inspired by a radiant social philosophy, it must be construed as strictly as one may, for the simple reason that the guarantee of fundamental rights cannot be permitted to be diluted by implications or inferences. An express provision of the Constitution which prescribes the extent to which a challenge to the constitutionality of a law is excluded, must be construed as demarcating the farthest limit of exclusion. Considering the nature of the subject-matter which Article 31B deals with, there is, in our opinion, no justification for contending by judicial interpretation the provisions of the field which is declared by that article to be immune from challenge on the ground of violation or abridgment of fundamental rights. The article affords protection to Acts and Regulations specified in the Ninth Schedule. Therefore, whenever a challenge to the constitutionality of a provision of law on the ground that it violates any of the fundamental rights conferred by Part III is sought to be repelled by the State on the plea that the law is placed in the Ninth Schedule, the narrow question to which one must address oneself is whether the impugned law is specified in that Schedule. If it is, the provisions of Article 31B would be attracted and the challenge would fail without any further inquiry. On the other hand, if the law is not specified in the Ninth Schedule, the validity of the challenge has to be examined in order to determine whether the provisions thereof invade in any manner any of the fundamental rights conferred by Part III. It is thus no answer to say that though the particular law, as for example a Control Order, is not specified in the Ninth Schedule, the parent Act under which the Order is issued is specified in that Schedule.

47. The Mustard Oil (Price Control) Order, 1977, was passed under Section 3 of the Essential Commodities Act, 1955, which by the relevant part of its sub-section (1) empowers the Central Government to provide by an order for regulating or prohibiting the production, supply and distribution of an essential commodity or trade and commerce therein, if it is of the opinion that it is necessary or expedient so to do for maintaining or increasing supply of any essential commodity or for securing its equitable distribution and availability at a fair price. Since the Act of 1955 has been placed in the Ninth Schedule, some of its provisions, including of course Section 3(1), is open to attack on the ground that it ever was or is inconsistent with or taken away or abridges any of the rights conferred by any provision of Part III of the Constitution. But that is the farthest that the immunity offered by Article 31B can go. In other words, speaking of a provision directly in point, Section 3(1) of the Act of 1955 is not open to challenge on the ground, to take a relevant instance, that it violates the guarantee contained in Article 19(1)(f) or 19(1)(g) of the Constitution. But there is no justification for extending the protection of that immunity to an Order passed under Section 3 of the Act like the Mustard Oil (Price Control) Order. Extending the benefit of the protection afforded by Article 31B to any action taken under an Act or Regulation which is specified in the Ninth Schedule, appears to us to be an unwarranted extension of the provisions contained in Article 31B, neither justified by its language nor by the policy or principle underlying it. When a particular Act or Regulation is placed in the Ninth Schedule, the Parliament may be assumed to have applied its mind to the provisions of the particular Act or Regulation and to the desirability, propriety or necessity of placing it in the Ninth Schedule in order to obviate a possible challenge to its provisions on the ground that they offend against the provisions of Part III. Such an assumption cannot, in the very nature of things, be made in the case of an Order issued by the Government under an Act or

Regulation which is placed in the Ninth Schedule. The fundamental rights will be eroded of their significant content if by Judicial interpretation a constitutional immunity is extended to Orders to the validity of which the Parliament, at least theoretically, has had no opportunity to apply its mind. Such an extension takes for granted the supposition that the authorities on whom power is conferred to take appropriate action under a statute will act both within the framework of the statute and within the permissible constitutional limitations, a supposition which just experience does not justify and to some extent falsifies. In fact, the upholding of laws by the application of the theory of derivative immunity is foreign to the scheme of our Constitution and accordingly Orders and Notifications issued under Acts and Regulations which are specified in the Ninth Schedule must meet the challenge that they offend against the provisions of Part III of the Constitution. The immunity enjoyed by the Parent Act by reason of its being placed in the Ninth Schedule cannot proprio vigore be extended to an offspring of the Act like a Price Control Order issued under the authority of the Act. It is therefore open to the petitioners to invoke the writ jurisdiction of this Court for determination of the question whether the provisions of the Price Control Order violate Articles 14, 19(1)(f) and 19(1)(g) of the Constitution.

48. The learned Solicitor General relies, justifiably, on the decisions of this Court in *Vasantlal Maganbhai Sanjanwala v. State of Bombay* ((1961) 1 SCR 341 : AIR 1961 SC 4 : (1961) 1 SCJ 394) and *Latafat Ali Khan v. State of U. P.* (1971 Supp SCR 719 : (1971) 2 SCC 355), in support of his argument that the Price Control Order must receive the protection of the Ninth Schedule to the same extent as the Essential Commodities Act under which that Order was issued and which has been placed in the Ninth Schedule. In *Vasantlal Maganbhai* the vires of Section 6(2) of the Bombay Tenancy and Agricultural Lands Act, 1948, was challenged on the ground that it suffered from the vice of excessive delegation. In exercise of the power conferred by Section 6(2), the State Government had issued a Notification fixing the maximum rent payable by tenants of lands situated in the areas specified in the Schedule appended to Notification. The validity of that Notification was challenged on the ground that it offended against Article 31 of the Constitution. The first contention was rejected by the majority which held that Section 6(2) did not suffer from excessive delegation. On the second question it was held by the Court that since the Bombay Tenancy Act was placed in the Ninth Schedule, the Notification which was issued under Section 6(2) of that Act could not be challenged on the ground that it violated Article 31. Subba Rao, J., who was in minority, did not consider the latter point regarding the validity of the notification issued under Section 6(2) because he took the view that Section 6(2) suffered from the vice of excessive delegation and was therefore unconstitutional. This decision undoubtedly lends support to the contention of the Union Government that if an Act or Regulation is specified in the Ninth Schedule, any order or notification issued under it would equally be entitled to the protection of that Schedule. We are, however, of the opinion, respectfully, that the decision in *Vasantlal Maganbhai* does not reflect the true legal position which, according to us, is that the immunity enjoyed by an Act placed in the Ninth Schedule cannot be extended to an order or notification issued under it. The decision of the Court appears to have been influenced largely by the consideration that the only argument advanced against the validity of the notification was that in substance it amended the provisions of Section 6(1) and was therefore a fresh legislation to which Article 31B could not apply. The Court rejected that argument and held that if Section 6(2) was valid, the exercise of the power validly conferred on the Provincial Government could not be treated as a fresh legislation.

49. The decision in *Latafat Ali Khan* (supra) contains no reasons beyond the bare statement that "if a statutory rule is within the powers conferred by a section of a statute protected by Article 31B, it is difficult to say that the rule must further be scrutinised under Articles 14, 19, etc.". It is clear from the judgment that since the Court was of the opinion that "at any rate" the impugned provisions of

the U.P. Imposition of Ceiling on Land Holdings Act and the Rules were part of a scheme of land reform and were therefore protected from attack under Article 31A of the Constitution, it did not think it necessary to examine the question whether statutory rules framed under the Act which was placed in the Ninth Schedule would enjoy the same immunity.

50. The decision of this Court in *Godavari Sugar Mills Ltd. v. S. B. Kamble* ((1975) 3 SCR 885 : (1975) 1 SCC 696) appears to us to be in point and it support the petitioners' contention that the benefit of Article 31B of the Constitution cannot be attended to an order or notification issued under an Act which is placed in the Ninth Schedule. The Bombay High Court while affording protection of Article 31B to the Maharashtra Agricultural Lands (Ceilings on Holdings) Act, 1961, which was included in the Ninth Schedule, also granted the benefit of that protection to the later Amending Acts 1968, 1969 and 1970 on the ground that they were only ancillary or incidental to Section 28 of the Principal Act. That view was rejected by this Court on the ground that if the protection afforded under Article 31B is extended to amendments made to an Act or Regulation subsequent to its inclusion in the Ninth Schedule, the result would be that even those provisions would enjoy the protection which were never scrutinised and could not, in the very nature of things, have been scrutinised by the prescribed majority vested with the power of amending the Constitution. That, according to the Court, would be tantamount to giving a power to the State Legislature to amend the Constitution in such a way as would enlarge the contents of the Ninth Schedule to the Constitution. Khanna, J., who spoke for the Court, observed that "Article 31B carves out a protected zone", that any provision which has the effect of making an inroad into the guarantee of fundamental rights must be construed very strictly and that it is not permissible to the Court to widen the scope of such a provision or to extend the frontiers of the protected zone beyond that is warranted by the language of the provision. In the result, it was held that the entitlement to protection cannot be extended to provisions which were not included in the Ninth Schedule and that this principle would hold good irrespective of the fact whether the provision in regard to which the protection was sought dealing with new, substantive matters or with matters which were mainly incidental or ancillary to those already protected. This decision shows unmistakably that the circumstance that a Control Order is a mere creature of the parent Act and is incidental or ancillary to it cannot justify the protection of the Ninth Schedule being extended to it on the ground that the parent Act is incorporated in that Schedule.

51. But, having won the battle on a point of law, undoubtedly of public importance, the petitioners have to lose the war of price-fixation because there is no substance in their grievance that the Price Control Order offends against Articles 14, 19(1)(f) and 19(1)(g). Taking first the challenge under Article 14 for consideration, the argument is that the impugned Order treats the entire country as one unit regardless of regional variations relating to factors like the cost of procurement of raw material and freight. The contention, in other words, is that the order is over-inclusive since it treats unequals as equals by imposing an identical burden upon a wider range of individuals than those who can legitimately be treated as constituting one single class for the purpose of remedying the mischief at which the law aims. In the first place, the averments in the various writ petitions are far too vague and general to justify the application of Article 14. The petitioners have failed to show by acceptable data that they fall into a separate class altogether and cannot therefore be subjected to the restraints of a single order of price fixation. It may be that economic factors governing the mustard oil trade vary from region to region as in the case of any other trade and further, the pattern of the trade may differ in different growing regions and manufacturing centres like Uttar Pradesh, Rajasthan, Bihar, West Bengal, Punjab and Orissa. But that by itself cannot justify the argument that different prices must be fixed for different regions and that failure to do so would necessarily entail discrimination. 'Dealers' in Mustard Oil, wherever they operate, can legitimately comprise a single

class for the purpose of price fixation, especially as it is undisputed that the two basic constants of the trade are that the cost of mustard seed constitutes 94 per cent of the cost of the mustard oil and that about 3.12 kilograms of seed goes into the extraction of one kilogram of oil. Fixation of different prices for different regions will, in this background, frustrate the very object of the exercise that an essential commodity should be made available to the consumer at a fair price. Consumer goods have a disconcerting tendency to disappear from regions where prices are lower and they notoriously migrate to areas where higher prices rule. Besides, the grievances of the West Bengal dealers that since they have to import mustard seed from Uttar Pradesh their cost of production is higher than in Uttar Pradesh can be met with the answer that in any event, West Bengal has also to import at least one-third of its total annual requirement of 1.3 lakhs of metric tones of Mustard Oil. Uttar Pradesh grows 66% of the total production of mustard seed whereas West Bengal grows only 6%. The question really is whether dealers in different regions can be said to be so differently situated in the context of and in relation to the purpose for which the Price Control Order is issued that one common price for dealers all over the country can reasonably be described as discriminatory as against some of them. As observed earlier, there is no reliable data to support this contention and we cannot accept the charge of over-inclusiveness for the mere reason that dealers in a certain region have to import their raw material from another region. Perhaps, the high rate of turnover and consumption in a region like West Bengal may easily absorb the additional cost of freight. We are therefore unable to hold, to use the language of Mathew, J., in *State of Gujarat v. Shri Ambica Mills Ltd.* ((1974) 3 SCR 760, 782 : (1974) 4 SCC 656 : 1974 SCC (L&S) 381), that the Government of India, in fixing one common price for mustard oil for the whole country, has acted like Herod who ordered the death of all male children born on a particular day because one of them would some day bring about his downfall.

52. It is interesting that in matters of price fixation, whichever method the authorities adopt is made the subject-matter of challenge for one reason or another, often conflicting and contradictory. In *Saraswati Industrial Syndicate Ltd. v. Union of India* ((1975) 1 SCR 956 : (1974) 2 SCC 630), one of the contentions on behalf of the manufacturers of sugar was that sugar prices should not have been determined on the basis of 22 different zones but should have been determined either on an All India basis or for a unit of five zones. That contention was rejected by this Court but the case is an instance of how a division of the country into separate zones for the purpose of fixing the price of an essential commodity does not offer a commonly acceptable solution. It is doubtless that if lower prices were fixed for Uttar Pradesh on the ground that the dealers there were not required to import raw material from outside, a hue and cry would have been raised that the Government of India was victimising the dealers in a particular area for the irrelevant reason that it grew the raw material in abundance. In the ultimate analysis, the mechanics of price fixation has necessarily to be left to the judgment of the executive and unless it is patent that there is hostile discrimination against a class of operators, the processual basis of price fixation has to be accepted in the generality of cases as valid.

53. That takes us to the petitioners' contention that the Price Control Order is violative of the petitioners' rights under Articles 19(1)(f) and 19(1)(g) of the Constitution. The case of *M/s. Prag Ice & Oil Mills* who are petitioners in Writ Petition 712 of 1977 is as follows :

54. The average cost of production of mustard oil, when the Price Control Order was issued, was about Rs. 1351.10 per quintal i.e. Rs. 13.51 per kilogram. Taking into consideration overhead costs and allowing for a reasonable margin of profit, the fair selling price of mustard oil would come to Rs. 14.01 per kilogram at the factory gate. Petitioners, being wholesalers, sell their goods to other wholesalers and retailers some of whom have to transport the goods at considerable distances from the petitioners' factory. Under the impugned Order the price of mustard oil is fixed at Rs. 10 per

kilogram which means that the petitioners have to sell the goods to the retailer at about Rs. 8.50 per kilogram since the retailer has to provide for a margin of at least Rs. 1.50 per kilogram for his costs and a small profit. Thus the petitioners have to suffer a loss of over Rs. 5 per kilogram as a result of the Price Control Order. By this method, the petitioners are deprived of their right to acquire and hold their property and carry on their trade or business of extracting, manufacturing and selling mustard oil. The price of Rs. 10 per kilogram has been fixed, according to the petitioners, arbitrarily and without any application of mind. These allegations contained in the Writ Petition of M/s. Prag Ice & Oil Mills may be taken as representing broadly the grievance of the other petitioners who are more or less similarly situated.

55. These allegations have been traversed by Shri V. Srinivasan, Deputy Secretary to the Ministry of Civil Supplies and Co-operation, Government of India, on behalf of the Union Government. Shri Srinivasan has stated in his affidavit that in March 1977, the retail price of mustard oil in several mustard oil consuming centres ranged between Rs. 9.75 and Rs. 10.81 per kilogram. It became necessary to issue the impugned Order in view of the fact that the price of mustard oil was increasing persistently in spite of the fact that the prices of other edible oils were showing a declining trend. The available stocks disappeared from the market suddenly and the Government had to intervene in order to control the distribution of an essential commodity in public interest. The fixation of price in these circumstances was necessarily empirical, for which purpose the Government took into account prices which were prevailing in the market when the goods were freely available, the general level of prices of other edible oils, the purchasing power of the consumer and the amount of loss which the industry was able to absorb after it had made huge profits in prosperous years. The affidavit further says that even at Rs. 10 per kilogram, it was possible for the petitioners to make a small profit but, whether or not the dealers made any profit, the validity of the Price Control Order was not liable to be challenged on the ground that the dealers would incur a loss if they were obliged to sell mustard oil at Rs. 10 per kilogram. The question as to which was the fair price to the consumer was kept by the Government in the forefront and by that method alone could the dominant object of the Essential Commodities Act be achieved effectively.

56. Shri Srinivasan's affidavit further states that mustard seed is grown mainly in the rabi season, i.e. from September to October and February to March and the peak marketing season is from April to June. The mustard crop is by and large grown by small farmers who have no staying ability and who, in their anxiety to dispose of their produce as quickly as possible after the harvest, sell their produce between April and June. From this it is stated to follow that the millers effect the bulk of their purchases during the first quarter of the year and therefore, the petitioners could not be heard to contend that the price of mustard seed after the coming into force of the impugned Price Control Order should be taken into account for determining the cost which they have to incur in producing mustard oil. The affidavit contains a table showing the prices paid by the millers and the prices received by the farmers for the mustard seed. The fair price of the mustard oil, according to the Government, could be fixed on the basis of weighted average price or the mean price of the mustard seed. But in order not to cause hardship to the dealers, the price was fixed at Rs. 10 per kilogram on the basis of the average of the highest and the lowest of the market prices prevailing during the period of bulk arrivals of the seed in the market. The prices ranging at ten different centres are alleged to have been taken into account, namely, Aligarh, Allahabad, Hapur, Gauhati, Hathras, Jullundur, Kanpur, Moga, Rohtak and Sriganaganagar. Those prices yield a mean price of around Rs. 350.0 per quintal of mustard seed and upon that basis the retail price works out to be less than Rs. 10 viz., Rs. 9.95 per kilogram.

57. Considering these rival contentions and the date which has been produced before us in support

thereof, we are unable to accept the petitioners' submission that the Price Control Orders is violative of their rights under Articles 19(1)(f) and 19(1)(g) of the Constitution. In the first place, it is impossible to determine in these writ petitions the accuracy of the petitioners' case that they purchase mustard seed from month to month and from week to week as the crushing of the progresses. We see no reason to doubt the statement contained in the affidavit filed on behalf of the Government of India that most of the growers of mustard seed are small agriculturists who have hardly any staying ability and are therefore compelled to sell their produce immediately after the harvesting season, that is to say, between March and June. If the prices of mustard seed prevailing during that period are taken into account, it is difficult to accept that the price of Rs. 10 per kilogram is so patently unreasonable as to be violative of the petitioners' right to hold property or to do trade or business.

58. An argument was repeatedly advanced before us on behalf of the petitioners that it is futile to fix the price of oil without at the same time fixing the ceiling price of the raw material, namely, the mustard seed. This contention is also effectively met by the respondent's plea that the bulk of the purchases are made by the petitioners immediately after the harvesting season and that, considering the pattern of the trade in mustard seed it is wholly unnecessary to control the price of the seed in order effectively to control the price of mustard oil. It is significant that whereas mustard seed was sold in certain areas at prices ranging between Rs. 480 and Rs. 520 per quintal in September 1977, prices are the promulgation of the impugned Price Control Order had come down to a range between Rs. 365 and Rs. 390 per quintal. This has not been denied by the petitioners but they describe the phenomenon as irrelevant for the purpose of determining the legality of the Price Control Order. Their contention in which we find no substance, is that the consequence of the Price Control Order cannot be looked at for the purpose of deciding whether the price of mustard oil was fixed in accordance with legally acceptable principles. The proof of pudding, as the saying goes, is in the eating, and no court can shut its eyes to the fact that the Price Control Order produced the salutary and tangible result of bringing down the price of raw material.

59. The basic rule of construction in these matters, as observed in *Vrajlal Manilal & Co. v. State of M. P.* ((1976) 1 SCR 400, 409 : (1969) 2 SCC 248), is that a mere literal or mechanical construction is not appropriate where important questions such as the impact of an exercise of a legislative power on constitutional provisions and safeguards thereunder are concerned. In cases of such a kind, two rules of construction have to be kept in mind : (1) that courts generally lean towards the constitutionality of a legislative measure impugned before them upon the presumption that a legislature would not deliberately flout a constitutional safeguard or right, and (2) that while construing such an enactment the court must examine the object and the purpose of the impugned Act, the mischief it seeks to prevent and ascertain from such factors its true scope and meaning.

60. Section 3(1) of the Essential Commodities Act, 1955, empowers the Central Government to fix the prices of essential commodities if it is of the opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at a fair price. Sub-section (2)(c) of Section 3 provides that without prejudice to the generality of the power conferred by sub-section (1), an order made under that sub-section may provide for controlling the price at which any essential commodity may be bought or sold. The dominant purpose of these provisions is to ensure the availability of essential commodities to the consumers at a fair price. And though patent injustice to the producer is not to be encouraged, a reasonable return on investment or a reasonable rate of profit is not the sine qua non of the validity of action taken in furtherance of the powers conferred by Section 3(1) and Section 3(2)(c) of the Essential Commodities Act. The interest of the consumer has to be kept in the forefront and the

prime consideration that an essential commodity ought to be made available to the common man at a fair price must rank in priority over every other consideration.

61. We are not impressed by the play of statistics on the part of the petitioners which is designed to show that as a result of the Price Control Order, they are faced with a loss of about Rs. 5 per kilogram on the sale of mustard oil. We will ignore, while we are on this point, the pronounced reiteration of the respondent that the petitioners have made huge profits in past years and that their concerns are sufficiently prosperous to be able to absorb a small loss for a temporary period. But even in the absence of satisfactory proof of the extent of the profits made by the petitioners in past years, we are of the opinion that the circumstance that the petitioners may have to suffer a loss over a short period immediately following upon the promulgation of the Price Control Order will not render the Order constitutionally invalid. The interplay of economic factors and the laws of demand and supply are bound eventually to have their impact on the pattern of prices prevailing in the market. If the dealer cannot lawfully sell the finished product at more than Rs. 10 per kilogram, the price of raw material is bound to adjust itself to the price of the product. Subsequent events unmistakably demonstrate the effect of such interplay the favorable reaction which the Price Control Order has produced on the price of mustard seed. But above all things, it is necessary to bear in mind in matters of the present nature what Krishna Iyer, J. said in *B. Banerjee v. Anita Pan* ((1975) 2 SCR 774, 782 : (1975) 1 SCC 166, 174 (Para 9)), that such provisions have to be prevented through a socially constructive, not legally captious microscope to discover a glaring unconstitutional infirmity, that when laws affecting large chunks of the community are enacted stray misfortunes are inevitable and that social legislation without tears, affecting vested rights, is virtually impossible.

62. Having considered the matter from every possible angle, we are unable to accept the petitioners' contention that the impugned Price Control Order is so unreasonable as to be constitutionally invalid. As observed by Beg. J., *Saraswati Industrial Syndicate*, it is enough compliance with the constitutional mandate if the basis adopted for price fixation is not shown to be so patently unreasonable as to be in excess of the power to fix the price.

63. Learned Counsel for the petitioners expressed the fear that the fixation of an uneconomic price will drive the manufacturers out of the market and thus the very source of supply of an essential commodity will dry up, thereby frustrating the object of the Essential Commodities Act that the consumer must get his basic needs at a fair price. The fallacy of this contention is that immediately prior to the promulgation of the Price Control Order the consumer was denied the chance to get the mustard oil at a price which he could reasonably afford. For him, therefore, the supply had already dried up. If, after the issuance of the order, the supply position shows no improvement, that consequence cannot be legitimately attributed to the operation of the Price Control Order. At best, the Order can then be said to have failed to achieve its purpose.

64. This discussion will not be complete without reference to the decision of a Constitution Bench of this Court in *Shree Meenakshi Mills Ltd. v. Union of India* ((1974) 2 SCR 398 : (1974) 1 SCC 468). The question which arose in that case was as regards the validity of a notification fixing fair prices of cotton yarn. It was contended on behalf of the petitioners therein that the price fixed was arbitrary because the fluctuation in the price of cotton was not taken into consideration, the price of raw materials, the liability for wages and the necessity for ensuring reasonable profit to the trader are not taken into accounts' and above everything else, the industry was not ensured a reasonable return on its investment. These contentions were rejected by Court on the ground that, just as the industry cannot complain of rise and fall of prices due to economic factors in an open market, it cannot similarly complain of some increase in or reduction of prices as a result of a notification

issued under Section 3(1) of the Essential Commodities Act because, such increase or reduction is also based on economic factors. Dealing with the contention that a reasonable profit must be assured to the manufacturers, the Court held that ensuring a fair price to the consumer was the dominant object and purpose of the Essential Commodities Act and that object would be completely lost sight of, if the producer's profit was kept in the forefront. Ray, C.J., speaking for the Court, observed (SCC p. 490, para 66) :

In determining the reasonableness of a restriction imposed by law in the field of industry, trade or commerce, it has to be remembered that mere fact that some of those who are engaged in these are alleging loss after the imposition of law will not render the law unreasonable. By its very nature, industry or trade or commerce goes through periods of prosperity and adversity on account of economic and sometimes social and political factors. In a largely free economy when controls have to be introduced to ensure availability of consumer goods like foodstuff, cloth and the like at a fair price, it is an impracticable proposition to require the Government to go through the exercise like that of a Commission to fix the prices.

Another passage from the judgment of the learned Chief Justice which has an important bearing on the instant case is to the following effect (SCC p. 491 para 67) :

When available stocks go underground and the Government has to step into control distribution and availability in public interest, fixing of price cannot be only empirical. Market prices at a time when the goods did not go underground and were freely available, the general rise in prices, the capacity of the consumer specially in case of consumer goods like foodstuff, cloth etc., the amount of loss which the industry is able to absorb after having made huge profits in prosperous years, all these enter into the calculation of a fair price in an emergency created by artificial shortages.

65. On this aspect of the matter, the Court cited with approval a passage from an American decision, *Secretary of Agriculture v. Central Reig Refining Company* (94 Law Ed 381 : 338 US 604, 620) to the effect that Courts of Law cannot be converted into tribunals for relief from the crudities and inequities of complicated experimental economic legislation.

66. Counsel for the petitioners relied upon the decisions in *Panipat Co-operative Sugar Mills v. Union of India* ((1973) 1 SCC 129 : (1973) 2 SCR 860 : AIR 1973 SC 537) and *Anakapalle Co-operative Agricultural and Industrial Society Ltd. v. Union of India* ((1973) 3 SCC 435 : (1973) 2 SCR 882 : AIR 1973 SC 734) in support of their contention that fixation of a price without ensuring a reasonable return to the producers or dealers is unconstitutional. The infirmity of this argument, as pointed out in *Meenakshi Mills v. Union of India* (SCC pp. 489-493) is that these two decisions turn on the language of Section 3(3C) of the Essential Commodities Act under which it is statutorily obligatory to ensure to the industry a reasonable return on the capital employed in the business of manufacturing sugar. These decisions can, therefore, have no application to cases of price fixation under Section 3(1) read with Section 3(2)(c) of the Act. Cases falling under sub-sections 3A, 3B and 3C of Section 3 of that Act belong to a different category altogether.

67. It is customary in price fixation cases to cite the oft-quoted decision in *premier Automobiles Ltd. v. Union of India* ((1972) 2 SCR 526 : (1972) 4 SCC (N) 1) which concerned the fixation of price of motor cars. It is true that it was realized that the decision constitutes no precedent in matters

of price fixation and was tendered for reasons peculiar to the particular case. In page 535 of the Report Grover, J., who spoke for the Court, stated at the outset of the judgment :

Counsel for all the parties and the learned Attorney General are agreed that irrespective of the technical or legal points that may be involved, we should base our judgment on examination of correct and rational principles and should direct deviation from the report of the Commission which was an expert body presided over by a former Judge of a High Court only when it is shown that there has been a departure from established principles or the conclusions of the Commission are shown to be demonstrably wrong or erroneous.

By an agreement of parties the Court was thus converted into a Tribunal for considering every minute detail relating to price fixation of motor cars. Secondly, as regards the escalation clause, the Court recorded at page 543 that it was not disputed on behalf of the Government, and the Attorney General accepted the position, that a proper method should be devised for escalation or de-escalation. Thirdly, it is clear from page 544 of the Report that the Learned Attorney General also agree that a reasonable return must be allowed to the manufacturers on their investment. The decision thus proceeded partly on an agreement between the parties and partly on concessions made at the Bar. That is the reason why the judgment in Premier Automobiles cannot be treated as a precedent and cannot afford any appreciable assistance in the decision of price fixation cases.

68. The contention that the Price Control Order is arbitrary because it is not limited in point of time is without any merit. In the very nature of things, orders passed under Section 3(1) read with Section 3(2) of the Essential Commodities Act are designed primarily to meet urgent situations which require prompt and timely attention. If a price control order brings about an improvement in the supply position or if during the period that such an order is in operation there is a fall in prices so as to bring an essential commodity within the reach of the ordinary consumer, the order shall have lost its justification and would in all probability be withdrawn. That in fact is what has happened in the instant case. It appears that the supply position having improved, or so at any rate seems to be the assessment of the situation by the Government, the order has been recently withdrawn.

69. Learned Counsel for the petitioners laid great stress on the circumstances that, as is shown by the affidavit filed on behalf of the Union Government, the Price Control Order did not take into account the circumstance that the cost of production of mustard oil includes a fairly large margin of profit of the middleman. It is urged that small millers cannot afford to make large investments and lock up their limited capital and therefore resort is required to be had to the intervention of the middleman who is in position to invest a large capital in the purchase of raw material and who, naturally, expects a fair return on his investment. The intervention of the middleman is an acknowledged reality of all trades and businesses. The fact that the middleman's profit increases the price of goods which the consumer has to pay, was described by this Court in *Narendra Kumar v. Union of India* ((1960) 2 SCR 375 : AIR 1960 SC 430) as 'axiomatic'. As observed in that case, since the middleman's charges often add to a considerable sum it has been the endeavour in modern times for those responsible for social control to keep the middleman's activities to the minimum and to attempt to replace them largely by co-operative sale societies of producers and co-operative purchase societies of consumers. The elimination of the middleman is bound to cause trouble and inconvenience, but the ultimate saving in the cost of the finished product could more than balance that inconvenience. The argument of the petitioners really amounts to a rigid insistence that they are entitled to carry on their business as they please, mostly in a traditional manner, regardless of its

impact on public interest. But, property rights are not absolute, and important as the right of property may be, the right of the public that such rights be regulated in common interest is of greater importance. These co-relative rights, as observed in *Leo Nebbia v. People of State of New York*, are always in collision.

No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint the private right must yield to the public need.

In the words of Justice Roberts who delivered the opinion of the Court in *Leo Nebbia* :

The Constitution does not secure to any one liberty to confront his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.

70. Counsel for the petitioners characterised the fixation of price in the instant case as a veiled transgression of power conferred by Section 3(1) of the Essential Commodities Act. In support of that submission the judgment of its Court in *K. C. Gajapati Narayan Deo v. State of Orissa* (1954 SCR 1 : AIR 1953 SC 375) was cited in which it was said that when a legislative power is defined by reference to purpose, legislation not directed to that purpose will be invalid. We are unable to appreciate how, if the Government has got the power to fix a fair price of an essential commodity, it can be said that they have under a pretext trespassed upon a field which does not properly belong to them. The power conferred by Section 3(1) of the Essential Commodities Act is undoubtedly purposive. But it seems to us incontrovertible that the Price Control Order was promulgated by the Government in order to achieve the purpose set out in Section 3(1) of the Act. The fact that a legislative remedy or an administrative order passed in exercise of a statutory power is ineffective to mitigate an evil may show that it has failed to achieve its purpose, highlighting thereby the paradox of reform. But, as observed in *Joseph Beaubarasis v. People of the State of Illinois* (96 L Ed 919), that "is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues". We are, therefore, unable to hold that by fixing a fair price for mustard oil, the Government had committed a veiled and subtle trespass upon private rights or upon a legislative field which is not open to them to occupy.

71. To sum up, it seems to us impossible to accept the contention of the petitioners that the impugned Price Control Order is an act of hostile discrimination against them or that it violates their right to property or their right to do trade or business. The petitioners have taken us into the minutest details of the mechanism of their trade operations and they have attempted to demonstrate in relation thereto that a factor here or a factor there which ought to have been taken into account while fixing the price of mustard oil has been ignored. Dealing with a similar argument it was observed in *Metropolis Theatre Company v. City of Chicago* (57 L Ed 730) that to be able to find fault with a law is not to demonstrate its invalidity.

It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism

should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void

The Parliament having entrusted the fixation of prices to the expert judgment of the Government, it would be wrong for this Court, as was done by common consent in Premier Automobiles (20 L Ed 2d 312) to examine each and every minute detail pertaining to the Governmental decision. The Government, as was said in Permian Basin Area Rate cases, is entitled to make pragmatic adjustments which may be called for by particular circumstances and the price control can be declared unconstitutional only if it is patently arbitrary, discriminatory or demonstrably irrelevant to the policy which the legislature is free to adopt. The interest of the producer and the investor is only one of the variables in the "constitutional calculus of reasonableness" and Courts ought not to interfere so long as the exercise of Governmental power to fix fair prices is broadly within a "zone of reasonableness". If we were to embark upon an examination of the disparate contentions raised before us on behalf of the contending parties, we have no doubt that we shall have exceeded our narrow and circumscribed authority.

72. Before closing, we would like to mention that the petitioners rushed to this Court too precipitately on the heels of the Price Control Order. Thereby they deprived themselves of an opportunity to show that in actual fact, the Order causes them irreparable prejudice. Instead, they were driven through their ill-thought haste to rely on speculative hypothesis in order to buttress their grievance that their right to property and the right to do trade was gone or was substantially affected. A little more patience, which could have been utilised to observe how the experiment functioned, might have paid better dividends.

73. The impugned Price Control Order is, therefore, valid and the challenge made thereto by the petitioners has to fail. These are our reasons in support of the order passed earlier that the petitions be dismissed with costs.

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