SUPREME COURT OF INDIA

I. T. C. LTD.

Vs.

AGRICULTURAL PRODUCE MARKET COMMITTEE & ORS.

24/01/2002

(Ruma Pal)

Appeal (civil) 6453 of 2001

JUDGMENT

RUMA PAL, J.

I regret my inability to concur with the conclusion reached by my learned Brother, Pattanaik J, that because of the enactment of the Tobacco Board Act, 1975 by Parliament, the State Act viz., the Bihar Agricultural Produce Markets Act, 1960 in so far as it relates to levy of fee on the sale and purchase of tobacco, is invalid.

That the legislative power of Parliament in certain areas is paramount under the Constitution is not in dispute. What is in dispute is the limits of those areas as judicially defined. Broadly speaking Parliamentary paramountcy is provided for under Articles 246 and 254 of the Constitution. The first three clauses of Article 246 of the Constitution relate to the demarcation of legislative powers between the Parliament and the State Legislatures. Under clause (1), notwithstanding anything contained in clauses (2) and (3), Parliament has been given the exclusive power to make laws with respect to any of the matters enumerated in List I or the Union List in the Seventh Schedule. Clause (2) empowers the Parliament, and State Legislatures subject to the power of Parliament under sub-clause (1), to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule described in the Constitution as the 'Concurrent List' notwithstanding anything contained in sub-clause (3). Under clause (3) the State Legislatures have been given exclusive powers to make laws in respect of matters enumerated in List II in the Seventh Schedule described as the 'State List' but subject to clauses (1) and (2). The three lists while enumerating in detail the legislative subjects carefully distribute the areas of legislative authority between Parliament (List I) and the State (List II). The supremacy of Parliament has been provided for by the non obstante clause in Article 246 (1) and the words 'subject to' in Art.246 (2) and (3). Therefore, under Article 246 (1) if any of the entries in the three Lists overlap, the entry in List I will prevail. Additionally some of the entries in the State List have been made expressly subject to the power of Parliament to legislate either under List I or under List III. Entries in the Lists of the Seventh Schedule have been liberally interpreted, nevertheless Courts have been wary of upsetting this balance by a process of interpretation so as to deprive any entry of its content and reduce it to 'useless lumber'. The use of the word 'exclusive' in Clause (3) denotes that within the legislative fields contained in List II, the State Legislatures exercise authority as plenary and ample as Parliament. "The fact that under the scheme of our

Constitution, greater power is conferred upon the Centre vis-à-vis the States does not mean that States are mere appendages of the Centre. Within the sphere allotted to them, States are supreme. The Centre cannot tamper with their powers. More particularly, the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the States".

Although Parliament cannot legislate on any of the entries in the State List, it may do so incidentally while essentially legislating within the entries under the Union List. Conversely, the State Legislatures may encroach on the Union List, when such an encroachment is merely ancillary to an exercise of power intrinsically under the State List. The fact of encroachment does not affect the vires of the law even as regards the area of encroachment. This principle commonly known as the doctrine of pith and substance, does not amount to an extension of the legislative fields. Therefore, such incidental encroachment in either event does not deprive the State Legislature in the first case or Parliament in the second, of their exclusive powers under the entry so encroached upon. In the event the incidental encroachment conflicts with legislation actually enacted by the dominant power, the dominant legislation will prevail. To return to the subject of Parliamentary supremacy. The second facet of the supremacy of Parliament is to be found in Article 254 (1) which provides:

Article 254: "Inconsistency between laws made by Parliament and laws made by the Legislatures of States (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void."

In other words where in due exercise of legislative powers in the Concurrent List there is an irreconcilable conflict in the legislations enacted, the Central Legislation will prevail. The doctrine of repugnancy has been developed in this context. [See: M/s Hoechst Pharmaceuticals Ltd. V. State of Bihar 1983 (4) SCC45, 89 ; Deep Chand v. The State of Uttar Pradesh [1959] Supp. SCR 8]. The controversy, in this case, is to be resolved keeping these broad principles in mind.

The immediate question before us is whether the Tobacco Board Act, 1975 debars the States from levying market fee in respect of tobacco. In the several matters argued and heard, the main protagonists were the tobacco traders and dealers on the one hand who argue that the States cannot levy market fee on tobacco, and the Market Committees on the other who contend to the contrary. The Union of India and the Tobacco Board have supported the former while the State Governments the latter. The details of the several matters which were heard by us have been noted in the opinion of Pattanaik, J. A galaxy of counsel have made submissions in support of the opposing camps. For the purpose of convenience and coherence, the diverse arguments have been clubbed together and those contending against the States competence are referred to compendiously as the appellants and their opponents as ' the respondents'. One further clarification is necessary. As the order referring the issue to this Court was passed in an appeal relating to the Bihar Agricultural Markets Act, 1960, although several other states have enacted substantially similar statutes, I will treat the Bihar Statute as representative and refer to the provisions of that Act for deciding the issues.

The Bihar Agricultural Produce Markets Act, 1960 (referred to hereafter as the Markets Act) was enacted by the State of Bihar and is ostensibly referable to Entry 28 of List II which gives the State Legislature the exclusive power to legislate on "Markets and Fairs" read with Entry 66 of List II

according to which the State Legislature may also levy fees in respect of any matter in List II except Court fees. It is true that in Belsund Sugar Company vs. State of Bihar the Court proceeded on the basis that the Markets Act had been enacted by the Bihar Legislature not only under the legislative power vested in it by Entry 28 but also under Entries 26 and 27 of List II of the Seventh Schedule of the Constitution but in that case, there does not appear to have been any controversy raised on this point. Entries 26 and 27 of List II read as under:

26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.

27. Production, supply and distribution of goods subject to the provisions of Entry 33 of List III."

It has also been argued by the respondents that the State Act is also referable to Entry 14 of List II which describes the permissible subject matter of legislation by States as:

14: Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases.

Except for Entries 26 and 27 of List II, each of the other entries comes within the exclusive legislative domain of the States.

The Tobacco Board Act, 1975, on the other hand, is claimed by the appellants to be relatable solely to Entry 52 of List I which enables Parliament to legislate on "industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest". According to the appellants, the Markets Act seeks to regulate, inter-alia, the sale of various kinds of agricultural produce including tobacco. They contend that the provisions of the Markets Act could not be applied to tobacco because the Tobacco Act was enacted by Parliament under Entry 52 of List I to control and regulate everything relating to the tobacco industry from the growth of tobacco to its processing, storing, sale, manufacture, export and import.

It had been initially argued by the appellants that once a declaration is made in terms of Entry 52 of the Union List, the industry in respect of which the declaration is made and the entire process relating thereto becomes part of the legislative head itself and within the exclusive domain of the Parliament, and the State legislature becomes incompetent to enact any provision with regard to that industry. The submission was somewhat watered down in the reply. It was conceded that the argument was an extreme one and that the true principle was that one has to examine the actual extent of coverage by the Central enactment. The next submission was that the word 'industry' in Entry 52 of List I will have to be given a wide meaning. Passages from the Encyclopaedia Britannica were referred to, to contend that an 'industry' could be primary, secondary or tertiary. Primary industries would include agriculture, forestry, fishing, mining and the extraction of minerals etc. A secondary industry would be a manufacturing industry where raw materials supplied by primary industries are processed to manufacture consumer and non- consumer goods. A tertiary industry would be one where services were rendered such as banking, insurance, transportation, information etc. This was contrasted with the meaning of the word as defined in the Industries, Development and Regulation Act, 1951 which only deals with manufacturing industries. According to the appellants, this Court in Harakchand Ratanchand Banthia & Ors. V. Union of India 1970 (1) SCR 479 1971 SC 479 not only accepted the wide definition of industries but also specifically held that the word 'industry' in Entry 52 would also comprise production, supply and distribution of goods referred to in Entry 27 of List II. It was, therefore, contended that the provisions of the Tobacco Act were clearly within the exclusive competence of Parliament and within the field

covered in Entry 52 of List I. As a corollary to this argument, it was contended that Parliament could also legislate with regard to the raw materials supplied to a declared industry in keeping with the principle of 'pith and substance'. The next submission was that even if the State Government retained the competence to legislate on tobacco, it could not enact any statutory provisions which would be repugnant to the Central Act. The provisions of the Tobacco Act and the Markets Act were referred to in some detail to contend that they could not possibly co-exist and therefore the Central Act would have to prevail. It was submitted that in the circumstances the provisions of the Markets Act with respect to tobacco were repugnant to the provisions of the Tobacco Act and that by virtue of the provisions of Article 254(1) of the Constitution, the law made by Parliament was to prevail and the law made by the Legislatures of the State to the extent of the repugnancy with the Central Act, is void. The respondents on the other hand contended that the Tobacco Act did not and could not occupy the entire legislative field relating to tobacco. According to them, despite the declaration in Section 2 of the Tobacco Act under Entry 52 of List I, the word 'industry' in the context of the Tobacco Act could not include anything more than processing and manufacturing of tobacco. Reliance was placed primarily on the decision of the Constitution Bench in Tika Ramji & Ors. Vs. State of U.P. & Others 1956 SCR 393.

It was further submitted on behalf of the respondents that the question of repugnancy between the Markets Act and the Tobacco Act would not arise since Parliament was not competent to enact provisions in respect of a legislative field specifically provided for in List II. It was submitted that the legislative field under Entry 52 of List I was derived from Entry 24 of List II and Entry 24 did not cover the legislative fields otherwise specially provided for in List II. It was stated that Entry 28 could not be rendered redundant by the Central Government's legislation on commodities sold at markets and fairs by issuing a declaration under Entry 52 of List I. It was also submitted that there may be provisions in the Tobacco Act which may incidentally trench on the State's competence and as long as States have not legislated on that topic, the Tobacco Act may prevail. It was submitted that even if the Markets Act were enacted under Entries 26 and 27 of List II nevertheless this would not make the Market Act invalid as far as tobacco was concerned. It was further submitted that although Entries 26 and 27 in the State List were subject to the provisions of Entry 33 of the Concurrent List, there was no provision in Entry 33 of the Concurrent List which covered tobacco. It was submitted that the issue of repugnancy did not arise because Article 254(1) only relates to repugnancy in actual legislations in respect of entries in the Concurrent List. According to the respondents, assuming that Parliament was competent to legislate in respect of tobacco, there was in fact no repugnancy between the Markets Act and the Tobacco Act as the Tobacco Act did not cover post auction sales. In any event, there could be no conflict between the Markets Act and the Central Act in Bihar particularly having regard to the fact that Section 13, 13A and 14A of the Tobacco Act had not been made operative in Bihar. Reliance has been placed upon the absence of a non-obstante clause in the Tobacco Act and the presence of Section 31 in that Act which, according to the respondents, makes it clear that the Tobacco Act was to be read as being in addition to and not in derogation of any other law. Therefore according to the respondents, even if tobacco were solely within the exclusive field of legislation by Parliament, the State Legislature could recover fees for services rendered in respect of markets where tobacco may be sold.

To begin with, I do not think that this Bench should at all go into the question of the validity of the Tobacco Board Act, 1975 (referred to briefly hereafter as the 'Tobacco Act) even though the issue was argued at some length by the main protagonists before us. The dispute which originally gave rise to this set of appeals is limited to the question whether the Market Committees have the authority to levy market fee under the Markets Act on the sale of tobacco and whether the provisions in the Markets Act granting Market Committees such right are repugnant to the

provisions of the Tobacco Act and are therefore, unconstitutional. What has been placed before this Bench for its consideration is the correctness of the earlier decision in ITC Ltd & Others v. State of Karnataka 1985 (Suppl.) SCC 476. The question raised in that case was whether the provisions of the Karnataka Agricultural Produce Marketing (Regulation) Act, 1966 relating to the levy of market fee on tobacco were repugnant to the Tobacco Act. The majority held that it was. The minority view was that both Acts could co-exist. But the validity of the Tobacco Act itself was never in dispute. No doubt, the States have been given notice but the focus of the arguments has been on the levy of fees on the marketing of tobacco. As the Tobacco Act covers a much larger field, a pronouncement on the validity of all the provisions dealing with a variety of activities under the Act would not be appropriate as it would perhaps pre-empt a decision on aspects other than the marketing of tobacco without hearing those who might be interested in the outcome of a decision on those provisions.

The starting point in any controversy dealing with apparently conflicting legislative jurisdictions is to see whether the conflict can be fairly reconciled by reading the entries to which the legislations are referable, together and "by interpreting and, where necessary, modifying the language of the one by that of the other". It is only when such resolution is not possible that the Courts should be called upon to decide the question of legislative competence. This principle has been stressed in a number of cases by the Privy Council, the Federal Court and more recently by this Court. [See: The Central Provinces and Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938", 'Governor-General in Council v. Province of Madras' , State of Bombay v. F.N. Balsara AIR 1951 SC 818, 822, Accountant & Secretarial Services Pvt. Ltd. V. Union of India AIR 1988 SC 1708; Fatehchand v. State of Maharashtra: AIR 1977 SC 1825, 1827: Calcutta Gas Company (Proprietary) Ltd. V. State of West Bengal AIR 1962 SC 1044).

Similarly, when there is an apparent conflict between two statutes enacted in valid exercise of legislative powers under the Concurrent List, reconciliation must be attempted. Only when the differences are irreconcilable should the Courts resort to striking down a piece of legislation.[See: The Kannan Devan Hills Produce v. The State of Kerala: (1972) 2 SCC 218' M/s. Hoechst Pharmaceuticals Ltd. v. State of Bihar: (1983) 4 SCC 45]

In my view, if therefore, the issue raised in this case can be resolved by limiting our consideration to the question of conflict, if any, between the two entries in the seventh schedule of the Constitution to which the Tobacco Act and the Market Act are respectively relatable and between the provisions of the two statutes which have a bearing on the marketing of tobacco, it is unnecessary to stray into those areas which may not be necessary for the disposal of these appeals. The discussion in this opinion is therefore limited to the scope of the two entries and the allegedly conflicting provisions of the two Acts with which we are concerned. The controversy in this case to a large extent turns on the meaning of the word "industry" as used in the three legislative lists. Now the power to legislate in respect of all industries has been given under Entry 24 of List II to the State Legislatures subject to Entries 7 and 52 of List I. Entries 7 and 52 of List I allow Parliament to legislate in respect of particular 'industries' namely such industries which are declared by Parliament by law to be necessary for the defence or for the prosecution of war (Entry 7) and industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest (Entry 52). Trade and commerce in, and the production supply and distribution of the products of such controlled industry have been provided for in Entry 33 of the Concurrent List wherein both Parliament and the State Legislatures are competent to legislate. A Constitution Bench of this Court in The Calcutta Gas Company (Prop.) Ltd. V. the State of West Bengal has held that the expression 'industry' in all the three lists must be given the same meaning and that since ordinarily industry is in the field of State Legislation the word must be construed in the context of the other entries in List II

in such a manner so that no entry in List II is deprived of its content. In other words, the meaning of the word 'industry' is to be determined with reference to Entry 24 of List II where the power to legislate generally in respect of industries has been provided. Entries 7 and 52 are entries which specify particular industries out of this general pool. The meaning of the word 'industry' in these two entries, therefore, must necessarily be derived from the meaning which may be ascribed to the word in Entry 24 of List II.

The seminal decision on this process of interpretation for arriving at the definition of 'industry' is Ch. Tika Ramji & Others V. State of Uttar Pradesh & Ors. in which a Constitution Bench unanimously held:

"Industry in the wide sense of the term would be capable of comprising three different aspects: (1) raw materials which are an integral part of the industrial process, (2) the process of manufacture or production, and (3) the distribution of the products of the industry. The raw materials would be goods which would be comprised in Entry 26 of List II. The process of manufacture or production would be comprised in Entry 24 of List II except where the industry was a controlled industry when it would fall within Entry 52 of List I and the products of the industry would also be comprised in Entry 27 of List II except where they were the products of the controlled industries when they would fall within Entry 33 of List III."

The underlying rationale of Tika Ramji's definition of the word 'industry' is that the Constitution having expressly provided for particular fields of legislation in the three Lists, each field must be given a meaning. Entry 24 of List II cannot be read so as to subsume within itself the other entries in List II. It must be given a meaning which allows the other entries to survive and be defined to that extent with reference to what it is not.

Thus in Calcutta Gas it was held that the word 'industry' in entry 24 of List II and 7 and 52 of List I did not include gas and gas works which was in terms provided for in Entry 25. The argument in that case was that the State was incompetent to enact the Oriental Gas Company Act, 1960 under Entry 25 of List II because Parliament had passed the Industries (Development & Regulation) Act, 1951 by virtue of Entry 52 of List I. The Central Act in that case had under Section 2 declared that it was expedient in the public interest that the Union should take under its control inter-alia industries of " 'fuel gas' (coal gas, natural gas and the like)". For the purpose of promoting and regulating these industries, the Central Act enabled the Central Government to investigate into the affairs of an undertaking, to regulate its production, supply and distribution, and, if necessary to take over the management of the undertaking. The Court said that if the word 'industry' in Entry 24 of List II and, therefore, 52 of List I were interpreted to include 'gas and gas works' which were expressly covered by entry 25 List II, entry 25 may become redundant and it would amount to attributing to the authors of the Constitution "ineptitude, want of precision and tautology". As a result, the challenge to the State Act was negatived and the Central Act, insofar as it purported to deal with the gas industry, was held to be beyond the legislative competence of Parliament.

Again in B. Viswanathiah and Company and others V. State of Karnataka 1991 (3) SCC 358, writ petitions were filed challenging the validity of the provisions of the Mysore Silkworm Seed and Cocoon (Regulation of Production, Supply and Distribution) Act, 1959 (Act 5 of 1960). It was contended that the impugned provisions lacked legislative competence after the enactment by Parliament of the Central Silk Boards Act (Act 61 of 1948) which contained a declaration as contemplated under Entry 52 of List I. The Court held, following Tika Ramji, that the "control of the industry vested in Parliament was only restricted to the aspect of production and manufacture of

silk yarn or silk. It did not obviously take in the earlier stages of the industry, namely, the supply of raw materials".

It was also held:

"though the production and manufacture of raw silk cannot be legislated upon by the State legislature in view of the provisions of the Central Act and the declaration in Section 2 thereof, that declaration and Entry 52 does not in any way limit the powers of the State legislature to legislate in respect of the goods produced by the silk industry. To interpret Entry 52 otherwise would render Entry 33 in List III of the Seventh Schedule to the Constitution otiose and meaningless".

This process of defining 'industry' in Entry 24 of List II and consequently Entry 52 of List I, by eliminating from its scope the fields specifically provided for in List II or List III has been consistently followed. For example in State of A.P. v. Mc Dowell & Co: 1996 3 SCC 709 it was said:

" Parliament cannot take over the control of industries engaged in the production and manufacture of intoxicating liquors by making a declaration under Entry 52 of List I, since the said Entry governs only Entry 24 in List II but not Entry 8 in List II."

In Kanan Devan Hill Produce v. State of Kerala 1972 (2) SCC 218 it was held that a declaration under Entry 52 of the Union List in respect of the tea industry did not debar the States from legislating to acquire land under tea cultivation under Entry 18 of List II and Entry 42 of List III.

A Constitution Bench in Ganga Sugar Corporation Ltd. vs. State of Uttar Pradesh and others 1980 (1) SCC 223 upheld the power of States to impose purchase tax on sugarcane under Item 54 in the State List despite central legislation under Entry 52 of List I in respect of the sugar industry.

Another Constitution Bench in Fateh Chand v. State of Maharashtra : AIR 1977 SC 1825 had to decide the constitutional tug-of-war between the Maharashtra Debt Relief Act, 1976 on the one hand and the Gold Control Act on the other. It was contended that the Debt Act was void insofar as it dealt with "gold loans" because Parliament had occupied the field under Entry 52 of List I. It was also urged that there was inconsistency between the Debt Act and the Gold Control Act and that the Debt Act could not be given effect to to the extent of such inconsistency. The Court noted that the Debt Act came squarely within Entry 33 of List II namely "money-lending and money-lenders; relief of agricultural indebtedness" and it was held that despite the fact that the Gold Act was referable to Entry 52 of List I:

". This does not mean that other entries in the State List become impotent even regarding 'gold'. The State Legislature can make laws regarding money-lending even where gold is involved under Entry 30, List II, even as it can regulate 'gambling in gold' under Entry 34, impose sales tax on gold sales under Entry 54 regulate by municipal laws under Entry 5 and by trade restrictions under Entry 26, the type of buildings for gold shops and the kind of receipts for purchase or sale of precious metal. To multiply instances is easy, but the core of the matter is that where under its power Parliament has made a law which overrides an entry in the State List, that area is abstracted from the State List. Nothing more."

It is unnecessary to multiply instances of the numerous decisions which have followed the logic of Tika Ramji and accepted its conclusion that for the purposes of Entry 24 of List II and consequently Entry 52 of List I, 'industry' means "manufacture or production" and nothing more. It is sufficient to

note that Tika Ramji's definition of industry has been affirmed and applied recently by a Constitution Bench in Belsund Sugar Company v. State of Bihar (supra) and is still good law. Harak Chand Banthia's case does not strike a discordant note.

Harakchand Ratanchand Banthia & Ors. v. Union Of India: 1970 1 SCR 479, has been cited by the appellants in support of the proposition that the negative test laid down in Tika Ramji and developed in Calcutta Gas does not apply to define the scope of Entry 52 of List I vis-a-viz Entry 27 of List II. The submission is unacceptable.In Banthia's case the constitutional validity of the Gold (Control) Act, 1968 enacted by Parliament was questioned. Gold had been declared to be a 'controlled' industry under Entry 52 of List I by the Industries (Development & Regulation) Act, 1951. One of the challenges raised was that the activity sought to be controlled by the Gold Act, was not an industry and did not come within the purview of Parliament under Entry 52 of List I. The passage particularly relied upon by the appellants is quoted:

"The question to be considered is what is the meaning of the word "industry" in Entry 52 of List I, Entry 24 of List II and Entry 33 of List III. Whatever may be its connotation it must bear the same meaning in all these entries which are so interconnected that conflicting or different meanings given to them would snap the connection. In the Shorter Oxford English Dictionary the word "industry" is defined as " a particular branch of productive labour; a trade or manufacture." According to Webster's Third New International Dictionary (1961 edn.) the word "industry" means "(a) systematic labour especially for the creation of value; (b) a department or branch of a craft, art, business or manufacture, a division of productive and profit making labour especially one that employs a large personnel and capital especially in manufacturing; (c) a group of productive or profit making enterprises or organisations that have a similar technological structure of production and that produce or supply technically substitutable goods, services or sources of income." It was said that if the word "industries" is construed in this wide sense, Entry 27 of List II will lose all meaning and content. It is not possible to accept this contention for, Entry 27 is a general Entry and it is a well- recognised canon of construction that a general power should not be so interpreted as to nullify a particular power conferred by the same instrument. In Tika Ramji v.State of Uttar Pradesh 1956 SCR 393 the expression "industry" was defined to mean the process of manufacture or production and did not include raw materials used in the industry or the distribution of the products of the industry. It was contended that the word "industry" was a word of wide import and should be construed as including not only the process of manufacture or production but also activities antecedent thereto such as acquisition of raw materials and subsequent thereto such as disposal of the finished products of that industry. But this contention was not accepted. It was contended by Mr. Daphtary that if the process of production was to constitute "industry" a process of machinery or mechanical contrivance was essential. But we see no reason why such a limitation should be imposed on the meaning of the word "industry" in the legislative lists. Similarly it was argued by Mr. Palkhivala that the manufacture of gold ornaments was not an industry because it required application of individual art and craftsmanship and aesthetic skill. But mere use of skill or art is not a decisive factor and will not take the manufacture of gold ornaments out of the ambit of the relevant legislative entries. It is well settled that the entries in the three lists are only legislative heads or fields of legislation and they demarcate the area over which the appropriate legislature can operate. The legislative entries must be given a large and liberal interpretation, the reason being that the allocation of subjects to the lists is not by way of scientific or logical definition but is a mere enumeration of broad and comprehensive categories. It is not, however, necessary for the purpose of this case to attempt to define the expression "industry" precisely or to state exhaustively all its different aspects. But we are satisfied in the present case that the manufacture of gold ornaments by goldsmiths in India is a "process of systematic production" for trade or manufacture and so falls

within the connotation of the word "industry" in the appropriate legislative entries. It follows, therefore, that in enacting the impugned Act Parliament was validly exercising its legislative power in respect of matters covered by Entry 52 of List I and Entry 33 of List III."

(Emphasis mine)

The decision cannot be read as whittling down or deviating from the reasoning or the definition of the word industry in Tika Ramji. It does not seek to do so. Indeed the Court re-affirmed the definition of industry in Tika Ramji. The observation relating to Entry 27 of List II must be understood in relation to the language of the entry which reads:

"Production, supply and distribution of goods subject to the provisions of Entry 33 of List III."

This provides for States to generally legislate on production, supply and distribution of goods. Entry 33 of List III deals particularly with the production, supply and distribution of the products of industries where the control of such industry by the Union is declared by law to be expedient in the public interest under Entries 7 or 52 of List I. It would not have been necessary to have especially provided for trade and commerce in, and the production, supply and distribution of the products of a controlled industry in Entry 33 of List III, had the word 'industry' in Entries 7 and 52 of List I covered the field. Similarly had the word 'industry' in Entry 24 of List II been sufficient, why have a separate head under Entry 27 of the same list dealing with the production supply and distribution of goods unless we concede that the framers of the Constitution were guilty of 'ineptitude, want of precision and tantology'? The concept of a 'general' and 'particular' term is necessarily relative depending upon the context in which the term is considered. Entry 27 of List II is certainly a general entry but only in relation to Entry 33 of List III which deals with trade, commerce etc. in particular kinds of products namely the products of a controlled industry. Finally, it is clear from the passage quoted, that Banthia held that the Gold Act was legislatively competent under Entry 52 of List I because it dealt with the process of manufacture or production of gold i.e., it was within the sweep of industry as defined in Tika Ramji.

The appellants' submission that Tika Ramji narrowly construed the word because the decision was rendered in the context of the Industrial (Development & Regulation) Act, 1951 proceeds on a mis-appreciation of the decision. Merely because Tika Ramji found that the particular Central enactment under consideration was under Entry 33 of List III and not Entry 52 of List I does not limit or detract from its authoritative pronouncement on the scope of Entry 52 of List I. The finding in fact formed the basis of the conclusion that the provisions of the Central Act in question did not fall within Entry 52 of List-I. What was construed was the ambit of Entry 52 of List I and the range of a declaration under that entry. That the declaration was contained in the Industries (Development and Regulation) Act, 1951 was inconsequential and could not colour the scope of the entry itself. It is significant that Banthia's case, which according to the appellants accepted a wider meaning of 'industry', was also a case in which the relevant declaration under Entry 52 of List I was under the Industries (Development and Regulation) Act.

Banthia's case has been considered and explained in the subsequent decision of the Constitution Bench in M/s Fatehchand Himmatlal and Others V. State of Maharashtra 1977 (2) SCC 670. With specific reference to Banthia's case, the Court held:

"..We see nothing in that decision which contradicts the position that while the Gold Control Act fell within Entry 52 of List I the State List was not totally suspended for that reason for purposes of

legislating on subjects which fell within that List, but incidentally referred also to gold transactions."

To add to the persuasive force of their arguments, the appellants then put forward what can only be described an argument of alarm. It was contended that if a narrow view of industry were taken, then despite a declaration by Parliament under Entry 7 of List I that an industry was necessary for the purpose of defence of the country or for the prosecution of war, Parliament would not be competent to legislate on the supply of raw materials or distribution of the finished product. Such an argument is hardly relevant to a question of construction. In any case it overlooks the superior powers of Parliament under Entry 33 of List III and the overriding powers of Parliament during a national emergency including those under Articles 249, 250, 251 and 252. To sum up: the word 'Industry' for the purposes of Entry 52 of List I has been firmly confined by Tika Ramji to the process of manufacture or production only. Subsequent decisions including those of other Constitution Benches have re-affirmed that Tika Ramji's case authoritatively defined the word 'industry'- to mean the process of manufacture or production and that it does not include the raw materials used in the industry or the distribution of the products of the industry. Given the constitutional framework, and the weight of judicial authority it is not possible to accept an argument canvassing a wider meaning of the word 'industry'. Whatever the word may mean in any other context, it must be understood in the Constitutional context as meaning 'manufacture or production'.

Applying the negative test as evolved in Tika Ramji in this case it would follow that the word 'industry' in Entry 24 of List II and consequently Entry 52 of List I does not and cannot be read to include Entries 28 and 66 of List II which have been expressly marked out as fields within the State's exclusive legislative powers. As noted earlier Entry 28 deals with markets and fairs and Entry 66 with the right to levy fees in respect of, in the present context, markets and fairs. Entry 52 of List I does not override Entry 28 in List II nor has Entry 28 in List II been made subject to Entry 52 unlike Entry 24 of List II. This Court in Belsund Sugar (supra) has also accepted the argument that Entry 28 of List II operated in its own and cannot be affected by any legislation pertaining to industry as found in Entry 52 of List I.

If 'industry' does not include 'markets and fairs' it is important to define what markets and fairs connote. 'Market' may strictly be defined as "the meeting or congregating together of people for the purchase and sale of provisions or livestock, publicly exposed, at a fixed time and place" . A 'fair' has been judicially defined as meaning 'a periodical concourse of buyers and sellers in a place generally for sale and purchase. at times or on occasion ordained by custom . The distinction between markets and fairs appears to lie in the periodicity viz. while a market may be a regular or permanent place of business, a fair is an intermittent one. At common law, fairs and markets were also franchises or rights to hold a concourse of buyers and sellers to dispose of the commodities in respect of which the franchise is given. This included the right to levy a toll or sum payable by the buyer upon sales of articles in a market. The sense in which the word has been used in Entry 28 appears to cover not only such right but the market place itself including the 'concourse of buyers and sellers' and the regulation of all these.

The word "Markets" has also found place in Entry 48 of List 1 which reads "Stock Exchanges and future markets". A Constitution Bench of this Court in Waverly Jute Mills Co. Ltd. vs- Raymon & Co. (India) Private Ltd. [1963] 3 SCR 209 rejected the submission that the word "markets" must be restricted to "a place set apart for the meeting of the general public of buyers and sellers, freely open to any such to assemble together, where any seller may expose his goods for sale and any buyer may purchase".

It was held that :

"Market no doubt ordinarily means a place where business is being transacted. That was probably all that it meant at a time when trade was not developed and when transactions took place at specified places. But with the development of commerce, bargains came to be concluded more often than not through correspondence and the connotation of the work 'market' underwent a corresponding expansion. In modern parlance the work 'market' has come to mean business as well as the place where business is carried on."

The question then is does the Markets Act fall within this definition of the word 'markets'? The establishment of regulated markets had long been recognized as an imperative requirement of any ordered plan of agricultural development in this country. The objects and reasons for enacting the Bihar Markets Act, 1960 has been stated as: properly organising markets of agricultural and allied commodities to ensure that the agriculturist gets a fair share of the price paid by the consumer for his produce by attempting to do away or rigidly controlling the middle man. What was originally a source of private profit in common law, has by virtue of the Markets Act become a matter of municipal concern namely, setting up of regulated markets for the marketing of agricultural produce.

The provisions of the Markets Act are briefly noted. The Markets Act provides for the issuance of a notification under Section 3 by the State Government declaring its intention of regulating the purchase, sale, storage, processing of specified agricultural produce in that area. "Agricultural produce" has been defined in Section 2 (6) as:

" all produce whether processed or non-processed, manufactured or not, of Agriculture, Horticulture, Plantation, Animal Husbandry, Forest, Sericulture, Pisciculture, and includes livestocks or poultry as specified in the Schedule."

Tobacco has been mentioned at Item XI in the Schedule. Under Section 4 the State Government declares the area specified as a market area for the purpose of the Markets Act. From the date of the declaration, under Section 4 no person or authority can establish or continue or be allowed to set up any place for the purchase, sale, stores or processing of any notified agricultural produce except in accordance with the provisions of the Markets Act. Under Section 5 the State Government may declare by notification any building or locality in any market area to be the principal market yard. Sections 6 to 15 and 17 to 27-A deal with the setting up of Market Committees, their constitution and functions. These Market Committees are subject to the superintendence and control of the Bihar Agricultural Marketing Board set up under Section 33A of the Markets Act.

Section 15 prohibits notified agricultural produce from being bought or sold by any person at any place in the market area other than the relevant principal market yard or sub- market yard or yards established therein unless it is for retail sale, personal consumption or exempted by the Marketing Board under Section 15(1) or (2). The mode of purchase and sale specified under Section 15(2) is by means of open auction or tender system. Sub-section (2) of Section 18 specifically authorises the Market Committee to issue licences to persons engaged in the processing, storage or processing of agricultural produce to operate in the market area and also to control and regulate the admission of persons into the market yard or the sub-market yards and to prosecute persons trading without a valid licence. Section 27 empowers the Market Committee to levy and collect market fee from the buyer on the agricultural produce bought or sold in the market area at specified rates. The remaining sections of the Markets Act are omitted from consideration as they are not at all relevant. We are

really concerned with Section 15 and more particularly Section 27. The setting up of markets areas, markets yards and regulating use of the facilities within such area or yards by levy of market fee is a matter of local interest and would be covered by Entry 28 of List II and thus within the legislative competence of the State. If any portion of the market area or the market yards is used for the sale or purchase of tobacco, that too will be within the State's competence. To hold to the contrary would be to ignore the exclusive powers of the States to legislate in respect of markets and fairs under Entries 28 and 66 of List II. The Markets Act does not seek to regulate either the "manufacture or production" of tobacco (assuming that agricultural produce can be manufactured) and thus does not impinge upon the Tobacco Act in so far as it is at all relatable to Entry 52 of List I. All the provisions of the Markets Act, in my view, are clearly relatable to Entry 28 of List II given the scope of the entry as discussed earlier. The State in the circumstances, was not incompetent to incidentally also legislate with regard to tobacco and "the semantic sweep of Entry 52 did not come in the way of the State Legislature making laws on subjects within its sphere and not directly going to the heart of the industry itself". In my opinion therefore Sections 15 and 27 of the Markets Act in pith and substance are relatable to Entries 28 and 66 of List II and have been competently enacted by the State. Incidentally it is nobody's case that the fee charged under Section 27 does not represent a quid pro quo for the services rendered and facilities afforded in the market area. It follows that Parliament is incompetent to legislate for the setting up or regulation of 'markets and fairs' within the meaning of the phrase in entry 28 of List II, even in respect of tobacco. It may of course incidentally trespass into the States legislative field, provided (1) the trespass is an inseparable part of the provisions validly passed and (2) the State has not already fully occupied its field with conflicting statutory provisions. Let us consider the scope of the Tobacco Act. The Statement of Objects and Reasons of the Tobacco Act shows that the enactment was necessary in view of the fact that India is the third largest producer of tobacco in the world, the sixth largest among the tobacco exporting countries and the second largest exporter of virginia tobacco. The manifest intention of Parliament was to take measures to ensure that the tobacco particularly virginia tobacco met the demands of the markets in India and abroad both qualitatively and quantitatively. The Act which extends to the whole of India has however not been brought entirely into force in all the States. Chapter I contains the first three Sections. Section 1, sub-section (3) provides for the Act coming into force on such dates as the Central Government may, by notification in the Official Gazette, appoint; provided that different dates may be appointed for different provisions for the Act and for different States or different parts thereof. Section 2 contains the necessary declaration in terms of Entry 52 List I in relation to the tobacco industry.

Chapter II of the Act consists of Sections 4 to 8 and deals with the establishment and functions of the Tobacco Board. Section 8 (1) casts a 'duty on the Board to promote the development of the tobacco industry'. Sub-section (2) prescribes some specific measures which may be taken by the Board. Those which are of relevance are noted:

"8(2) (a)

(b) keeping a constant watch on the virginia tobacco market both in India and abroad, and ensuring that the growers get a fair and remunerative price for the same and that these are no wide fluctuations in the prices of the commodity;

(c) maintenance and improvement of existing markets, and development of new markets outside India for Indian virginia tobacco and its products and devising of marketing strategy in consonance with demand for the commodity outside India, including group marketing under limited brand names;

(cc) establishment by the Board of auction platform with the previous approval of the Central Government for the sale of virginia tobacco by registered grower or curers and functioning of the Board as an auctioneer at auction platform established by or registered with it subject to such conditions as may be specified by the Central Government.

(e) regulating in other respects virginia tobacco marketing in India and export of virginia tobacco having due regard to the interests of growers, manufacturers and dealers and the nation;

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(g) purchasing virginia tobacco from growers when the same is considered necessary or expedient for protecting the interests of the growers and disposal of the same in India or abroad as and when considered appropriate; ..." Sections 10 to 15 are in Chapter III which deals with Regulation of Production and Disposal of Tobacco, for registration/licensing not only of the growers including nursery growers(Section 10, 10-A) but also curers (Section 11), processors and manufacturers (Section 11-A), graders and storers (11-B), and exporters, dealers, packers or auctioneers (Section 12).

Of particular relevance are Sections 13 and 13A which provide for virginia tobacco to be sold at registered auction platforms or auction platforms established by the Board, and places a duty on registered dealers and exporters to purchase tobacco only at such auction platforms. However, in those States in which Section 13 is not in force, under Section 13B dealers purchasing virginia tobacco must pay the full price for the whole quantity and are restricted from taking recourse to any such practice which may be specified as unfair by the Board.

Section 14 deals with the forms for registration and Section 15 with the power of inspection to ascertain whether the particulars in the forms are correct. Apart from these sections, according to the appellants, Section 14-A in particular occupies the field with respect to levy of fees on the sale of tobacco. It reads:

"14-A(1) Where virginia tobacco is sold at any auction platform established by the Board under this Act, it shall be competent for the Board or for any officer of the Board authorised by it in this behalf to levy fees, for the services rendered by the Board in relation to such sale, at such rate not exceeding two percent of the value of such tobacco as the Central Government may from time to time, by notification in the Official Gazette, specify;

(2) The fees levied under sub- section (1) shall be collected by the Board or such officer equally from the seller of the Virginia tobacco and the purchaser of such tobacco, in such manner as may be prescribed."

The contents of Chapter IV and V of the Act need not detain us as they deal with aspects far removed from the Markets Act. Of the last Chapter viz. Chapter VI, two Sections are noteworthy viz. Section 30(1) which allows the Central Government to suspend provisions of the Act in respect of certain territories and Section 31 which reads:

31. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."

The object of the Tobacco Act is to keep a control on the quality and quantity of tobacco grown in the country with an eye on the international markets. The location of domestic markets for sale of

tobacco can hardly be described as a necessary concomitant to the achievement of this object. Assuming it is, fairly read, it is possible to reconcile the allegedly conflicting provisions of the two statutes by a reasonable and practical construction of their provisions. The use of the word "markets" and marketing in the Tobacco Act, including Section 8, does not mean a market in the sense the word has been used in the Markets Act. It is obvious from phrases such as 'the Virginia Tobacco market", 'development of new markets outside India' etc. that the word has been used in the sense of 'sale as controlled by supply and demand; especially a demand for a commodity or service" - in this case tobacco. The Tobacco Act is not concerned so much with the 'where' but with the 'how', the tobacco is disposed of. Even when the Tobacco Act speaks of setting up of auction platforms it does not indeed it could not say where the auction platforms are to be set up.

Since States are exclusively competent to decide on the location of markets, the authorities under the Tobacco Act would have to comply with the municipal laws and set up the auction platforms only within the permissible areas. If the facilities afforded under the Market Act are utilised, the facilities will have to be paid for and the authorities appointed to levy and collect fees for the purpose under the Markets Act would be competent to do so. If further facilities are offered at the Auction Platforms under the Tobacco Act, fees may be levied under Section 14-A of that Act. The right to levy fees under the two acts therefore may not necessarily conflict, the levy not being in the alternative but additional. Assuming this is not possible and there is any conflict, the provisions of the Markets Act and not the Tobacco Act would prevail.

Even if Sections 15 and 27 of the Markets Act are not referable to Entries 28 and 66 of List II and are referable to Entries 26 and 27 of List II nevertheless these Sections of the Markets Act do not trespass on turf reserved by Parliament under Entry 52 of List I? State legislation on the supply and distribution of goods as well as trade and commerce therein which are relatable to Entries 26 and 27, is only subject to the Central enactment if any under Entry 33 of the Concurrent List and not Entry 52 of List I. Furthermore, whether or not any portion of the Tobacco Act relates to an "industry' within the meaning of Entry 52 List I, following the logic of Tika Ramji at least those provisions relating to the disposal of tobacco are not so relatable. The declaration under Entry 52 List I does not cover these provisions and the States were free to legislate under Entries 26 and 27 of List II on tobacco. I do not propose to decide whether the provisions of the Tobacco Act dealing with the sale of tobacco may be sustained with reference to Entry 33 of List III. It is an unnecessary exercise because the appellants did not argue this, and also because, as I have said earlier, the Constitutional validity of the provisions of the Tobacco Act has not been referred to this Bench for scrutiny.

Assuming that Chapter III of the Tobacco Act are covered by Entry 52 of List I, nevertheless the Parliament did not intend to invalidate any portion of the Markets Act. It has consciously clarified by Section 31 that it does not intend to occupy the entire field and has 'made space' for the State legislation and made it clear that the provisions of the Central Act shall be in addition to and not in derogation of any other law. The Section assumes greater significance since most of the Markets Acts were in place when the Tobacco Act was enacted. There are two ways in which such a saving clause as is contained in Section 31 of the Tobacco Act may be understood. There is the way which found favour with this Court in M. Karunanidhi vs. Union of India : 1979 (3) SCC 431 which held that such a section clearly evinced the intention of the dominant legislature leaving "no room for any argument that the State Act was in any way repugnant to the Central Act". There is the other way of reading such a section in the dominant legislation as incorporating or taking under its legislative umbrella the allegedly conflicting provisions of the subservient statute. Either way, the express words in Section 31 coupled with the duty of Courts to reconcile and uphold legislation, if

possible, can only result in upholding the constitutional validity of the Market fee imposed by the State.

A further compelling circumstance to uphold the levy of market fee is the fact that several provisions of Chapter III of the Tobacco Act particularly those dealing with the setting up of auction platforms namely Sections 13 and 13A, and Section 14 A relating to the levy of fees on the sale of tobacco have not been brought into operation in any State in India except for the State of Karnataka. I have already stated the reasons why the provisions relating to sale of tobacco in the Tobacco Act do not come within the definition of 'industry' and are not covered by the declaration under Entry 52 of List I. But granting for the sake of argument that the sale of tobacco comes within the definition of industry until the Central Government chooses to actually occupy the field by effective legislation, it would remain open for the State Legislature to cover that field under Entry 24 of List II. It is difficult to adopt an interpretation which would debar the States from the right to provide for the sale of tobacco only within market Areas and levy market fees although Parliament does not now and may never seek to bring Sections 13, 13A and 14A into operation in those States. This view finds support in the pronouncement of a Constitution Bench in Ishwari Khetan Sugar Mills (P) Ltd. v. State of Uttar Pradesh (supra) when it was construing the impact of a declaration under Entry 52 of List I, it was said that legislation for assuming control containing the declaration under entry 52 of List I must spell out the limit of control so assumed by the declaration. Therefore, the degree and extent of control that would be acquired by Parliament pursuant to the declaration would necessarily depend upon the legislation enacted spelling out the degree of control assumed. In Belsund Sugar (supra), one of the controversies raised related to a conflict between the provisions of the Markets Act and the Tea Act, 1953. There too, the Tea Act envisaged that an order might be passed under Section 30 relating to the sale and purchase of tea. The contention that the mere possibility of issuance of such a control order under Section 30 of the Tea Act was sufficient to oust the State Legislature from the field, was negatived in the following words:

"mere possibility of issuance of any future order under Section 30(1) of the Tea Act by the Central Government in the absence of any existing express order to that effect, cannot be said to have occupied the field regarding purchase and sale of manufactured tea and fixation of maximum or minimum price thereof, or the location of such sales. These topics cannot be said to be legitimately covered by the Tea Act. Hence, the field is wide open for the State Legislature to exercise its concurrent legislative power under Entry 33 of List III for effectively dealing with these matters."

Therefore, even if one were to concede that there is a conflict between the provision in the Markets Act prohibiting sale of tobacco otherwise than in a market area and the setting up of auction platforms under the Tobacco Act, and between the States power to levy market fee under the Markets Act and the levy of fee on the sale of tobacco under the Tobacco Act, at least in those States where Sections 13, 13A and 14A of the Tobacco Act are not operative, the provisions of the Markets Act must prevail. It now remains for me to answer the question which was referred to this Bench, namely whether ITC Ltd. V. State of Karnataka (Supra) has been rightly decided. The majority opinion on the issue of legislative competence of the State Legislature was delivered by Fazal Ali, J. In striking down that part of the Karnataka Markets Act which provided for the power to levy market fee on tobacco and its products, the opinion was based on six premises, each of which do not appear to be in consonance with the law.

First The Court proceeded on the basis that the Tobacco Act was wholly and solely relatable to Entry 52 of List 1. I have already given my reasons for holding that the Tobacco Act in so far as it deals with the disposal of tobacco is not within Entry 52 of List I.

Second Article 246(4) was relied on to hold that Parliament had overriding power "to legislate in exceptional cases in matters appearing in the State List". Article 246(4) has no manner of application to the present dispute. It reads :

"(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

The Sub-Article only deals with the power of Parliament to make laws in respect of Union Territories even in respect of matters enumerated in the State List. Third It was held to be "well settled that where two Acts, one passed by the Parliament and the other by State Legislature collide and there was no question of harmonizing them, then the Central Legislation must prevail". What is well settled is that if the Parliament and the State Legislature enact conflicting legislation in respect of the same subject matter under an Entry in the Concurrent List then only will the Central Legislation prevail. In other cases it will be a question of whether the conflicting legislation is referable to an exclusive entry under the State List or the Union List, after the determination of which, the dominant legislation will prevail.

Fourth It was said that if the minority view (expressed by Mukharji-J) were accepted, it would "amount to robbing the 1975 Act of its entire content and essential import by handing over the power of legislation to the State Government which per se has been taken over by the Parliament under Article 246 by the 1975 Act". Mukharji-J had in fact followed Tika Ramji and held correctly that the Tobacco Act and Markets Act operated in their respective fields and that there was no repugnancy if both the Acts were considered in the light of their respective true nature and character. Tika Ramji and the other Constitution Bench decisions following it were not even referred to by the majority..

Fifth- In determining the impact of Entry 52 of List I vis a viz entry 28 of List II, the majority relied on decisions dealing with Entry 54 of List I, and Entry 23 of List II. The scope of the entries are different and I agree with the view expressed in the opinion of my learned Brother Pattanaik, J that the decisions relied upon by the majority viz the Hingir Rampur Coal Co. Ltd. v. State of Orissa; AIR 1961 SC 459, Baijnath Kedia v. State of Bihar: 1969 (3) SCC 838; Bharat Cooking Coal Ltd. v. State of Bihar 1990 4 SCC 557 and State of Orissa v. M.A. Tullock & Co. : 1964 (4) SCR 461 are inapposite.

The final premise on which the majority based their view that the States could not levy any market fee on Tobacco, was that since the assent of the President was not taken, the Karnataka Markets Act 1980, was wholly incompetent. The view proceeds on a misinterpretation of Article 254(2), which in any event has no application to this case. Article 254(2) provides :

"(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State."

The language is clear. It only deals with the question of supremacy and not competence. In respect of conflicting legislation under the Concurrent List, if the State Legislation has received the assent of the President, it will prevail over the Central Legislation in that State. The Article does not

provide that State Legislation without the assent of the President is incompetent.

In the circumstances I would hold that ITC vs. State of Karnataka (Supra) was wrongly decided and would for the reasons discussed uphold the competence of the State Legislatures to levy market fee on tobacco.