ORISSA HIGH COURT

Bijoy Kumar

Vs

State (Orissa)

O.J.C. Nos. 1320 of 1974, 207, 241, 287, 288, 325, 404, 439 and 444 of 1975

(R.N. Misra and B.K. Ray, JJ.)

13.05.1975

JUDGEMENT

R.N. Misra, J.

1. These nine applications have been made under Article 226 of the Constitution challenging the vires of the Orissa Paddy Procurement (Levy) Order, 1974 made by the State Government of Orissa in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 (10 of 1955), read with the notification of the Government of India, in the Ministry of Agriculture (Department of Food) No. G.S.R.-316 (E), dated the 20th June, 1972. The petitioners have made different allegations on questions of fact, such as the quantity of land possessed, the nature of such land, the quantum of levy demanded et cetera to which we shall advert at the appropriate place. But common questions of law have been pleaded and argued by these petitioners and on behalf of the State Government, resistance has been offered to these applications on common grounds of law. These applications have been heard together. We, therefore, proceed to dispose of all these applications by a common judgment.

2. The State Government of Orissa by notification dated 19th of November, 1974, promulgated an order called the Orissa Paddy Procurement (Levy) Order, 1974 (hereafter referred to as the 'Order') in exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 (hereafter called the 'Act') as delegated in its favor by the Central Government vide the notification dated 20th June, 1972, under Section 5 thereof. The requisitioning authority in exercise of powers vested under clause 3 of the Order issued notices requiring the petitioners to sell and deliver to the persons named in the notices at the declared price within the time indicated in such notices the quantity of paddy shown therein. Most of the petitioners preferred appeals as provided under Clause 9 of the Order to the Tahasildar. In some cases, the Tahasildar after making such enquiries as he found necessary reduced the demand, in some other cases he sustained the demand, while yet in some instances he even enhanced the demand. We propose to deal with the legal contentions first and thereafter advert to the facts of each case.

3. The following contentions have been raised on behalf of the petitioners in support of their challenge regarding the *ultra vires* character of the Order:-

(1) The power conferred on the requisitioning authority under clauses 3 and 4 of the Order is bad on account of excessive delegation of legislative function as also on the ground that arbitrary, unguided and uncanalised power has been vested on very subordinate executive authorities.
(2) The basis of imposition of levy under Clause 3 of the Order is in excess of-or contrary to-the basic provision in Section 3 (2) (f) of the Act, inasmuch as while under the statute, the demand of levy is relatable to 'holding in stock' of the person on whom levy is imposed, under the order, levy is imposable on 'land holding'.
(3) 'Declared price' as defined in clause 2 (c) of the Order and the manner of payment of the price for the quantity of paddy in respect of which levy is demanded are at variance with the provision in the Act. Therefore, enforcement of the demand is contrary to law. As failure to comply with the demand gives rise to criminal liability, the illegal demand is liable to be quashed.
(4) The order imposes unreasonable restrictions with regard to the holding of property and has the effect of compelling land-holders to part with the produce of their land at a consideration which is less than the market price. That part of the order is, therefore, violative of the guarantees under Articles 19 and 31 of the Constitution.
(5) The definition of 'irrigated land' appearing in clause 2 (e) of the order is contended to be violative of Article 14 of the Constitution, inasmuch as lands which are actually irrigated and lands which are capable of being irrigated have been classed together though patently they are of different classes.
(6) It has also been contended that paddy is not 'food-stuff' and, therefore, does not come within the ambit of the Act. The order, therefore, could not make provisions with reference to 'paddy'.
(7) Though justification for the order, as would appear from the Preamble, is securing equitable distribution and availability of paddy at fair prices within the State, the order does not make any provision for achieving such purpose.
(8) The provisions contained in Clause 3 (2) and (3) of the Order which prohibit payment of interest in kind on outstanding loans, provisions relating to seizure in clause 8 and for entry, search et cetera in clause 12 are attacked on the ground that these confer arbitrary power.
(9) Clause 9 is attacked on the ground that appellate power has been vested in a very subordinate authority and finality has been attached to such appellate decision. No appropriate guideline has been indicated for the appellate authority and the appellate authority seems to have been made subordinate to directions to be issued by the Government and the Collector under Clause 10 of the Order. As the appellate authority is bound by the general scheme of the order being a creature of the order itself, he is not capable of giving appropriate relief even where facts of the case justify such relief to an appellant before him.
(10) It is finally contended that the scheme is absolutely unworkable and has the effect of

driving the citizens into a sea of uncertainty and exposes them to various hazards resulting from exercise of power under the Order.

4. The State of Orissa and its officers have not filed separate counter-affidavits in each case. It has, however, been submitted on behalf of the State that since common questions arise at least so far as the legal aspects are concerned, one comprehensive counter-affidavit which has been filed in O. J. C. No. 404 of 1975 may be adopted for the purpose of these cases. Counsel appearing in different cases having no objection to such a prayer, the same has been allowed. On behalf of the opposite parties, it has been claimed that the order is in accordance with the Act and the State of Orissa in exercise of the delegated authority of the Central Government has promulgated the order. It has also been pointed out that the provisions in the order have been made keeping the pressing requirements of the State in view. Paddy has become scarce and consequently its price has gone up and with a view to making it available at reasonable price and for securing equi-distribution thereof as also controlling inflation, strict regulation has become necessary and, therefore, the order has been made to meet the grave situation arising out of food scarcity.

5. Before we deal with the various contentions of the petitioners, it is appropriate to refer to certain provisions of the Act as also of the Order. The Preamble of the Act reads thus:

> "An Act to provide in the interest of the general public for the control of the production, supply and distribution of and trade and commerce in certain commodities."
> "Essential commodity" has been defined in Section 2 (a) of the Act. "Food-stuffs" including edible oil seeds and oil have been included in the definition in clause (v) of Section 2 (a). Under Section 3 of the Act, 'power to control, production, supply, distribution, etc. of essential commodities' has been vested in the Central Government. Sub-section (2) gives instances where power can be exercised under sub-section (1). Section 5 makes provision for delegation of powers and delegation can be to an officer or authority subordinate to the Central Government as also to the State Government or an officer or authority subordinate to the State Government. Section 7 makes contravention of any order made under Section 3 of the Act criminally punishable. In the Act, other provisions have been made with a view to ensuring strict compliance with the provisions of the Statute.

The State Government of Orissa as a delegate of the Central Government has promulgated the order. The broad scheme of the order is that the requisitioning authority as defined in clause 2 (h) thereof makes a demand on every land-holder as defined keeping in view the rate of levy prescribed in the schedule attached to the order. Clause 4 provides for service of the notice demanding levy on the land-holder. Persons aggrieved by the demand are entitled to appeal to the Tahasildar. The requisitioning authority is also entitled to seize paddy in certain eventualities as provided in clause 8. Against such order of seizure, an appeal also lies to the said appellate authority. In clause 10, power has been vested in Government as also Collector to give general or special directions to every subordinate authority. Under clause 11, provision has been made for exempting land-holders from demand of levy while under clause 12, power for search, seizure et cetera has been vested in certain categories of public officers.

6. We shall now proceed to deal with the various contention of the petitioners:-
Contention No. 1. Petitioners have contended that there has been undue delegation of legislative function in favor of the requisitioning authority and arbitrary, unguided and uncanalised power has been vested on very subordinate executive authorities under the order. We have heard learned counsel for parties at great length, but we are not impressed with this argument. As already noticed, the order has been made in exercise of delegated authority of the Central Government under the Act. Enough guideline is available in the Act as also in the Preamble to the order for working out the provisions in the Act as also the order. Similarly, no legislative function has at all been delegated to the requisitioning authority. What is prohibited under the law is delegation of essential legislative function (See In re. Article 143, Constitution of India, etc. AIR 1951 Supreme Court 332 and *Harishankar Bagla v. M. P. State*[1]*,).* The provisions of the Act are not assailed on the ground of excessive delegation of legislative function. The vires of the Act has also been upheld already. In that view of the matter it is difficult to appreciate how when the power under the Act is delegated and exercised by the delegate, challenging on the ground of excessive delegation of legislative function is open to be raised. In another part of the judgement, we have indicated how it is necessary to confer power on subordinate authorities for effective implementation of a scheme like this. The situation is such that the power has got to be given to an authority of the rank of Revenue Inspector. As he is made to act subject to the control of the appellate authority and under directions of the Collector as also the State Government, we do not think, the contention that arbitrary power has been vested in him is open to acceptance. This contention must accordingly fail.
Contention No. 4.

7. The petitioners have contended that the order imposes unreasonable restriction in regard to the holding of property-the usufructs of their lands-and has the effect of compelling land-holders to part with the produce of their land at a consideration which is not the equivalent to the market price. The Order, according to them, is violative of the guarantees under Articles 19 and 31 of the Constitution. It has been argued on behalf of the State that the Proclamation of Emergency made on 3-12-1971 in exercise of powers under Article 352 of the Constitution is still in force and in view of the provisions of Article 358 of the Constitution, laws made by the State or executive actions taken by the State Government cannot be challenged on the ground that they are contrary to Article 19 of the Constitution. Reliance has been placed on some decisions.

Article 358 provides:-

> "While a Proclamation of Emergency is in operation, nothing in Article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would but for the provisions contained in that part be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect."

That the effect of a Proclamation under Article 358 is prospective is not disputed. Though the order is one during the continuance of the Proclamation of Emergency, it has been made in exercise of powers under a Pre-Emergency law. In the case of *Shree Meenakshi Mills v. Union of India*[2]*,* the learned Chief Justice speaking for the Constitution Bench observed:-

"It was said on behalf of the State that the petitions were not maintainable because of the proclamation of emergency. During the proclamation of emergency Article 358 does not apply to executive action taken during the emergency if the same is a continuance of a prior executive action or an emanation of the previous law which is otherwise violative of Article 19 or otherwise unconstitutional. The petitioners challenged the action or previous law to be violative of fundamental rights. This court in Bennett Coleman and Co. case (1972) 2 SCC 788 said.

'During the proclamation of emergency Article 19 is suspended. But it would not authorize the taking of detrimental executive action during the emergency affecting the fundamental rights in Article 19 without any legislative authority or in purported exercise of power conferred by any pre-emergency law which was invalid when enacted.'

Therefore, if it can be shown that the executive action taken during the emergency has no authority as a valid law its constitutionality can be challenged....."

In view of our finding in another part of the judgment that the basic provisions in the Order are in excess of the delegation and, therefore, are not a valid piece of subordinate legislation, in view of what has been observed by the learned Chief Justice, the attack on the ground of Article 19 is available to be raised. Petitioners have also relied upon a Bench decision of the Madras High Court in the case of *State of Madras v. Sri Vanamamalai Mutt*[3], which dealt with a dispute under the Essential Commodities Act. In view of our finding elsewhere in the judgment that the Order is not in accordance with law, it is unnecessary to examine this aspect of the matter further. The next contention is on the footing that the Levy Order is violative of Article 31 (2) of the Constitution inasmuch as market price is not paid to the land-holder by way of consideration. Reliance has been placed by the State on the Twentyfifth Amendment of the Constitution and the decision of the Supreme Court in the case of *Kesavananda v. State of Kerala*[4], Without examining the matter any further, it is sufficient to indicate here that the scheme of the Act requires payment of a price which is intended to be a just equivalent because the mode as indicated in Section 3 (3B) of the Act is payment of the prevailing market price on the date when the direction for sale is made or the price which is likely to prevail in the post-harvest period. If what is offered as price does not satisfy the requirement of the Act, there
would be a statutory infraction and the requirement to sell at a price inadequate enough would not be enforceable. As the Act does not intend any ex-proprietary measure, the Order cannot make a provision essentially for such a purpose. It is unnecessary to examine the tenability of the application of Article 31 (2) of the Constitution.

Contention No. 5.

8. The petitioners have next argued that the definition of 'irrigated land' appearing in clause 2 (e) of the Order is violative of Article 14 of the Constitution, inasmuch as categories of lands very dissimilar in nature have been classed together. The argument was not without force, but as rightly pointed out by learned Government Advocate, the definition in the order has been changed with effect from 25-3-1975 and 'land capable of being irrigated' has been dropped out of the definition. 'Irrigated land' would now cover lands which are actually irrigated. To meet this situation arising out of the amendment, Clause 9 (a) has been added and a right of appeal has

been provided to re-open the matter and obtain relief within the Scheme of the order. This contention of the petitioners must accordingly be negatived.

Contention No. 6.

9. Counsel for some of the petitioners had taken the stand that 'paddy' was not 'foodstuff' and, therefore, did not come within the ambit of the Act. The Order made under the Act, therefore, could not deal with paddy. Reliance has been placed on the observations of the Supreme Court in the case of *State of Bombay v. Virkumar*[5], wherein turmeric was held to be food-stuff. Another decision in the case of *Sujan Singh v. State of Haryana*[6], was cited where with reference to the definition of 'food-stuff' in the Essential Commodities Act, it was observed that a liberal meaning to the term should be given. It is conceded before us by petitioners that rice would be food-stuff but on the principle that paddy cannot be directly eaten without being converted into rice, it is contended, the same cannot be a food-stuff. We see no force in such a contention and must negative the ground of attack.

Contention No. 7.

10. It has also been contended on behalf of the petitioners that as there is no provision for securing equitable distribution and availability of paddy at fair prices in the Order itself, the Order is bad. Here again, we see no force in the contention. The Preamble to the Order indicates the purpose for which the Order has been promulgated. In order to be valid under the Act, it is not necessary that provision should have been made for equitable distribution or availability of paddy at fair prices in the Order itself and because no provision has been so made, the order is not open to attack. It is not open to the petitioners to take such a stand. We accordingly negative this contention.
Contention No. 8.

11. Sub-clauses (2) and (3) of Clause 3 of the Order prohibit payment of interest in
kind on outstanding loans. Clauses 8 and 12 relate to seizure, search, et cetera. These have been attacked on ground of arbitrariness. Sub-clauses (2) and (3) of clause 3 are provisions to protect the land-holder and we do not think that any land-holder has any justification to feel aggrieved by this provision. If the demand under the Order turns out to be appropriate, the impugned sub-clauses work as cloaks of protection for him. The power of seizure under clause 8 is necessary for effective execution of the scheme. In fact, a right of appeal has been provided against any arbitrary exercise of such power. Clause 12 confers general powers on an authority of named officers also in the interests of working out the scheme of the Order. Undoubtedly such provisions are necessary for effective execution of the scheme particularly in the background of prevailing situations in the country. No serious objection can be taken against presence of such provisions in the Order.

Contention No. 2.

12. It has been contented that the basis of imposition of levy under clause 3 of the Order is in excess of the basic provision in Section 3 (2) (f) of the Act. Sub-sections (1) and (2) of Section 3 of the Act which are material for appreciating the point raised are as follows:-

"(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-

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(f) for requiring any person holding in stock any essential commodity to sell the whole or a specified part of the stock to the Central Government or State Government or to an officer or agent of such Government or to such other person or class of persons and in such circumstance as may be specified in the order.

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It is contended that while under clause (f) of Section 3 (2) of the Act a levy order could require the person holding in stock any essential commodity to sell the whole or a specified part of such stock, the scheme of the Order has no reference to the stock in the hands of the land-holder and is based upon possession of land which is subjected to cultivation of paddy. The order defines 'land-holder' and under clause 3 obliges every such land-holder on service of notice by the requisitioning authority under clause 4 to sell and deliver to the Agent or Officer named in the notice at the declared price within such time as specified the quantity and variety of paddy named therein. The Schedule attached to the order provides the basis for raising the demand. It classifies the lands into 'irrigated' and 'unirrigated' varieties. In respect of a land-holder having four acres or less of irrigated lands, there is no liability under the order. Land-holders having more than four acres of irrigated have been put under three classes (a) above four acres and up to 6 acres; (b) above six acres and up to ten acres; and (c) above ten acres. In regard to unirrigated lands up to eight acres, there is no liability. Two other classifications have been provided, namely, (i) above eight acres and up to ten acres and (ii) above acres. Depending upon the quantity of land in which paddy is produced, the demand varies in terms of column (2) of the Schedule Petitioners contend that while under Section 3 (2) (f) of the Act, a person holding in stock any essential commodity may be required to sell the whole or a specified part of the stock, the Order subjects the land-holder to a direction for sale on the basis of land-holding. Thus while under the Act, holding of stock is the basis of liability, under the Order, liability accrues on the basis of a land-holder producing or causing to be produced paddy on his land. The law as it is in excess of-and inconsistent with-the provisions of the Act.

Learned Government Advocate relies on the definition of 'land-holder' appearing in clause 2 (f) of the Order to meet the contention of the petitioners. 'Landholder' has been defined to mean-

"..... a person who produces or causes to be produced paddy on his land measuring more

than four acres in extent, where all his lands are irrigated and more than eight acres where all his lands are either unirrigated or partly irrigated, the extent of irrigated land being deemed equivalent to twice that of unirrigated land for this purpose."

According to learned Government Advocates, the definition of 'land-holder' is production-oriented and the emphasis is not on land-holding itself. Even if a person is possessed of land, unless he grows paddy or causes paddy to be grown on such land, he does not come within the mischief of the definition of land-holder. His next contention is that the power to demand levy under the Order is relatable to the provisions in Section 3 (1) of the Act, where 'holding in stock' is not the foundation for subjecting a person to the rigour of the Order. Sub-section (2) of Section 3 begins with the non obstante clause "without prejudice to the generality of the powers conferred by sub-section (1) ..... " The clauses of sub-section (2) are merely illustrative of the power conferred by sub-section (1). The wide powers under sub-section (1) are not subject to the illustrations in sub-section (2) and, therefore, the order is not open to challenge by reference to Section 3 (2) (f) of the Act if it is tenable under sub-section (1) of Section 3 thereof. Undoubtedly, under the Order, 'land-holder' is defined to mean a person who produces or causes to be produced paddy on his land. A person holding land, but not putting the same for production of paddy does not come within the definition. Yet, the definition of land-holder cannot be equated with the concept of 'holding in stock' appearing in Section 3 (2) (f) of the Act. "Holding in stock" has reference to physical existence of the stock in the hands of the person to be subjected to the order while under the definition of 'land-holder' there is no reference to the physical stock of the essential commodity. The process of production may lead to yielding of a stock, but merely because a person has taken steps to produce or cause to be produced paddy on his land, he cannot be said to be holding paddy in stock. Many factors are responsible to vary the output. In the same way as one can predict the output in a factory on the basis of raw materials put into the manufacturing process, one cannot estimate the yield of paddy in the field on the basis of acreage, the quantity of seeds sownet cetera. Only when the paddy crop has grown and has reached the stage of harvesting can a fair estimate of the yield be made. Appraisement at any earlier point of time is no sure foundation for the estimate of yield. Learned Government Advocate's contention that standing paddy crop can indeed be taken as stock in the hands of the land-holder is very fallacious and adoption of such a basis for imposition of levy under the order cannot be in conformity with the provisions of Section 3 (2) (f) of the Act. Learned Government Advocate has contended that the power to make the order is not under sub-section (2) but is indeed vested in the Central Government under sub-section (1). He relies upon the observations of the Supreme Court in the case of *Santosh Kumar v. State*[7], where the court was considering a similar provision in the Essential Supplies (Temporary Powers) Act, 1946- the predecessor Act. Dealing with this aspect of the matter, the court stated:-

"It is manifest that sub-section (2) of Section 3 confers no further or other powers on the Central Government, than what are conferred under sub-section (1) for it is 'an order made thereunder' that may provide for one or the other of the matters specifically enumerated in sub-section (2) which are only illustrative as such enumeration is 'without prejudice to the generality of the powers conferred by sub-section (1)'. Seizure of an Article being thus shown to fall within the purview of sub-section (1), it must be competent for the Central Government or its delegate the Provincial Government, to make

an order for seizure under that sub-section apart from and irrespective of the anticipated contravention of any other order as contemplated in clause (j) of sub-section (2)....."

In the case of *State of Kerala v. Shri M. Appukutty*[8], the provisions of Section 19 (1) and (2) (f) of the Madras General Sales Tax Act of 1939 came up for consideration of the court. Those provisions are:

"(1) The State Government may make rules to carry out the purposes of this Act.
(2) In particular and without prejudice to the generality of foregoing power such rules may provide for-
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(f) the assessment to tax under this Act of any turnover which has escaped assessment and the period within which such assessment may be made, not exceeding three years;"

Dealing with the objection raised, the court observed:-

"..... Rule 17 (1) and (3A) *ex facie* properly fall under Section 19 (2) (f). In any event as was said by the Privy Council in *King Emperor v. Sibnath Banerji*[9], the rule-making power is conferred by sub-section (1) of that section
and the function of sub-section (2) is merely illustrative and the rules which are referred to in sub-section (2) are authorized by and made under sub-section (1). The provisions of sub-section (2) are not restrictive of sub-section (1) as expressly stated in the words 'without prejudice to the generality of the foregoing power' with which sub-section (2) begins and which words are similar to the words of sub-section (2) of Section 2 of the Defense of India Act which the Privy Council was considering....."

A similar question came up for consideration of the court in the case of *Kangra Valley State Co. Ltd. v. State of Punjab*[10], The Court was dealing with the provisions of the Mines and Mineral Regulations and Concession Rules, 1960. Dealing with the matter, the court observed:-

"Mr. Gupta next contends that Rule 28 laying down the period of limitation for renewal application was *ultra vires* Section 13 (2) of the Act, as the time limit prescribed in the rule does not fall under any of the matters set out in that sub-section. Assuming that it is so, sub-section (1) authorizes the Central Government to make rules for regulating the grant of mining leases and the Central Government in pursuance of that power can make rules including the one laying down the time within which a renewal application should be made. A grant of renewal of a lease is granting a mining lease, and, therefore, fixing time within which an application for it should be made would be regulating the grant of a lease. A similar contention was considered in *King Emperor v. Sibnath Banerji*[11], in connection with Rule 25 of the Defence of India Rules made under Section 2 of the Defence of India Act, 1939, as amended in 1940, and the Privy Council held that though the rule did not fall under any of the matters enumerated in sub-section (2) of Section 2,

the rule was competent as it would be one which could be made under the generality of powers contained in sub-section (1) of Section 2. Their Lordships held that the function of sub-section (2) was merely an illustrative one considering that the rule-making power was conferred by sub-section (1) and the rules referred to in the opening sentence of sub-section (2) were the rules which were authorized by and made under sub-section (1). Therefore, the provisions of sub-section (2) were not restrictive of sub-section (1) and that indeed was expressly stated by the words 'without prejudice to the generality of the powers conferred by sub-section (1)'. The general language of sub-section (1), therefore, amply justified the terms of Rule 26 and avoided the contention that it was not justified under sub-section (2)....."

Counsel for petitioners have no dispute in regard to the position of law as settled by these decisions. In fact, the matter is beyond the range of controversy and no second contention is available so far as the proposition goes. The benefit of this proposition is, however, not available to the State in view of the position that it is a delegate and its powers are those that are delegated to it by the Central Government under Section 5 of the Act. Section 5 provides:-

"The Central Government may, by notified order, direct that the power to
make orders or issue notifications under Section 3 shall, in relation to such matters, and subject to such conditions, if any, as may be specified in the direction, exercisable also by-
(a) such officers or authority subordinate to the Central Government; or
(b) such State Government or such officer or authority subordinate to State Government; as may be specified in the direction."

The Central Government in exercise of the power of delegation in Section 5, made the following notification:-

"Ministry of Agriculture
(Department of Food)
O R D E R
New Delhi, the 20th June, 1972.
G. S. R. 316 (E).- In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby directs that the powers conferred on it by sub-section (1) of Section 3 of the said Act to make orders to provide for the matters specified in clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (j) of sub-section (2) thereof shall, in relation to foodstuffs be exercisable also by a State Government subject to the conditions-
(1) that such powers shall be exercised by a State Government subject to such directions, if any, as may be issued by the Central Government in this behalf;
(2) that before making an order relating to any matter specified in the said clause (a), (e)

or (f) or in regard to distribution or disposal of foodstuffs to places outside the State or in regard to regulation of transport of any foodstuff, under the said clause (d), the State Government shall also obtain the prior concurrence of the Central Government; and
(3) that in making an order relating to any of the matters specified in the said clause (j) the State Government shall authorize only an officer of Government."

What has been delegated to the State Government under the above notification is, therefore, the power of the Central Government under sub-section (1) of Section 3 to make an order in regard to matters specified in the clauses (a) to (j) excepting (g). As the delegate, the State Government is not entitled to fall back upon the wide powers of sub-section (1) and must exercise power within the field of delegation. The decisions of the Supreme Court are of no avail to the State and unless the order is within the frame of delegation, it cannot be sustained. Examining this aspect of the matter, a Bench of the Punjab and Haryana High Court, in the case of *Sujan Singh v. State of Haryana*[12], observed:-

"There is no doubt that Section 5 of the Central Act empowers Central Government to delegate the power to make orders under Section 3, but Section 5 itself lays down that no general delegation is permitted, but that the
notification whereby a delegation is made must specify the matters in relation to which the powers may be exercised by the State Government. It is, therefore, apparent that the Central Government is not expected to notify under Section 5 of the Central Act that all the powers vested in it under sub-section (1) of Section 3, shall be exercised by a particular State Government. The notification under Section 5 would be valid only if it specifies the matters in relation to which and the conditions, if any, subject to which powers under Section 3 are authorized to be exercised by the State Government. The notification dated June 9, 1966, is valid as it has clearly specified the matters in relation to which the delegation has been made....."

A Bench of the Allahabad High Court in the case of *State v. Suraj Bhan*[13], dealt with the scope of delegation. In paragraph 8 of the judgment, it has been stated:-

"The learned Chief Standing Counsel then argued that the mention of a wrong source of power in the notification will not invalidate it if the power can be attributed to the proper source under sub-section (1). This argument is well founded. Nevertheless, the fact remains whether the power under sub-section (1) had been delegated or not to the State Government. We are of the view that there was no such delegation. The notification issued by the Central Government directs that its powers under sub-section (1) of Section 3 to make orders to provide for the matters specified in clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (j) of sub-section (2) shall, in relation to food-stuffs be exercisable also by a State Government. It is clear, therefore, that what was delegated was the power to make orders in respect of the matters specified in the clauses referred to above and not in respect of the totality of powers that fall under sub-section (1). We may illustrate this point further by pointing out that the power specified in clause (g) of sub-section (2) has

been specifically omitted from the notification. It cannot, therefore, be said that all the powers comprised in sub-section (1) had been delegated when there is explicit indication that at least one was reserved. Again, if the Central Government intended to divest itself of all its powers, in relation to food-stuffs, and delegate them to State Governments, the notification would not have been worded in the manner in which it has been worded. It would have said that the powers conferred on the Central Government by sub-section (1) of Section 3 to make orders to provide for regulating or prohibiting the production, supply and distribution and trade and commerce therein, in relation to food-stuffs, shall be exercisable also by a State Government. The Central Government did not say so in the notification. In fact, therefore, the power under sub-section (1) of Section 3 was not made the subject-matter of delegation."

A Bench of the Patna High Court in the case of *T. M. Prasad v. State*[14], was also called upon to examine the same question. Untwalia, J., as the learned Judge then was, delivering the judgment of the Court observed:-

"I am also inclined to accept the argument put forward on behalf of the petitioners in one of the cases that under Section 5 of the Act the Central Government had not delegated to the State Government all their general powers to make the order under sub-section (1). Only such power under that section were delegated as were enumerated in some of the clauses of sub-section (2) including clause (i). That being so, the State Government could not travel beyond their power under clause (f) in making the order in question. Clause (f) in terms can require any person holding in stock any essential commodity,...."

These authorities very much support the proposition advanced on behalf of the petitioners. We have already indicated that a direction for sale as provided by the Order can be in relation to the stock in the hands of the land-holder and he cannot be subjected to a direction for sale of a quantity of paddy calculated on the basis of the acreage of land subjected to paddy cultivation. In many of these cases, petitioners have taken the stand that there is no stock of paddy with them which can satisfy the demand even if the entire yield is parted with. There is no material, as we shall indicate when we advert to the pleadings, on the record to discard this assertion. Such a situation has arisen because the demand of levy has been cultivation-oriented without reference to the stock in possession.

Contention No. 3.

13. Under the Act, provision has been made for payment of price when a direction for sale of food grains is given by an order made with reference to clause (f) of sub-section (2) of Section 3 of the Act. Sub-section (3B) of Section 3 provides:-

"Where any person is required by an order made with reference to clause (f) of sub-section (2) to sell any grade or variety of foodgrains, edible oilseeds or edible oils to the Central Government or a State Government or to an officer or agent of such Government

and either no notification is in respect of such food grains, edible oilseeds or edible oils 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 as the price for the food grains, edible oilseeds or edible oils-

(i) 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 food grains, edible oilseeds or edible oils; or

(ii) Where no such price is fixed, the price for such grade of food grains, edible oilseeds or edible oils prevailing or likely to prevail during the post-harvest period in the area to which that order applies.

Explanation.- For the purposes of this sub-section, 'post-harvest period' in relation to any area means a period of four months beginning from the last day of the fortnight during which harvesting operations normally commence."

Admittedly there is no controlled price for paddy either fixed in exercise of powers under Section 3 (2) (c) of the Act or under any other law for the time being in force. Therefore, clause (i) has no application and the price to be paid for the paddy in respect whereof an order of levy is made has to be in terms of clause (ii). Two alternatives have been provided under clause (ii) namely, the price prevailing, or likely to prevail during the post-harvest period in the locality. Clause 3 of the Order directs payment to be made at the 'declared price'. 'Declared price' has been defined in clause 2 (c) thus:-

" 'Declared price' in relation to any variety, grade and specifications of paddy or rice means the price fixed and declared for that variety, grade and specifications of paddy or rice, as the case may be, by the Government for paddy or rice procured on Government account."

In paragraph 6 of the counter-affidavit filed by the Deputy Secretary to Government in Food and Civil Supplies Department, in O. J. C. No. 404 of 1975 which is taken as the principal counter-affidavit, it has been averred:-

"That with regard to the averments made in paragraphs 10 to 12 of the writ application, it is submitted that Section 3 (3B) of the Act provides that the payment to a person shall be made for the foodgrains which the person sells under an order issued with reference to clause (f) of sub-section (2) of Section 3 of the Act at a price as may be fixed having regard to the price for such variety or grade of foodgrains prevailing or likely to prevail during the post-harvest period. The explanation to the aforesaid Section 3 (3-B) defines the meaning of post-harvest period. The State Government has issued notification in pursuance of clause 2 (c) of the Paddy Procurement Order fixing the price payable for the different grades and varieties of paddy. In fixing the price, the State Government has taken into consideration the price fixed by the Government of India on the recommendations made by Agricultural Prices Commission in September, 1974 regarding

price policy for khariff cereals for the 1974-75 session. It is submitted that the Agricultural Prices Commission is an All India body which collects data regarding relevant issues like the cost of production of the cereals from the States and other sources including Agricultural Universities and formulates its recommendations. The price thus fixed has been accepted by all States in India. The State Government also took into consideration the open market price of paddy that was prevalent during the last year during the period from December to March (obviously referring to December, 1973 to March, 1974). Taking these factors into consideration, the Government fixed and declared the price for paddy and rice for the purpose of the Order which according to the Government was the price likely to prevail during the post-harvest period. It is submitted that according to Section 3 (3B) of the Act, the Government has to fix this price having regard to the price prevailing or likely to prevail and not the exact price prevailing or likely to prevail. (Underlining is ours). In this view of the matter, it cannot be said that the price has been fixed arbitrarily or without taking into consideration any data. It is not possible or practicable to determine the price on the basis of market rates prevailing or likely to prevail from place to place or time to time. The price has to be fixed taking a cross section. The basis of price to be fixed in the year should be reasonable, efficient and representative of a cross section of data from different places. As stated above, the Agricultural Prices Commission makes its recommendations with reference to the data available from all States and various other sources and the State Government took into consideration the price fixed by the Government of India on the recommendations of the Agricultural Prices Commission before fixing the price by Notification. Thus the prices in question fixed by the State Government for purchase of paddy under the Levy Order represent a reasonable price based on the data as aforesaid, and the said price thus fixed cannot be said to be arbitrary."

In paragraph 3 of a supplementary counter-affidavit of the same Deputy Secretary, it has been further averred:-

"..... No controlled price has been fixed for the rice and paddy in State of Orissa. However, the declared price has been determined having regard to the prevailing price as well as the price likely to prevail during the post-harvest period.

4. That the scheme of producers levy forms part of the national food policy. The experience of procurement operation on all-India basis has shown that reliance cannot be placed solely on millers' levy and a firm basis has to be built to ensure that adequate quantities are procured to meet the requirements of public distribution system. The rationale behind the producers' levy is that the farming community owes a duty to contribute some share of their produce to the public distribution system for feeding landless persons. It is a known fact that even in years of normal production of rice, people living in urban, industrial and mining areas and also landless labourers and artisans, salaried employees, small and marginal farmers depend on the public distribution system for supply of rice."

In Paragraph 8 of the said counter-affidavit, the following assertions have also been made:-

> "The contention raised in the writ application that the 'declared price' has been fixed in violation of the statutory provisions contained in sub-section (3B) of Section 3 of the Essential Commodities Act is totally false and is hereby denied. After the issue of the Paddy Procurement (Levy) Order, 1974, the State Government determined the 'declared price' in due compliance of the requirements of Section 3 (3B) of the Essential Commodities Act, 1955. The wholesale price of paddy in the open market as reported by the different marketing centres for the period of November and December, 1973 were taken into account. The recommendation made by the Agricultural Prices Commission on price policy for khariff cereals for 1974-75 season which has been accepted by the Government of India was duly considered. No controlled price of rice or paddy has yet been fixed for State of Orissa. The Government, however, determined the 'declared price' of procurement on Government account having regard to the prevailing price as available from time to time. The Government also felt that the main crop of paddy would be harvested late this year due to delayed rains and market prices are expected to fall after the arrival of the main crop as has been experienced generally in the past. Accordingly, the market price likely to prevail during the post-harvest period was duly taken into account and the declared price was fixed by the Government.
> It may be mentioned that the Agricultural Prices Commission has been set up by the Government of India to assess the procurement price for the standard variety of paddy and other agricultural commodities, after investigating into the cost of production. The Commission is required to consider the data collected from the State Government as well as the Agricultural Universities and the various other sources for determining such price. The Commission has recommended the procurement price for paddy for 1974-75 marketing season to be fixed at Rs. 74 per quintal and the recommendations of the said Commission have been duly accepted by the Government of India as a uniform price for the entire country."

To another further counter-affidavit of the same Deputy Secretary, the Report on Price Policy for the khariff cereals for 1974-75 season given by the Agricultural Prices Commission has been appended. Table 5 of the said Report shows that there has been a fall in total production of rice during 1971-72 and 1972-73. Admittedly there has been drought in large parts of the State during 1974-75 Khariff season and the paddy crop has been badly affected. The yield of paddy, therefore, was bound to be lower than in the previous years. In paragraph 2 of the Report, at page 1, it has been stated:-

> "The current year has witnessed an unprecedented increase in foodgrain prices, the pace of rise having been almost double of what it was last year. The index number of foodgrain prices in July 1974 has recorded an increase of 35.6 per cent over its level in July 1973 as against an increase of 18.3 per cent in July, 1973 over that in the corresponding month of

1972. Nature, by and large, cannot be blamed for this acceleration in the rate of price increase; the rise in prices in the year of drought, 1972-73, was far milder in comparison with what has occurred in the face of an increase of nearly 10 million tonnes in the output of foodgrains in 1973-74. Nor does the proximate influence of the expansion in money supply seem capable of explaining a large part of the near-doubling in the rate of price increase. The explanation of what appears, on the face of it, a baffling phenomenon starts unfolding itself, however, as one traces the course of price development through the year. (Tables 1 and 2).

3. According to the normal seasonal pattern, the index number of foodgrain prices tends to reach a through(?) in April when the arrivals of wheat in the market are brisk, and rises thereafter till about October to take another dip in November and December when the market arrivals of the khariff cereals are in full swing and then rises again till March before the next rabi crop arrives in the market. The increase in the index between April and October, 1973, amounting to about 11 per cent as compared to the increase of 15 per cent over the corresponding period of 1972, did reflect the good khariff crop of 1973-74, but instead of declining in November-December, as would normally have been expected, the index rose in response to the increases effected in the prices of the cereals issued through the public distribution system, consequent to the sizeable increases allowed in the procurement prices of the khariff cereals. Thus, the subsequent seasonal rise started from a higher base than would have been the case if the administered prices had not been jacked up so substantially. Even so, the rise in the index between December 1973 and March 1974, being of the order of 8 per cent, was comparatively moderate but, combined with the decline in wheat output, the sharp increase in the procurement and hence the issue price of wheat effected in April 1974 set into motion a process of continuing rise in the index till, additionally reflecting the effect of the delay in the south-west monsoon, it recorded an increase of another 18 per cent in the short span of four months between March and July, 1974."

In Table 1 appended to the report, the rise in price of rice between the months of January and April, 1974 from Rs. 293.4 to Rs. 336.8 per quintal has been shown.

Under Annexures B-1 and C-1 to the additional counter-affidavit of 13th of March, 1975, given by the Deputy Secretary, the wholesale price of paddy in open market as prevailing in the months of October-November, 1974 (Annexure B-1) and as prevailing in November-December 1973 (Annexure C-1) have been furnished. Peculiarly enough in respect of most of the markets, the report is that there has been either no transaction or no report. In some places, the figures indicated appear to be more than what has been fixed as the declared price. It may be stated that the declared price which the State Government has accepted is Rs. 74 per quintal as recommended by the Agricultural Prices Commission and accepted by the Central Government. The Agricultural Prices Commission recommended that there should be uniformity of price throughout the country. The scheme under the Act is that in the absence of a controlled price, the prevailing price in the locality would provide the basis. Judicial notice can be taken of the fact that the price of paddy and rice varies from State to State and even from place it place to within the same State in the absence of a controlled price. Fixation of a uniform price for the whole

country is contrary to the mandate of the Act in Section 3 (3B) (ii). The figures shown in Annexure B-1 disclose higher price than what has been fixed as the declared price by the State Government. Annexures D-1 and E-1 have been appended to the aforesaid further counter-affidavit in support of the stand that declared price is in accordance with the Act. Annexure D-1 is a note prepared by the deponent Deputy Secretary dated 25-11-1974. Therein it has been indicated that the State average for November, 1973, was Rs. 70.13 and for December, 1973, it was Rs. 72.78. The Agricultural Prices Commission have recommended uniform procurement price of Rs. 74 per quintal for the standard variety of paddy for 1974-75 season. The note nowhere indicates any clear material for fixing the market price on the date of the order or the price that is likely to prevail during the post-harvest period Annexure D-1 shows that on 25-11-1974, the Commissioner-cum-Secretary, Food, accepted the proposal of the Dy. Secretary and on the following day the Minister also accepted the proposal. On 27-11-1974, the prices were duly declared by a notification. On behalf of the petitioner in O. J. C. No. 404 of 1975, it has been averred in an affidavit filed on 14th of March, 1975 that the average selling price of paddy in October, 1974 was Rs. 125.65 and in November, 1974, it came to Rs. 110.95. These are said to be the average of the figures disclosed in Annexure B-1. The petitioner has also produced a Press Note issued by the State Government dated 31st of October, 1974, which would go to show that the State Government had as early as October, 1974, taken the view that the price of Rs. 74 per quintal should be fixed for the coarse variety in view of the fact that the Government of India had fixed the same for the entire country. The price of Rs. 74 as fixed by the State Government appears to be the outcome of its decision to adopt the price fixed by the Government of India on the recommendation of the Agricultural Prices Commission and not keeping the requirements of the law in view. It has been contended by learned Government Advocate that under Section 3 (3B) (ii) of the Act, the price is to be determined 'having regard to' the price prevailing or likely to prevail during the post-harvest period. Discretion has been vested in Government by the Act to determine the price and it is not Parliament's intention that the person holding the stock of the foodgrain be paid either the prevailing market price or the price which was likely to prevail in the post-harvest period. A duty has been cast by the Act on the appropriate authority to determine the price and for determining the same, the guideline indicated is the prevailing price or the price to prevail in the post-harvest period. The phrase "having regard to" came to be interpreted by the Privy Council in the case of *Ryots of Garabandho v. Zamindar of Parlakimedi*[15], It was observed that when some statutory power is to be exercised having regard to certain specified provisions, it only means that those matters must be taken into consideration, for the statutory authority is not strictly bound by such provisions even if none of such provisions is worded in a negative form and an exercise of power does not become invalid or in excess of jurisdiction if those provisions are not strictly followed. In the case of *Saraswati Industrial Syndicate Ltd. v. Union of India*[16], the Supreme Court came to deal with this phrase and stated:-

> "Clause 7 (2), set out above, requires the Government to fix the price 'having regard to the estimated cost of production of sugar on the basis of the relevant schedule'. The expression 'have regard to' only obliges the Government to consider as relevant data material to which it must have regard..... The appellants concede that this is the effect of language of clause 7 (2). It is evident that the price fixed is an estimated maximum price chargeable because the manufacturer cannot charge more. Furthermore, it should be noted that the only 'adjustment' provided for is before a fixation of the estimated price 'having regard' to the basis provided by the relevant schedule, but there is no obligation

whatsoever cast upon the Government to make any 'adjustment' to compensate for losses due to any previous erroneous fixations....."

The same question came up for consideration before the Division Bench of the Patna High Court in the case of *T.M. Prasad v. State*[17], Untwalia, J. as the learned Judge then was, stated:-

"..... Their main attack seems to be on the fixation of price and that on two grounds- (i) that when there was no controlled price for paddy and rice in the State of Bihar, the market price prevailing in October, 1970 when the Order was made or the post-harvest price which was likely to prevail during the post-harvest period ought to have been fixed and (ii) that the State Government have fixed a much lower price. On the basis of the decision in Queen on the Prosecution of *James Smith v. Vestry of St. George's, Southwark*[18], which was

cited by learned counsel in one of the cases it was argued that the phrase 'having regard to' occurring in sub-section (3B) must mean the fixation of the price as enumerated in clauses (i) and (ii) of sub-section (3B). In reply, Government Pleader II pointed out a passage at page 186, Paragraph 7 in the Bench decision of the court in *Mohammad Sagiruddin v. District Mechanical Engineer*[19], that

'the words 'have regard to' in a statutory provision do not mean that there must be very strict compliance with the statutory provision, but that the provision should be taken for guidance only.'

I am inclined to accept the argument put forward on behalf of the State, and hold that the expression 'having regard to' occurring in sub-section (3B) of Section 3 of the Act means that great weight and dominant regard must be attached and given to the controlled price, if any, and to the post-harvest price prevailing or likely to prevail, and not the market price at the date of the promulgation of the Order. It does not by necessary implication exclude taking into consideration other factors. Of course, if the price is fixed in disregard of or by not giving due regard to, the said price, arbitrarily or *mala fide* the fixation of the price may be knocked down as being in colourable or fraudulent exercise of the power. But if some other factors, namely, the consumers' interest or the like are taken into consideration while fixing the price, it is difficult to hold that the State Government having not fixed the price prevailing during the post-harvest period promulgated the procurement order in violation of the requirement of sub-section (3B)."

Relying on these observations, learned Government Advocate contends that there is no obligation cast under Section 3 (3B) (ii) of the Act to adopt the prevailing market rate or the rate likely to prevail in the post-harvest period. It is sufficient if Government while fixing the price 'have regard to' these features. We have already indicated that in the matter of fixation of the price, these aspects were not indeed given due weight. Appropriate materials were not collected and the dominant consideration in adopting the rate of Rs. 74 per quintal of coarse paddy and with small increases for better varieties thereof was the Government of India's decision to fix a uniform price throughout the

country on the recommendation of the Agricultural Prices Commission. In the note given by the Deputy Secretary for the matter of fixation of price to which we have already adverted, no other feature was taken note of. We agree that it was open to Government to take other relevant and germane aspects into account along with the prevailing price as also the post-harvest price. But in view of the facts disclosed in the note of the Deputy Secretary (supra) it is not possible for us to hold that due regard was given to these aspects of the matter.

We have already stated that it is not the intention of the Act to be exproprietary in any manner. Therefore, it must be taken that Parliament intended to pay a reasonable price for the statutory purchase. The use of the word 'price' must also be given due weight in disposing of the dispute. 'Price' according to the Shorter Oxford English Dictionary means "value, worth, estimation of value, money or the like paid for something".

We have already noted the huge gap between the actual prevailing price or the price which was likely to prevail in the post-harvest period on one side and the declared price on the other. According to us, it could not have been the intention of the Parliament to fix such a price in exercise of powers under Section 3 (3B) (ii) of the Act. Therefore, the direction to sell at a price not in terms of the Act is an infraction and beyond the authority of delegation.

Contention No. 9.

14. Clause 9 of the Order deals with appeals and is to the following effect:-

"(1) Any land-holder aggrieved by the notice served under clause 4 or an order made under clause 8 by the Requisitioning Authority, may within 7 days from the date of service of such notice or order, appeal to the Tahasildar exercising jurisdiction in the area in which the land of the land-holder referred to in the notice or order is situated.

(2) The Tahasildar shall fix the date, time and place for the hearing of the appeal thus preferred to him and may, from time to time adjourn the hearing and make or cause to be made such further enquiry as he deems fit.

(3) In disposing of an appeal, the Tahasildar may confirm or annul the notice or order appealed against or reduce or enhance the quantity of paddy to be sold under the said notice or order.

(4) The Tahasildar shall communicate in writing the order passed in appeal by him to the appellant and also to the Requisitioning Authority. Every order of the Tahasildar on such appeal shall be final." The petitioners have contended that final appellate power having been conferred on a subordinate authority like the Tahasildar in the hierarchy of executive administration, unjust orders are likely to be upheld. It has been further contended that in the absence of appropriate guideline for the appellate authority and he having been made subordinate to directions given by the Collector of the District, appropriate justice is not expected from the appellate authority. It is also the contention of the petitioners that the appellate authority has no power to go beyond the scheme of the order and in a case

where by arithmetical calculation, a demand has been raised against a landholder, even if he is able to satisfy the appellate authority that he is not liable to sell any paddy, no relief can be granted.

The original order of levy is provided to be raised by the requisitioning authority who in terms of Clause 2 (h) of the Order is the Revenue Inspector or the Additional Revenue Inspector. In the administrative hierarchy, the Tahasildar is his superior authority. The number of land-holders who are likely to be subjected to the Order being enormous, as learned Government Advocate rightly pointed out, the power to raise a demand could not be vested in any other officer. The lands are spread out. The levy has to be raised immediately following the harvest of the crop; otherwise it becomes difficult to collect the food-stuff. The Revenue Inspector in due discharge of his duties is expected to be in the know of the land-holding and other requisite particulars relevant for the purpose of the administration of the Order. After the abolition of the Sarbarakari system, it is the Revenue Inspector who has been in charge of collection of taxes and is directly associated with the maintenance of revenue records. The State Government must have anticipated that most of the demands raised by the requisitioning officer would be subjected to appeal. Keeping the number of appeals to be filed in view and the necessity of quick disposal thereof, the State Government could not have found any other officer in the hierarchy of the administration more suitable for the purpose. Therefore, the vesting of the power to raise a demand in the Revenue Inspector and conferring the appellate power on the Tahasildar would not be open to objection merely on the ground that they are subordinate revenue authorities in whom wide powers have been vested. As rightly contended by learned Government Advocate, the principles have been indicated in the order in the matter of raising of demand of levy and what has been left to the requisitioning officer to work out is more or less an arithmetical process which can be equated as a ministerial act. No discretion of any manner has been vested in him.
Reddy, J. pointed out in the case of *Y.E. Choudry v. State*[20],:-

"I may further add that in the very nature of things the discretion given to the authorities has necessarily to be wide. It is a matter of common knowledge that the food situation in our country is precarious, because the production of food is marginal in relation to the requirements of our growing population and the rising standards of living. The balance may be upset by the slightest disturbance such as food, fire, cyclone, drought or public disorder in addition to the usual practices of hoarding and black-marketing indulged in by unsocial elements. Ordinarily the paddy and rice procured under the Paddy Procurement (Levy) and Restriction on Sale Order may be quite sufficient to secure the even distribution of rice at fair prices throughout the country. But an unforeseen emergency may arise at any time in any part of the country. It is essential that the authorities should be armed with necessary powers to deal with emergent situation arising out of any of the many causes mentioned by me earlier. Since the causes are many and cannot be foreseen the discretion given to the authorities has necessarily to be wide. The discretion is of course to be exercised always for the purposes mentioned in the Essential Commodities Act. Sri Krishna Reddy urged that even assuming that it was necessary to confer wide discretion to the authorities such discretion should have been entrusted to highly placed officials and not to officials in the lower ranks. He invited my attention to cases where the

> wide discretion given to certain licensing authorities was upheld by courts on the ground that the discretion was entrusted to highly placed officials. There is no axiomatic rule that discretion, if wide, should always be entrusted to highly placed officials. In the case of licensing provisions often very great monetary stakes are involved. Entrusting discretion in such cases to lower officials may have the result of leading to undesirable practices. In such cases, it may be desirable that the discretion is entrusted to highly placed officials. But we are concerned here with the food problem which touches every nook and corner of the country and affects every one. Emergent situations may arise at any time in any nook and corner of the country. The officer on the spot must be entrusted with the power to deal with the situation immediately. Otherwise great mischief and havoc may be done by the time the highly placed officials are apprised of the situation and take necessary action. Take the case of a sudden
>
> flood or fire which washes away or destroys a village in a remote corner of the State. The Deputy Tahasildar is the man on the spot. It is his duty to provide food and shelter immediately to those affected by the devastation. He may provide food by requisitioning stocks of paddy and rice from a neighbouring village and making them available to those affected by the flood or fire. If he is to wait for an appropriate order to be passed by the highly placed official at the capital of the State or even the head-quarters of the district great hardship may be caused to the people affected by the devastation. In situations which can only be dealt with satisfactorily and according to need by lower officials there is no charm in insisting upon higher officials dealing with such situations....."

Our view is in accord with the spirit of the law and the problem as indicated by the learned Judge. The appellate authority has the normal powers of an appellate forum. There is, however, force in the contention of the petitioners that the appellate authority is not entitled to act in derogation of the scheme of the Order. The policy which guides the requisitioning authority also binds the appellate authority as he is a creature if the Order and cannot, in the absence of a clear provision, travel beyond the limits set by the Order. For instance, if the requisitioning authority has found that a person owns 10 acres of irrigated land on which paddy is produced and raises a demand in terms of the Schedule, the appellate authority cannot cancel the demand on the ground that there has been no adequate yield. The contention of the petitioners receives support from the fact that the power to exempt in cases of this type is vested in the Collector of the District under clause 11 (1) of the Order. Learned Government Advocate took the stand that exemption provided in clause 11 is not in regard to cases of individual land-holders and, therefore, when in appeal a land-holder raises such contention, it would be a matter for the Tahasildar as appellate authority to consider. We do not find any merit in this contention. The appellate authority is to operate within the limits of the scheme and on consideration which are not open to him he is not entitled to afford relief in appeal. Therefore, there may be cases where the appeal would not bring in any remedy. The objection that under Clause 10, the Government or the Collector of the district can issue directions even to the appellate authority cannot be seriously viewed. There is no indication in clause 10 that in regard to matters covered by appeal, directions under Clause 10 may issue. The power under Clause 10 is certainly not intended to be exercised to control the appellate power of the Tahasildar. What is intended by clause 10 is to regulate either by general or special directions the administrative machinery. The last objection in regard to clause 9 is that

the order of the appellate authority has been made final. Counsel for petitioners have contended that the Tahasildar is the lowest of Gazetted Officers in the executive administration. To make his orders in appeal final in regard to such a serious matter is wholly unjust. As we have already said, the State Government must have felt that no other working machinery can be evolved in view of the number of appeals, the nature of enquiry necessary and the quickness of disposal of appeals warranted by the special nature of the matter. In these circumstances, we are prepared to accept the contention of learned Government Advocate that no serious objection can be taken to the provision of finality in regard to appellate orders.

Contention No. 10.

15. The petitioners have contended that the scheme under the order is unworkable and has the effect of driving the citizens into a sea of uncertainty and exposes them to various hazards. To support such a contention, it has been argued that the settlement proceedings have not been completed in all parts of the State. In several areas claim of mutation has not been disposed of on the ground that settlement is to take place soon. After the abolition of estates, lands have passed from hand to hand and records have not been made uptodate. In view of the land legislation several alienations have taken place, petitioners have been effected, family settlements done, etc. to avoid its rigors and in the absence of correct and uptodate revenue records, the requisitioning officers have no appropriate data to raise demands. In many cases, though there is no liability even under the Order, demands have been raised on the basis of 'ancient' records and people have been forced to prefer appeals though they have really no liability and if the order had been properly administered, they would have had no occasion to undertake such trouble. Many of these objections appear to be germane. It is, however, unnecessary to discuss this aspect of the matter any further.

16. Objection has also been raised challenging the vires of Clause 6 of the Order. Clause 6 of the Order is to the following effect:-

> "Delivery of stocks.- (1) The agent or officer of the Government shall, subject to such general or special instructions as may be issued from time to time, by the Government or the Collector of the District, take delivery of the quantity of paddy sold under this order by or on behalf of the land-holder and shall give a receipt to him as to the quantity and variety of paddy delivered by him together with the date of taking delivery thereof:
> Provided that every land-holder on whom a notice under clause 4 is served shall take all reasonable care to deliver the exact quantity and variety of paddy of fair average quality.
> (2) The agent or officer of the Government shall, on taking delivery of the paddy sold, pay for the quantity and variety of paddy delivered, at the declared price and obtain a receipt from the land-holder therefor."

Notice of demand is issued under a printed form. Therein the direction given is to deliver the demanded paddy at a specified centre on payment of Rs. 3 per quintal for transport. This amount has been subsequently enhanced. Though not raised in the writ applications specifically, it has been argued before us that the direction to deliver paddy at a specified centre is not authorized under the Act or the order and is an additional burden imposed on the land-holder without any

authority of law. It is true that on account of transport charges, a payment has been offered. The payment is not adequate and it is very difficult for most of the land-holders to carry the paddy to the named centre which in some cases is located at a distance of 3 to 4 miles or even more from their residences. Again, transporting paddy has become very difficult and risky on account of the fact that owing to non-availability of paddy, people seize the stocks during transit and take away the same by application of force or on payment of nominal price. These are certainly practical difficulties which cannot be brushed aside. But as there is no requirement in clause 6 in regard to delivery of the paddy at a place may be directed in the notice, the clause is not open to attack. The direction in the notice seems to be in excess of the order.

17. Learned Government Advocate has canvassed before us during hearing of these cases keeping the sensitive problem of food in view, we should uphold the order and even if there be some infraction, the same should not be made the ground to disturb the food policy in the broad and general interests of the society. We have given anxious considerations to this submission and have not been able to accept the same. Undoubtedly, the country has been passing through a period of stress. For some reason or other, there has been deficit food for some time and it has become necessary to distribute foodstuff through a public distribution system. To keep up the system of public distribution, acquisition of appropriate stocks of food-stuffs is indispensable. For the said purpose, the Order has been promulgated. Parliament by the Act vested adequate powers in the Central Government to meet such situations and the Central Government in exercise of powers vested in Section 5 thereof authorized the State Governments as its delegate to exercise such powers within the limit of delegation to meet the situation. If the scheme of the Act has been properly followed, there could be a valid Order beyond the range of attack to adequately meet the situation. The impugned order being not in confirmity with the requirements of law has failed to achieve its purpose. Ours is a country wedded to the rule of law and all institutions within the country are subjected to the said rule. Any infraction of the said rule has to be struck down so that the bull work of rule of law will ultimately survive and work and the equilibrium may not be disturbed. Any negative inroad has to be shut out so that the edifice may not suffer. It is only in times of stress that fundamental laws are appropriately tested. We feel inclined to quote a brief passage from the judgment of the Supreme Court, in the case of *State of Punjab v. Khan Chand*[21], where it was observed:-

> "It would be wrong to assume that there is an element of judicial arrogance in the act of the courts in striking down an enactment. The Constitution has assigned to the courts the function of determining as to whether the laws made by the Legislature are in conformity with the provisions of the Constitution. In adjudicating the constitutional validity of statutes, the courts discharge an obligation which has been imposed upon them by the Constitution. The courts would be shirking their responsibility if they hesitate to declare the provisions of a statute to be unconstitutional, even though those provisions are found to be violative of the Articles of the Constitution.... Hesitation or refusal on the part of the courts to declare the provisions of an enactment to be unconstitutional, even though they are found to infringe the Constitution because of any notion of judicial humility would in a large number of cases have the effect of taking away or in any case eroding the remedy provided to the aggrieved parties by the Constitution. Abnegation in matters affecting one's own interest may sometimes be commendable but abnegation in a matter where

> power is conferred to protect the interest of others against measures which are violative of the Constitution is fraught with serious consequences. It is as much the duty of the courts to declare a provision of an enactment to be unconstitutional if it contravenes any Article of the Constitution as it is theirs to uphold its validity in case it is found to suffer from no such infirmity."

The basic spirit behind the passage applies to the facts of the case. In view of what we have said above, we come to the conclusion that Clauses 2 (c), 3 and 4 of the order are *ultra vires* the Act and are liable to be struck down. If these clauses go, can the rest of the Order be sustained? These clauses constitute the pivot of the scheme contained in the Order and the remaining provisions of the Order would not serve any purpose. In fact the Order cannot be worked out without these clauses. What remains is so inextricably bound up with the part which is found invalid that what remains cannot independently survive and serve the purpose of the order. The entire order must accordingly be held liable to go.

18. We shall now revert to deal with the facts of each of the cases in brief. O. J. C. 1320 of 1974- Opposite party No. 2 served a notice of demand requiring the petitioner to deliver 188 quintals of paddy on the basis that the petitioner possessed 68.48 acres of land, all being irrigated, as would appear from Annexure 1. The petitioner claimed that he had filed an appeal, but though the appellate order had not been passed, as he was apprehensive that the demand might be collected by force, he approached this court. One counter-affidavit and an additional counter-affidavit have been filed by the Deputy Secretary which are in the same lines as in the main counter-affidavit already taken note of. In view of our findings on the questions of law already indicated, the demand has to be quashed. We accordingly allow the writ application and quash the impugned demand. The petitioner shall have costs of the proceeding. Hearing fee is assessed at rupees one hundred. O. J. C. No. 207 of 1975.- The petitioner is a resident of Kamakshayanagar area in the district of Dhenkanal. A demand for 19 quintals of paddy was raised by the requisitioning authority on the footing that the petitioner possessed 17.76 acres of land. The entire land was shown to be cultivated in the notice of demand. The petitioner disputed that fact in the writ application contending that 6.66 acres of land is 'taila' and does not grow any paddy. He also claimed that as early as 4-7-1966, he had sold away about half an acre of land. According to him, he was in possession of 9.99 acres of land on which he was cultivating paddy. The petitioner preferred an appeal to the Tahasildar under Clause 9 of the Order, but his appeal was dismissed. Thereafter he came with the writ application. In the counter-affidavit, opposite parties 1 and 2 have taken the stand that the petitioner is liable on the basis of 18.83 acres as 1.62 acres in the name of his son who is living jointly with him has to be taken into account. This, in fact, is a new case and goes beyond the basis of the demand raised by the requisitioning officer. The claim that six acres of odd constitute 'taila' has been disputed. We do not think, it is appropriate that we examine this question of fact. In view of our findings on the questions of law, the demand raised in this case has to be quashed. By an interim order dated 31-1-1975, six quintals of paddy were directed to be sold out of the demand. In view of the fact that sale has been made under orders of this court, we direct, in the event of sale having really been made, that the petitioner be paid for the said six quintals according to the prevailing market rate in the absence of any price fixed under the Act. The writ application succeeds. The notice of demand is quashed. The petitioner shall have costs of the proceeding and hearing fee is assessed at rupees one hundred. O. J. C. No. 241 of 1975.- The petitioner is a resident of Pipili area in the district of Puri. The requisitioning

officer issued a notice requiring the petitioner to sell 77 quintals of paddy on the footing that the petitioner was possessed of 31.44 acres of irrigated land. The petitioner alleged that the crops on his land had been badly affected on account of drought, the quantity of paddy which he was expecting was not adequate to meet the needs of his family; there was no basis for treating the lands as irrigated as there had been no supply of water on account of drought and that only eight acres of land were provided with facilities of irrigation and the remaining land had no irrigation facilities. The petitioner also alleged that he had sold away some land. The Tahasildar reduced the area to 27 acres of land and consequently the demand to 65 quintals of paddy. He, however, did not deal with the other contentions raised before him in the appellate order dated 12-1-75. The assertions of the petitioner about the other aspects indicated above have not been specifically denied and in an additional counter-affidavit filed on 28th February, 1975, it has been stated that the lands are irrigated without affording any further material. We are of the view that the challenge in the counter-affidavit is not adequate. Besides, in view of our findings on the questions of law, the demand cannot be sustained. We accordingly quash the demand and allow the writ application with costs. Hearing fee is assessed at rupees one hundred. O. J. C. No. 287 of 1975.- The petitioner is a man of Ranpur area in the district of Puri. He was served with a notice dated 10-12-1974 requiring him to sell 77.50 quintals of paddy on the footing that he possessed 56.22 acres of land. The petitioner preferred an appeal to the Tahasildar on the ground that crop had been damaged, most of the lands were in the possession of Bhagchasis and the share of crop had not been delivered. He further pleaded that one Bharat Santra had two wives. Through the first wife Raghunath Sahu was the only son while through the second wife he had two daughters. Seven acres out of the lands on the basis of which notice had been issued had been granted to the said second wife who happens to be the grandmother of the petitioner and she had title therein and was in possession. Raghunath Sahu died and in the name of his wife, 3.77 acres of land was recorded. His wife Hira Bewa was in possession. He also indicated in paragraph 7 of the writ application as to how certain lands had been disposed of and the petitioner was not in possession of the lands indicated in the notice. The appeal preferred by the petitioner was disposed of on 30th of January, 1975 and it was found that (sic) therefore, obliged to sell 43 quintals. As the order of the Tahasildar would show, he has gathered the entire material from the report of the Revenue Supervisor dated 30th of January, 1975 and without affording an opportunity to the petitioner to meet the facts stated in the report, he has disposed of the appeal. In this case no counter-affidavit on facts has been filed. Accordingly we are prepared to accept the uncontroverted statements of the petitioner because, the appellate order has not dealt with the factual aspects. In view of the findings given on the questions of law, we must hold that the demand is without justification. The demand is accordingly quashed. The writ application succeeds with costs. Hearing fee is assessed at rupees one hundred. O. J. C. No. 288 of 1975.- The petitioner is a resident of Rambha area in the district of Ganjam. On the footing that he was possessed of 44.73 acres of land out of which more than 41 acres were cultivable, a demand of 121 quintals of paddy was raised against him. The petitioner contended that 9.25 acres were topes and padar lands, some lands had been sold away more than 25 years back, the rest of the lands were all non-irrigated and drought was to the extent of 59 per cent as declared by the appropriate authorities. The appellate decision has not been made available. No counter-affidavit has been filed to dispute the questions of fact. Accordingly we are left with the uncontroverted allegations in the writ application. We have already found that the Order is not sustainable in law. Accordingly the demand has to be quashed. The writ application must stand allowed with costs. Hearing fee is assessed at rupees one hundred. By an interim order dated 11-2-1975, we had directed the petitioner to sell three quintals of paddy on the stipulation that in case he succeeds he

is entitled to be compensated at the market rate therefor. Accordingly we pass an order directing the opposite parties to pay the petitioner the price of three quintals of paddy if sold by him at the market rate prevailing on the date of sale. O. J. C. No. 325 of 1975.- The petitioner is a resident of Nayagarh area in the district of Puri. On the footing that he was possessed of a little more than 19 acres of irrigated land, he was required to sell 41 quintals of paddy as per the demand under Annexure 1. He preferred an appeal claiming that there was no irrigation facility, about 9.00 acres of land were bagayats, homestead and lands already sold. Therefore, the petitioner, was in possession of about ten acres of land which is unirrigated. The Additional Tahasildar vide order under Annexure 2 rejected the claim of unirrigated character of land and required the petitioner to sell 14 quintals of paddy. We have already found that the Order is not sustainable in law. Accordingly the demand has to be quashed. The writ application must stand allowed with costs. Hearing fee is assessed at rupees one hundred. O. J. C. No. 404 of 1975.- The petitioner is a resident of Ranpur area in the district of Puri. By notice dated 9-12-1974, 171/2 quintals of paddy were demanded from him to be sold on the footing that he was in possession of 17.09 acres of irrigated land. The petitioner preferred an appeal contending that he had no liability and the calculation of his holding was erroneous. By the appellate order under Annexure 2, the demand was reduced to 141/2 quintals on a finding that the petitioner was now in possession of 15.22 acres of land. We have already found that the Order is not sustainable in law. Accordingly the demand has to be quashed. The writ application must stand allowed with costs. Hearing fee is assessed at rupees one hundred. O. J. C. No. 439 of 1975.- The petitioner is a resident of Ranpur area in the district of Puri. The requisitioning officer required the petitioner to sell 19 quintals of paddy on the footing that the petitioner was in possession of 18.38 acres of land. The petitioner preferred an appeal to the Tahasildar and contended that the lands in question belonged to the petitioner, his sons and there had already been a division of the properties. To the petitioner's share has fallen 5.13 acres of land and his entire yield is within the range of ten quintals of paddy. He pleaded that the stock of paddy with him would not be adequate for the members of the family and it is necessary that he must save some seeds for the next crop. Without taking any aspect into consideration, the demand was reduced by 10 per cent only and the petitioner has been required to sell seventeen and odd quintals of paddy. In view of our finding that the order is not sustainable in law, the demand is liable to be quashed. We accordingly quash the demand. The writ application is allowed with costs. Hearing fee is assessed at rupees one hundred. O. J. C. No. 444 of 1975.- The petitioner is a resident of Balipatna area in the district of Puri. He was served with a notice dated 8-12-1974 to sell 22 quintals of paddy on the footing that he possessed 9.70 acres of irrigated land and about an acre of unirrigated land. The petitioner preferred an appeal contending that there had been a partition in the family and his three married sons had separated from him. He had a tope some nadia lands and ditches which have been unnecessarily treated as growing paddy. He further contended that on account of drought, the crop had been badly affected and he claimed exemption from the demand. The appellate authority without taking any evidence and holding any enquiry came to hold that the entire land was in the control of the petitioner and accordingly sustained the demand. We have already found that the order is not sustainable in law. Accordingly the demand has to be quashed. The writ application must stand allowed with costs. Hearing fee is assessed at rupees one hundred.

B.K. Ray, J.

19. I agree.

Petition allowed.

Cases Referred.

[1] AIR 1954 SC 465
[2] AIR 1974 SC 366
[3](1969) 2 Mad LJ 324
[4] AIR 1973 SC 1461
[5] AIR 1952 SC 335
[6] AIR 1968 Pun and Har 363
[7] AIR 1951 SC 201
[8](1963) Supp (1) SCR 563
[9](1945) 72 Ind App 241
[10](1969) 3 SCR 165
[11]72 Ind App 241 at p. 258 = (AIR 1945 PC 156 at p. 160)
[12] AIR 1968 Pun and Har 363
[13] AIR 1972 All 401
[14] AIR 1972 Pat 250
[15] AIR 1943 PC 164
[16] AIR 1975 SC 460
[17] AIR 1972 Pat 250
[18](1887) 19 QBD 533
[19] AIR 1966 Pat 184
[20] AIR 1974 And Pra 96
[21] AIR 1974 SC 543