PATNA HIGH COURT

Delhi Cloth and General Mills Co

Vs

The Agricultural Produce Market

(B.C. Basak, C.J. A Alam , J.)

30.03.1992

JUDGMENT

B. C. Basak, C. J.

1. These series of 28 writ petitions involve similar facts and common questions of law so far as the main submissions are concerned and for this reason they have been heard together and are being disposed of by this common judgment. In some of these writ petitions some additional points are urged which were special to them. These writ petitions relate to the following "agricultural produce", namely, (1) Wheat and wheat products e.g., Atta, Maida, Suji and bran, (ii) oil seeds, edible oil mustard oil, (in) sugar and (iv) Vanaspati.

2. (a) C.W.J.C. Nos. 3920/85, 1201/86, 3930/86, 1222/87, 1228/87, 1272/87, 1273/87, 1333/87, 1926/87, 3810/87, 4278/87, 4289/87, 5831/87, 2354/88, 3863/88, 4497/88, 4623/88, 4803/88, 7912/88, 8705/88 and 5187/89.
Excepting in CWJC 3920/85 all these applications are at the instance of flour mills which have been set up either by a Company incorporated under the Companies Act or by a partnership firm. They carry on the business of manufacturing different products, namely, Atta, Maida, Suji etc.

(b) CWJC Nos. 3920/85, 5974/88, 7502/ 88, 7508/88 and 7510/88.Three of these applictions (CWJC Nos. 7502/88, 7508/88 and 7510/88) are on behalf of several partnership firms manufacturing edible oil from oil seeds. CWJC Nos. 3920/ 85, 3920/85 and 5974/88 are on behalf of either proprietary firm or a partnership firm carrying on wholsale business in edible oil/mustard oil.

(c) CWJC Nos. 432/83, 3914/85 and 5159/87.

These three petitions concern Vanaspati. In this group of three, the first two are on behalf of the petitioners who are manufacturers of this commodity. In the third case of this group, the petitioner is a proprietary concern, carrying on business in Vanaspati.

(d) CWJC Nos. 3920/85 and 5974/88.
These two petitions are at the instance of the petitioners carrying on business in sugar.

3. These cases arise out of the enforcement of the provisions of the Bihar Agricultural Produce Markets Act, 1960 (hereinafter referred to as 'the State Act') which is challenged in these proceedings. Before we deal with the respective contentions raised in support of these petitions, it would be fit and proper if we set out the relevant provisions relating to the State Act and some Central Acts, viz. the Industries (Development and Regulation) Act, 1951 (hereinafter referred to a 'the IDR Act'), the Essential Commodities Act, 1955 (hereinafter referred to as 'the E. C. Act), the National Oilseeds and Vegetable Oils Development Board Act, 1983 (hereinafter referred to as the "NOSVODB Act") and the Vegetable Oils Cess Act, 1983.A. The State Act Statement of Objects and Reasons "The importance of properly organised markets of agricultural and allied commodities, though long recognised, has once again been emphasised by the Planning Commission. They have recommended that all the States which have not done so should review the present position and draw up suitable programmes for regulating all important wholesale markets during the Second Plan. The need for legislation for regulating markets is all the greater in Bihar where the agriculturists have to depend in a large measure on the mercy of middlemen to whom they are obliged to sell their produce as soon as the harvesting season is over. The Arhatiyas and wholesale buyers enter into a secret understanding to exploit the unwary agriculturists and they prevent him from having correct information as to the current sale prices of agricultural produce with the result that the agriculturist seldom gets a fair share of the price paid by the consumer for his produce. The main object of having regulated markets is to secure to the cultivator better prices, fair weightment and freedom from illegal deductions. A fair deal for his produce is a good incentive for an agriculturist to adopt improved agricultural programme.The question of regulation of markets was first taken up in Bihar in 1939. A Bill called the Bihar Market and Dealers Bill, 1939 was introduced in the Legislature in 1939, but it could not be passed as the then Ministry went out of office. It was again taken up in 1944, but it was considered that the Bill, which had been prepared in 1939, required modifications and redrafting in view of the changed conditions. It was then decided that the question of regulating markets should be taken up after the war. The States of Andhra, Bombay, Madras, Madhya Pradesh, Mysore and the Punjab have already enacted such legislation and conditions of agricultural marketing in those States have improved appreciably by virtue of legislation. The

main objects of the Bill are ; -

(1) Creation of market areas and markets with a view to ensuring fair trade transactions in agricultural and allied commodities.

(2) Appointment of Market Committees fully representative of growers, traders, local authorities and Govt. to supervise the working of regulated markets.

(3) Regulation of market charges and prohibition of realisation of excess charges.

(4) Regulation of market practices.

(5) Licensing of market functionaries.

(6) Arrangement for conciliation of disputes regarding quality, weighment. deductions etc. (7) Sale by open auction.

(8) Arrangement for the display of reliable and up-to-date market information in the market yard.

(9) Improving generally the conditions of agricultural Marketing."

The recital Clause of the Act is as follows : -

"To provide for the better regulation of buying and selling of agricultural produce and the establishmnl of markets for agricultural produce in the State of Bihar and for matters connected therewith."

"Section 3 (1) Notwithstanding anything to the contrary contained in any other Act for the time being in force, the State Government may, by notification, declare its intention of regulating the purchase, sale, storage and processing of such agricultural produce and in such area, as may be specified in the notification.

(2) A notification under Sub-section (I) shall state that any objection or suggestion which may be received by the State Govern-merit within a period of not less than two months to be specified in the notification, shall be considered by the Stale Government."

S. 4. (1) After the expiry of the period specified in the notification issued under Section 3 and after considering such objection and suggestion as may be received before such expiry and after holding such enquiry as it may consider necessary, the State Government may by notifications, declare the area specified in the notification under Section 3 or any portion thereof to be a market area for the purposes of this Act, in respect of all or any of the kinds of agricultural produce specified in the notification under Section 3.

(2) On and after the date of publication of the notification under Sub-section (1), or such later date as may he specified therein, no municipality or other local authority, or other person, notwithstanding anything contained in any law for the time being in force, shall, within the market area, or within a distance thereof to be notified in the official Gazette in this behalf, set up, establish, or continue, or allow to be set up, established or continued, any place for the purchase, sale, storage or processing of any agricultural produce so notified, except in accordance with the provisions of this Act, the rules and bye-laws.

Explanation- A municipality or other legal authority or any other person shall not be deemed to set up, establish or continue or allow to be set up, established or continued a place as a place for the purchase, sale, storage or processing of agricultural produce within the meaning of this section, if the quantity is as may be prescribed and the seller is himself the producer of the agricultural produce offered for sale at such place or any person employed by such producer to transport the same and the buyer is a person who purchases such produce for his own use or if the agricultural produce is sold by retail sale to a person who purchases such produce for his own use.

(3) Subject to the provisions of Section 3, the State Government may at any time, by notification exclude from a market area or any agricultural produce specified therein or include in any market area any area or agricultural produce included in a notification issued under Sub-section (1).

(4) Nothing in this Act shall apply to a fiader whose daily or annual turnover does not exceed such amount as may be prescribed."

Section 18. "(1) It shall be the duty of a Market Committee to implement the provisions of this Act, the rule and bye-laws made thereunder in the market areas to provide such facilities for marketing of agricultural produce therein as the Board may from time to time, direct, and do such other acts as may be required in relation to the superintendence, direction and control of market, or for regulating the marketing of agricultural produce in any place in the market area, and for purposes connected with the matters aforesaid, and for that purpose the Market Committee may exercise such powers and perform such functions and discharge such duties as may be provided by or under this Act.

(2) Without prejudice to the generality of the foregoing provision, a Market Commitee may:-

(i) When so required by the State Government, to establish a market for the market area providing for such facilities as the State Government may, from time to time, direct in connection with the purchase and sale of the agricultural produce concerned;

(ii) Where a market is established under sub-clause (i), to issue licences in accordance with the

rules to traders, brokers, weighmen, measurers, surveyors, warehousemen and other persons, including persons or firms engaged in the processing, storing or pressing of agricultural produce concerned operating in the market area;

(iii) to maintain and manage the principal market yard and sub-market yards and to control, regulate and run the market in the interest of the agriculturists and licensees in accordance with the provisions of this Act and the bye-laws made thereunder;

(iv) to act in the prescribed manner as mediator, arbitrator or surveyor in all matters of differences, disputes, claims, etc., between licensees inter se or between them and persons making use of the market as sellers of agricultural produce;

(v) to control and regulate the admission of persons and vehicular traffic to the principal market yard or sub-market yards, to determine the conditions for the use of market and to check and prosecute persons trading without a valid licence in the market area;

(vi) to bring, prosecute or defend, or to aid in bringing, prosecuting or defending and suit, action, proceeding, application, or arbitration in regard to any matter on behalf of the committee, or otherwise when directed by the Board.

(vii) to enforce the provisions of this Act, the rules and bye-laws; and

(viii) to perform such other duties and exercise such other powers as are imposed or conferred upon it by or under this Act, the rules or the bye-laws."

Section 27 of the State Act in its original form was as follows:

(1) The Market Committee shall levy and collect market fees on the agricultural produce bought in the market area, at such rate not exceeding fifty naye paise per Rs. 100 worth of agricultural produce, as may be prescribed.

(2) The fee realised from the buyer under Sub-section (1) shall be recoverable by the buyer from the seller as a market charge.

Section 27 after its amendment by Act, 60 of 1982 is as followings:

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the market Committee Fund and all expenditure incurred by the Market Committee under or for the purposes of this Act shall be defrayed out of the said fund and any surplus remaining with the Market Committee after such expenditure has been met shall be invested in such manner as may be prescribed in this behalf."

Section 30- "Subject to the provision of Section 29, the Market Committee Fund may be applied to the following purposes only namely: -

(i) the acquisition of a site or site for the market;

(ii) the maintenance and improvement of the market;

(iii) the provision and maintenance of standard weights;

(iv) the construction and repair of buildings (check posts, market gates and other fixtures) necessary for the purpose of such market and for the health, convenience and safety of the persons using it;

(v) the pay, pensions, leave allowances, gratuities, compensations for injuries resulting from accidents, compassionate allowances and contributions towards leave allowances, pensions or provident fund of the officers and servants employed by it;

(vi) the payment of interest on the loans that may be raised for the purposes of the market and the provision of a sinking fund in respect of such loans;

(vii) the expense of and incidental to elections;

(viii) the construction, repair and maintenance of means of communication which are useful for the purposes of (regulation, control and) development of a market or for the convenience and safety of the persons using it;

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(ix) the planting and rearing of trees, and making arrangement for providing water to the persons and cattle coming to a market and like purposes;

(x) with the previous sanction of the Director or any other officer specially empowered in this behalf by the Board and other purpose whereon the expenditure of the market fund is in the public interest;

(xi) such travelling and other allowances of the members of the Market Committee as may be prescribed; and

(xii) any other purposes which the State Government may notify by special order."

Section 33A. "(I) For the purposes of exercising superintendence and control over Market Committees, and for exercising such other powers and performing such functions as are conferred or entrusted under this Act, the State Government shall, by notification in the Official Gazette, establish a Board called the Bihar Agricultural Marketing Board."

Section 33C. Board's Fund- "(0 Every Market Committee shall, out of its fund, pay to the Board as contribution, such percentage of its income derived from license fees and market fees as may be prescribed to meet expenses of the establishment of the Board and also those incurred in the interest of the Market Committee.

(2) The Board may from time to time, with the previous sanction of the State Government and subject to the provisions of this Act and to such conditions as the State Government may by general or special order determine, borrow any sum required for the purposes of this Act, whether by issye of bond or stocks, (3) The Board may at any time have on loan under Sub-section (1), apart from the amount of loans from the State Government an amount excluding such amount as the State Government may from time to time fix in that behalf.

(4) Stock issued by the Board under this section shall be issued, transferred, dealt with and redeemed, in such manner as the State Government may by general or special order direct.

(5) All moneys received by or on behalf of the Board shall constitute the "Marketing Development Fund".

Section 33J. Powers and functions of the Board- "(1) The Board shall subject to the provisions of this Act, perform the following functions and shall have power to do such thing as may be necessary or expedient for carrying out those functions-

(i) superintendence and control over the working of the market committees and other affairs thereof including programmes undertaken by such market committees for the development of markets and market areas;

(ii) giving direction to market committees in general or any market committee in particular with a view to ensure efficiency thereof;

(iii) any other function specifically entrusted to it by this Act;

(iv) such other functions of like nature as may be entrusted to the Board by the State Government.

(2) Without prejudice to the generality of the foregoing provision, such power of the Board shall include the power-

(i) to approve proposal for selection of new sites by the market committee for development of market;

(ii) to supervise and guide the market committees in the preparation of plans and estimate of construction programme undertaken by the market committee;

(iii) to execute all works chargeable to the Board's fund;

(iv)to maintain accounts in such forms as may be prescribed and get the same audited in such manner as may be laid down in the regulation of the Board;

(v) to publish annually at the close of the year, its progress report, balance sheet, and statement of assets and liabilities and send copies thereof to each member of the Board;

(vi) to make necessary arrangement for propaganda and publicity on matters related to regulated marketing of an agricultural produce;

(vii) to provide facilities for the training of officers and servants of the market committees;

(viii) to prepare and adopt budget for the ensuing year;

(ix) to grant subventions to market committees for the purposes of this Act on such terms and conditions as Board may determine;

(x) to do such other things as may be of general interest to market committees or considered necessary for the efficient functioning of the Board."

Section 39. "Power to amend the Schedule.- The State Government may, by notification, add, to amend or cancel any of the items of agricultural produce specified in the Schedule."

i B. I.D.R. Act Section 2-" Declaration as to expediency of control by the Union - It is hereby declared that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule."

Section 3(i) - "Scheduled industry" means any of the industries specified in the First Schedule;

18-G. Power to control, supply, distribution, price, etc., of certain articles.- (1) The Central Government, so far as it appears to it to be necessary or expedient for securing the equitable distribution and availability at fair prices of any article or class of articles rela-table to any scheduled industry may, notwithstanding anything contained in any other provision of this Act, by notified order, provide for regulating the supply and distribution thereof and trade and commerce therein, (2) Without prejudice to the generality of the powers conferred by Sub-section (1), a notified order made thereunder may provide-

(a) for controlling the prices at which any such article or class thereof may be bought or sold;

(b) for regulating by licences, permits or otherwise the distribution, transport, disposal, acquisition, possession, use or consumption of any such article or class thereof;

(c) for prohibiting the withholding from sale of any such article or class thereof ordinarily kept for sale;

(d) for requiring any person manufacturing, producing or holding in stock such article or class thereof to sell the whole or the part of the articles so manufactured or produced during a specified period or to sell the whole or a part of the article so held in stock to such person or class of persons and in such circumstances as may be specified in the order;

(e) for regulating or prohibiting any class of commercial or financial transactions relating to such article or class thereof which in the opinion of the authority making the order, or if unregulated are likely to be, detrimental to public interest;

(f) for requiring persons engaged in the distribution and trade and commerce in any such article or class thereof to mark the articles exposed or intended for sale with the sale price or to exhibit at some easily accessible place on the premises the price-lists of articles held for sale and also to similarly exhibit on the first day of every month, at such other time as may be prescribed a statement of the total quantities of any such articles in stock;

(g) for collecting any information or statistics with a view to regulating or prohibiting any of the aforesaid matter; and

(h) for any incidental or supplementary matters, including in particular, the grant of issue of licences, permits, or other documents and charging of fees therefor.

(3) Where in pursuance of any order made with reference to clause (d) of Sub-section (2), any person sells any article, there shall be paid to him the price therefore -

(a) where the price can consistently with the controlled price, if any, be fixed by agreement, the

price so agreed upon;

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

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

(4) No order made in exercise of any power conferred by this section shall be called in question in any Court.

(5) Where an order purports to have been made and signed by an authority in exercise of any power conferred by this section, a Court shall, within the meaning of the Indian Evidence Act, 1872 (1 of 1872), presume that such order was so made by that authority.

C. N.O.S.V.O.D. Act, 1983, Section 2.- "Declaration as inexpediency of control by the Union- It is hereby declared that it is expedient in the public interest that the Union should take under its control the oilseeds industry."

Section 9. Functions of the Board.-(1) It shall be the duty of the Board to promote, by such measures as it thinks fit, the development under the control of the Central Government of the oilseeds industry and the vegetable oils industry.

(2) Without prejudice to the generality of . the provisions contained in Sub-section (1), the measures referred to therein may provide for-

(a) taking such measures for the development of the oilseeds industry and the vegetable oils industry as would enable farmers, particularly small farmers, to become participants in, and beneficiaries of the development and growth of the oilseeds industry and the vegetable oils industry;

(b) recommending measures for improving the marketing of oilseeds, products of oilseeds and vegetable oils and for their quality control in India;

(c) imparting technical advice to any person who is engaged in the cultivation of oilseeds of the processing or marketing of oilseeds and its products;

(d) providing for, or recommending, financial or other assistance for the production and development of adequate quantity of breeders' seeds, foundation seeds and certified seeds of high quality, arranging supply of inputs for the oilseeds growers, adoption of improved methods of cultivation of oilseeds and modern technology for processing of oilseeds, extension of areas under oilseeds cultivation with a view to developing the oilseeds industry and the vegetable oils industry:

(e) recommending such measures as may be practicable for assisting oilseeds growers to get incentive prices, including recommending, as and when necessary, after consultation with the Agricultural Prices Commission, minimum and maximum prices for oilseeds and products of oilseeds and vegetable oils;

(f) recommending and taking such measures as may be necessary for collection, procurement and maintenance of buffer stocks of oilseeds for establishing the price situation and market conditions in respect of oilseeds, products of oilseeds and vegetable oils;

(g) recommending and taking such measures as may be necessary for the -

(i) promotion and development of storage facilities;

(ii) establishment of processing units, in respect of oilseeds, and rendering such financial or other assistance as may be considered necessary for such purposes;

(iii) promotion of oilseeds growers' cooperatives and other appropriate agencies, with a view to achieving integration between production, processing and marketing of oilseeds;

(h) recommending measures for regulating import, export or distribution of oilseeds or products of oilseeds or vegetable oils in the context of an integrated policy and programme of development of oilseeds and vegetable oils;

(i) collecting statistics from growers of oilseeds, dealers in oilseeds, manufacturers of products of oilseeds and vegetable oils and such other persons and institutions as may be necessary on any matter relating to the oilseeds industry or vegetable oil industry and publishing the statistics so collected or portions thereof or extracts therefrom;

(j) recommending the setting up and adoption of grade standards for oilseeds and their products and vegetable oils;

(k) financing suitable schemes in consultation with the Central Government and the

Governments of the States where oilseeds are grown on a large scale, so as to increase the production of oilseeds and to improve their quality and yields; and for this purpose evolving schemes for the award of prizes or grant of incentives to growers of oilseeds and the manufacturers of oilseeds products and vegetable oils and for providing marketing faci-

lities for oilseeds products and vegetable oils;

(1) assisting, encouraging, promoting, coordinating and financing agricultural, technological, industrial or economic research on oilseeds, their products and vegetable oils in such manner as the Board may deem fit by making use of available institutions;

(m) undertaking publicity work on the research and development of the oilseeds industry and the vegetable oils industry;

(n) setting up of regional offices and other agencies for the promotion and development of production, processing, grading and marketing of oilseeds and its products and vegetable oils in different States and Union Territories for the efficient discharge of the functions of the Board.

(o) such other matters as may be considered necessary for the purpose of carrying out the functions of the Board or as may be prescribed.

(3) The Board shall perform its functions under this section in accordance with, and subject to, such rules as may be made by the Central Government in this behalf."

D. The Vegetable Oils Cess Act, 1983 Sec.3. Levy and collection of cess on vegetable oils.- (I) There shall be levied and collected by way of cess for the purposes of the National Oilseeds and Vegetable Oils Development Board Act, 1983, a duty of excise on vegetable oils produced in any mill in India at such rate not exceeding five rupees per quintal of vegetable oil, as the Central Government may, from time to time, specify by notification in the Official Gazette :

Provided that until such rate is specified by the Central Government, the duty of excise shall be levied and collected at the rate of one rupee per quintal of vegetable oil.

(2) The duty of excise levied under sub-section(l) shall be in addition to the duty of excise leviable on vegetable oils under the Central Excises and Salt Act, 1944 (1 of 1944), or any other law for the time being in force.

(3) The duty of excise levied under sub-section (1) shall be payable by the occupier of the mill in which the vegetable oil is produced.

(4) The provisions of the Central Excises and Salt Act, 1944 (I of 1944), and the rules made

thereunder, including those relating to refunds and exemptions from duty, shall so far as may be, apply in relation to the levy and collection of the said duty of excise as they apply in relation to the levy and collection of the duty of excise on vegetable oils under that Act.

Section 4. Crediting proceeds of duty to the consolidated fund of India : - The proceeds of the duty of excise levied under Sub-section (1) of Section 3 shall first be credited to the consolidated fund of India and the Central Government may, if Parliament, by appropriation made by law in this behalf, so provides, pay to the Board, from time to time, from out of such proceeds (after deducting the cost of collection) such sums of money as it may think fit for being utilised for the purposes of the National Oilseeds and Vegetable Oils Development Board Act, 1983.

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

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

(a) for regulating by licences, permits or otherwise the production or manufacture of any essential commodity;

(b) for bringing under cultivation any waste or arable land, whether appurtenant to a building or not, for the growing thereon of foodcrops generally or of specified food-crops and for otherwise maintaining or increasing the cultivation of food-crops generally, or of specified food-crops;

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

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

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

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

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

(b) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him, to the Central Government or a State Government or to an Officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the order, Explanation 1.- An order made under this clause in relation to food-grains, edible oilseeds or edible oils may, having regard to the estimated production, in the concerned area, of such foodgrains, edible oilseeds and edible oils, fix the quantity to be sold by the producers in such area and may also fix, or provide for the fixation of, such quantity on a graded basis, having regard to the aggregate of the area held by, or under the cultivation of, the producers.

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

(g) for regulating or prohibiting any class of commercial or financial transactions relating to foodstuffs or cotton textiles which, in the opinion of the authority making the order, are, or, if unregulated, are likely to be, detrimental to the public interest;

(h) for collecting any information or statistics with a view to regulating or prohibiting of the aforesaid matters;

(i) for requiring persons engaged in the production, supply or distribution of, or trade and commerce in, any essential commodity to maintain and produce for inspection such books, accounts and records relating to their business and to furnish such information relating thereto, as may be specified in the order;

(j) for any incidental and supplementary matters, including, in particular, the entry, search or examination of premises, aircraft, vessels, vehicles or other conveyances and animals, and the seizure by a person authorised to make such entry, search or examination,-

(i) of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being, or is about to be, committed and any packages, coverings or receptacles in which such articles are found,

(ii) of any aircraft, vessel, vehicle or other conveyance or animal used in carrying such articles, if such person has reason to believe that such aircraft, vessel vehicle or other conveyance or animal is liable to be forfeited under the provisions of this Act;

(iii) of any books of accounts and documents which in the opinion of such person, may be useful for or relevant to, any proceeding under this Act and the person from whose custody such books of accounts or documents are seized shall be entitled to make copies thereof or to take extracts therefrom in the presence of an officer having the custody of such books of accounts of documents.

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

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

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

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

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

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

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

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

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

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

(iv) For the purposes of sub-clause (iii), the average market rate prevailing in the locality shall be determined by an officer authorised by the Central Government in this behalf, with reference to the prevailing market rates for which published figures are available in respect of that locality or of a neighbouring locality, and the average market rate so determined shall be final and shall not be called in questions in any Court.

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

(a) the controlled price, if any, fixed under this section or by or under any other law for the time being in force for such grade or variety of foodgrains, edible oilseeds or edible oils;

(b) the general crop prospects;

(c) the need for making such grade or variety of foodgrains, edible oilseeds or edible oils available at reasonable prices to the consumers, particularly the vulnerable sections of the consumers; and

(d) the recommendations, if any, of the Agricultural prices commission with regard to the price of the concerned grade or variety of foodgrains, edible oilseeds or edible oils.

,(3-C) Where any producer is required by an order made with reference to clause (0 of Sub-section (2) to sell any kind of sugar (whether to the Central Government or a State Government

or to an officer or agent of such Government or to any other person or class of persons) and either no notification in respect of such sugar has been issued under Sub-section (3-A) or any such notification, having been issued, has ceased to remain in force by efflux of time, notwithstanding anything contained in Sub-section (3), there shall be paid to that producer an amount therefor which shall be calculated with reference to such price of sugar as the Central Government may, by order, determine, having regard to -

(a) the minimum price, if any, fixed for sugarcane by the Central Government under this section;

(b) the manufacturing cost of sugar;

(c) the duty of tax, if any, paid or payable thereon; and

(d)the securing of a reasonable return on the capital employed in the business of manufacturing sugar, and different prices may be determined from time to time for different areas or for different factories or for different kinds of sugar.

Explanation for the purposes of this subsection "producer" means a person carrying on the business of manufacturing sugar.

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

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

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

(5) An order made under this section shall,-

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

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

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

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

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

4. It is contended that the 1DR Act is an Act enacted under Entry 52, List I of Schedule VII of the Constitution which provides as follows:-

"Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest."

In this context reference may be made to the declaration contained in section 2 of the IDR Act quoted above. It was submitted that accordingly no such levy by State Act was authorised or competent, it is contended that all the industries, which are the subject matter of the writ petitions, being scheduled industries within the meaning of the IDR Act and particularly having regard to Section 18-G of the IDR Act, the State Legislature was not competent to make any enactment in relation to any of the said industries and particularly impose any levy in respect thereof. It was contended that the declared industries within the meaning of IDR Act would be within the exclusive jurisdiction of the parliament. It was submitted that Section 18-G of IDR Act specifically legislates in respect of supply, distribution, marketing, etc. The IDR Act was extended to cover the entire field of marketing including charges of fees -

5. Similar argument was made with reference to the E. C. Act, NOSVODS Act and VOC Act which are all Central Acts. It is submitted that in view of the said Central Acts', the State legislature had no legislative competency to enact the impugned provisions of the State Act.

6. The next main point, which is also common to all these cases, is that what is sought to impose under Section 27 of the State Act is 'Fee'. This being a 'Fee' there must be an element of quid pro quo. It was argued that the services must be of some special nature rendered to the payers and that there must be a reasonable correlation or existence of quid pro quo between the services rendered and the amount of fee. In the present case, the imposition is challenged on the ground that the Market Committee does not render any service commensurate to the 'Fee' realised from the petitioners and according such levy is not 'Fee' and realisation of such 'Fee' is unauthorised and illegal.

7. Before I deal with the question of legislative competency of the State Act. I shall first refer to some of the decisions relating to general principles of interpretation, in connection with this question.

8. In the case of Southern Pharmaceuticals & Chemicals v. State of Kerala, AIR 1981 SC 1863 : (1981 Tax LR 2838) it was observed (at page 1869):-

"In determining whether an enactment is a legislation 'with respect to' a given power, what is relevant is not the consequences of the enactment on the subject matter or whether it affects, it, but whether in its pith and substance, it is a law upon the subject matter in question. The Central and the State Legislations operate on two different and distinct fields. The Central Rules, to some extent, trench upon the field reserved to the State Legislature, but that is merely incidental to the main purpose, that is, to levy duties of excise on medicinal and toilet preparations containing alcohol. Similarly, some of the impugned provisions may be almost similar to some of the provisions of the Central Rules, but that does not imply that the State Legislature had no competence to enact the provisions."

9. In the case of Hoechest Pharmaceuticals Ltd. v. State of Bihar (1983) 4 SCC 45 : (AIR 1983 SC 1019) on the question of interpretation of entries in the lists of the Seventh Schedule the Supreme Court observed as follows:-

"The words" notwithstanding anything contained in clauses (2) and (3) "An Article 246(1) and the words "subject to clauses (1) and (2)" in Article 246 (3) lay down the principle of federal supremacy viz. that in case of inevitable conflict between Union and State powers, the Union power as enumerated in List I shall prevail over the State Power as enumerated in Lists II and III, and in case of overlapping between Lists II and III, the former shall prevail. But the principle of

federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an "irreconcilable" conflict between the entries in the Union and State Lists. In the case of a seeming conflict between the entries in the two Lists, the entries should be read together without giving a narrow and restricted sense to either of them. Secondly an attempt should be made to see whether the two entries cannot be reconciled so as to avoid a conflict of jurisdiction. It should be considered whether a fair reconciliation can be achieved by giving to the language of the Union Legislative List a meaning which, if less wide than it might in another context bear, it yet one that can properly be given to it and equally giving to the language of the State Legislative list a meaning which it can properly bear. The non obstante clause in Article 246(1) must operate only if such reconciliation should prove impossible. Thirdly, no question of conflict between the two Lists will arise if the impugned legislation, by the application of the doctrine of 'pith and substance' appears to fall exclusively under one List, and the encroachment upon another List is only incidental.

"It may be added at a corollary of the pith and substance rule that once it is found that in pith and substance an impugned Act is a law on a permitted field, any incidental encroachment on a forbidden field does not affect the competence of the legislature to enact that Act.

It is well settled that the validity of an Act is not affected if it incidentally trenches upon matter outside the authorised field and therefore it is necessary to inquire in each case what is the pith and substance of the Act impugned. If the Act, when so viewed, substantially falls within the powers expressly conferred upon the Legislature which enacted it, then it cannot be held to be invalid merely because it incidentally encroaches on matters which have been assigned to another Legislature.

It is equally well settled that the various entries in the three Lists are not 'powers' of legislation, but 'fields' of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution.".

10. In the case of Ujagar Prints v. Union of India, (1989) 3 SCC 491 : (AIR 1989 SC 516) it was observed as follows (at page 529):

"Entries to the legislative Lists are not sources of the legislative power but are merely topics or fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The expression "with respect to" in Article 246 brings in the doctrine or "pith and substance" in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised the test is whether the legislation, looked at as a whole, is substantially 'with respect to' the particular topic of legislation. If the legislation has a substantial and not merely a remote connection with the entry,

the matter may well be taken to be legislation on the topic".

11. In the case of Goodyear India Ltd. v. State of Haryana, (1990) 2 SCC 71 : (AIR 1990 SC 781) the Supreme Court observed as follows (at page 791) :--

"...It is well to remember that in construing the expressions of the Constitution to judge whether the provisions like section 9(1)(b) of the Act, are within the competence of the State legislature, one must bear in mind that the Constitution is to be construed not in a narrow or pedantic sense. Constitution is not to be construed as mere law but as the machinery by which laws are to be made, It was observed by Lord Wright in James v. Commonwealth of Australia, that the rules which apply to the interpretation of other statutes however apply equally to the interpretation of a constitutional enactment. In this context, Lord Wright referred to the observations of the Australian High Court in Attorney General for the State of New South Wales v. Brewery Employees Union, where it was observed that the words of the Constitution must be interpreted on the same principles as any ordinary law, and these principles compel us to consider the nature and scope of the Act and to remember that the Constitution is a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be. Hence such mechanism should be interpreted broadly, bearing in mind in appropriate cases, that a Supreme Court like ours is a nice balance of jurisdiction. A Constitutional Court, one must bear in mind, will not strengthen, but only derogate from its position if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution is a living and organic thing, which of all instruments has the greatest claim to be construed broadly and liberally".

12. On the first point, that is, the legislative competency of the State Act, I shall first consider some of the cases already decided by this Court. In the case of Belsund Sugar Co. Ltd. v.State of Bihar, (1977) PLJR 8 : (AIR 1977 Pat 136), the subject matter before a Division Bench of this Court were two writ applications, wherein the petitioners were two sugar factories. In those writ petitions the authority of the respondents, Agricultural Produce Market Committees to issue directions to the petitioner companies to obtain licences in accordance with the provisions of the State Act and the Rules made thereunder was challenged on the ground that the provisions of the State Act and the Rules are not applicable to sugar factories, and, if they are applicable, they are ultra vires. The main contention urged therein was that sugar industry was an industry Under the control of the Union and in view of Entry 52 of the Union List, Parliament had exclusive jurisdiction over the industries, the control of which by the Union has been declared by Parliament by law to be expedient in the public interest, and, as such, the State Legislature was not competent to legislate and make provisions in connection with such industries and any such provisions made in respect of such industries have to be declared as void. This is the very same submission urged before us. Dealing with the same the Division Bench held that it was difficult

to hold that the Act, in pith and substance, deal with industries as such. It was pointed out that the object of the State Act was to regulate buying and selling of agricultural produce by establishing markets in the State of Bihar, and, while doing so, its incidentally making the purchaser of sugar cane or sugar liable to pay market fee cannot be said to be an act concerning an industry. Reference was made in this connection to the decision in M/s. B.K. Traders v. State of Bihar, (1973) B.B.C.J. 1, wherein it was held that the said State Act was covered by Entry No. 28 'Markets and Fairs'. Accordingly the Division Bench held that there was no question of legislative incompetency on the part of the State Legislature in enacting the State Act. It was further urged therein that the provisions of the State Act read with the Rules were repugnant with the provisions of the Control Orders made in exercise of the powers conferred by Section 3 of the Essential Commodities Act which is a Central Act. In this connection reference was made to Article 254 of the Constitution and it was pointed out that the said Article had no application to cases where the conflict is between two Acts made by Parliament and the State Legislature having competence to legislate the same on the pith and substance. It was rightly pointed out that the repugnancy referred to an (in) Article 254 of the Constitution was in connection with Acts when Parliament and the State Legislature both are legislating in respect of any of the entries in the concurrent List (List III).

13. In the case of Raptakos, Bret & Company Limited v. Bihar State Agricultural Marketing Board, (1988) BLJR 830, another Division Bench judgment of this Court, various submissions were advanced, one of which was whether the State Marketing Act was ultra vires the powers of the State Legislature to the extent it had been made applicable to products of industry declared to be under the control of the Union under Entry 52, List, I to the Seventh Schedule of the Constitution of India, particularly in view of Section 8 of the Industries Regulation Act, 1951, and Section 3 of the Essential Commodities Act, 1955, read with the orders framed thereunder. In this connection, reference was made to different Entries in the different Lists of Seventh Schedule, the object of the State Act and the Central Act respectively, and the scope of the State Act, the Industries (Development & Regulation) Act and Essential Commodities Act. It was observed in this context as follows :-

"As I said earlier, the Bihar Act (in short 'the Market Act') was enacted to provide for regulation of buying and selling of agricultural produce and for establishment of markets for agricultural produce. Marketing legislation has now for long been considered as essential feature in the commercial world. Markets have been set up all over the world. The object of such legislation is to protect the producers of commercial crops for being exploited by middle men and profiteers, so that they secure fair rent for their produce. The concept of establishment of agricultural market has found acceptance in this country as well. The Bihar Legislature took the hint to establish agricultural markets from Bombay legislation. In its objects and reasons for the enactment of the

Bihar Act, it was stated 'the establishment of regulated market must form an essential part of any ordered plan of agricultural development in this country'. While the Bombay Act was limited to cotton markets the Bihar Legislature considered it expedient to cover other crops as well. 'The 'key note to the system of marketing agricultural produce in the State is the predominant part played by middlemen. It is the cultivator's chronic shortage of money that has allowed the intermediary to achieve the prominent position he now occupies.' The relevance of agricultural markets in that behalf cannot be called in question. The various Acts in the country have been subject to scrutiny by various Courts, including the Supreme Court, from time to time. The vires of such legislation has firmly found favour in the judicial ferment. A Bench of this Court in M/s. Mahabir Tea Company v. State of Bihar, 1979 BUR 560 observed that the Marketing Act will result in protecting the interest of the Agriculturists. Onslaughts have been made on the vires of the Agricultural Market Act, but without any success. We must, therefore, proceed on the assumption that although Agricultural Markets Act placed restrictions on buyers or sellers, they must be treated as being in the interest of the general weal."

It was contended therein that marketing was an integral aspect of industries and that once the Indian Parliament in its wisdom having taken infant food or Baby food under its wings by declaring those items as industries' the control of which is expedient in public interest in terms of section 18-G of I.D. R. Act, the field of legislation in respect of Baby food got occupied. In this connection reliance was placed on I.T.C. Ltd. v. State of Karnataka, (1985) SCC Suppl. 476. In this context it was observed as follows :

".....The question is, is the field of leglis-lation for the Bihar Legislature occupied and whether in exercise of the powers under the Bihar Act a market fee can be levied on goods produced by industries which have been notified in terms of section 18-G of the Industries Development and Regulation Act. It is now well settled that bar relating to agricultural produce markets fall within the ambit of Markets and Fairs' in Item 28 of List II. It is not doubted that if the food processing industries and Milk foods have not been notified in terms of section 18-G of the Industries Development and Regulation Act, the chal-lenge to levy market fee would be pointless. It must also be conceded that any legislation in regard to the items mentioned in the Schedule to the Industries Development and Regulation Act would prevail over any legislation by the Bihar Legislature. But the significant aspect is that although Milk foods and processed industries have been notified in terms of Section 18-G, the Central Government has not enacted any law in regard to Milk foods processing industries. If there had been a law it would be worth considering which law will prevail. But in absence of any law enacted by the parliament or by the Central Government, the question of field being occupied does not arise. The field is absolutely wide open. There can thus be no question of law made by he State Government being invalid on account of field being occupied....."

The Division Bench of this Court, in this context, made a reference to the observations made by Mukharji, J. In his judgment in the I.T.C. case to the following effect:-

"225. It was submitted on behalf of the appellants that the State Legislature lost its competence because the field was occupied by Parliament in view of the declaration under section 2 of the Central Act. It was evident, it was urged, that the intention to cover the whole field has been expressed by the Central Act and as intended, the Central Act is a complete and exhaustive code in respect of tobacco. Consequently, the enactment of the subsequent State legislation was overborne on the ground of repugnancy. Reliance was placed on the decision in the case of State of Orissa v. M. A. Tulloch & Co. (1964) 4 SCR 461,477: AIR 1964 SC 1284".

In this context it was further observed as follows:-

"The submission that the Bihar Law was invalid on account of the declaration under Section 18-G of the Industries Development and Regulation Act is fallacious for still another reason. The Bihar Law does not pretend to control the licensing of industries in regard to production of goods. It is not a law in relation to 'Industry'. It only deals with marketing in a limited way. The Bihar Act only provides that with a view to protecting the agriculturists of this State every producer/trader must come to a particular place and buy/ sell in a particular manner. In order to protect the producers the Market Committee has been authorised to charge 1% as market fee. This cannot effect the industry in any manner. It does not entrench upon the power of the Parliament in regard to 'Industry'. On a superficial view it appears that the State Legislature and the State Government, while legislating under the head "Market", has entrenched upon the field of industry which may include marketing as well. But incidental entrenchment has not been banned by law.".

In this connection reference was made to the observations of Sabyasachi Mukharji, J. (at paragraphs 216 and 220) in the said judgment. Accordingly, it was observed as follows :-

"In my view, therefore, the law relating to levy of market fee on Milk foods which must include Baby food or infant food or other processed foods cannot be held to be invalid as being beyond the competence of the State Legislature. The field was not occupied by any Central legislation. Even if it has been occupied, the question of clash could be resolved on the anvil of the doctrine of 'pith and Substance'. The Market Act, like the Bihar Act, would pass the test of competence on the footing that the Act did not regulate industry. The subjects enumerated in the three Lists are fields of legislations.".

The Division Bench rejected the contention of the petitioners that the law relating to Agricultural Market would fall within the ambit of Item 26 or 27 of List II and held that the State Act falls

squarely within Item 28, List II.

Thereafter the question of any possible clash between the Essential Commodities Act and the State Act was gone into and it was held that the clash must be resolvea on the, basis of pattern of 'Pith and Substance'. In, this context it was held as follows :-

The object of the Essential Commodities Act and the Bihar Agricultural Produce Market Act are entirely divergent to each, other. There is no meeting point. Whereas, the Essential Commodities Act was enacted in , the interest of general public for the control of production, supply and distribution of any trade or commerce in certain commodities, the Bihar Act, on the other hand, was not meant to protect the citizens at large but only to protect the interest of the agricultural producers by regulating buying and selling of the agricultural produce or for matters of allied character. The Bihar Act regulates only the buying and selling operations in a limited way. The control there of the Essential Commodities Act is to ensure that every citizen is able to get foodstuffs and other essential commodities. With that object it visualises system of licensing of dealer with conditions of licence laying down their conducts. If a dealer fails in that behalf, the enforcing authorities may seize and confiscate the goods besides booking up the delinquents by criminal prosecution. The intention of the Bihar Market Act is only to keep out the middle men, so that agricultural producers are not exploited. With that end the State Government has been empowered to make provisions for purchase, sale, storage and processing of agricultural produce as may be notified the object is to be achieved by publication of Notifications in terms of Section 3 of the Act and for declaration of a market area with a view to protecting the agriculturists. Section 15 provides that barring retail sales or sales for personal consumption agricultural produce shall not be sold except in Market Yard. With the same objective Section 16 prohibits making or recovery of any trade allowance in respect of agricultural produce. Section 26 of the Market Act empowers the Market Committee to levy fee of 1% on every transaction and to realise it from the buyers. Section 29 provides for creation for Market Committee fund, for meeting expenditure by the Market Committee generally in terms of Section 30 of the Act. There are provisions for establishing of check posts, for stoppage of vehicles for realisation of market fee and power to order production of accounts and power of entry. Section 52 is a rule making power in regard to State Government and making rules for carrying out the purpose of the Act. In my view, there is no inconsistency or clash between the provisions of the Essential Commodities Act and the provisions of the Agricultural Produce Market Act."

14. In the case of Food Corporation of India v. Bihar State Agricultural Marketing Board, (1989) P.L.J.R. 285 it was argued before a Division Bench of this High Court that if the State Act was applicable to purchase and sale of sugar, then the State Act was ultra vires because sugar is a product of industry declared to be under the control of the Union under Entry 52 List 1 to the

VIIth Schedule of the Constitution. It was submitted that in view of the I.D.R. Act the Essential Commodities Act, 1955 and the Orders framed thereunder, the complete field in respect of production of sugar and distribution thereof was controlled by the Central Government. The field having been completely occupied by the Acts and Orders framed by the Parliament and the Central Government, there was no scope for the State Legislature to make the Act applicable to sugar industries. The Division Bench pointed out that it has been held by this Court in several judgments that the State Act has been framed, in pith and substance, under Item 28 of List II 'Markets and Fairs'. In this connection reference was made by the Division Bench to the case of Belsund Sugar Company Ltd. v. State of Bihar (supra) and it was pointed out that this very point which was urged was repelled by the earlier Division Bench. In this context it was observed as follows :-

"No decision has been brought to our notice of this court or of the Supreme Court where any Act made by the State Legislature in respect of realisation of market fee over the sale and purchase of agricultural produce has been held to have been enacted under any other entry of the State List, except No. 28 "Market and Fairs" The matter would have been different if the Markets Act would have been held to have been enacted under Entry No. 24 of the State List, that is, an Act relating to an industry which in view of the declaration by the Parliament, referred to above, was not possible to be enacted by the State Legislature. But once it is held that the "Markets Act, in pith and substance, has been enacted under Entry No. 28 of the State List, there is no question of its being void merely because sugar industry is an industry which has been declared under the control of the Union and it is the Parliament which has exclusive jurisdiction over such industries in view of Entry No. 52 of the Union List." (Page 291).

With regard to the argument that the whole field in respect of production, sale and distribution of sugar was occupied by the: enactments and orders framed by the Parliament and the Central Government, it was observed as follows:-

".....nothing was pointed out from the Industries (Development and Regulation) Act to show that provision of that Act provides a specific procedure for purchase of sugar from the mills by the dealers/ traders and then sale of such sugar to other dealers or consumers so as to make the provision of the Markets Act inapplicable in respect of Sugar".

Reference was also made to Levy Sugar Supply (Control) Order, 1979 framed under Section 3 of the Essential Commodities Act and it was observed as follows;-

".....The provisions of Levy Sugar Supply (Control) Order simply empowers'the Central Government to "issue directions to any producer or recognised dealer to supply levy sugar to persons, organisation or State Government, as directed by the Central Government. None of the

clauses of that order make any provision in respect of marketing of such levy sugar. The Markets Act is concerned only with the marketing of sugar, as an agricultural produce whether it is levy sugar or free sale sugar, in specified market areas. The provisions in respect of establishment of markets under the Markets Act have been made with an object to provide facilities to persons buying and selling agricultural produce including sugar. The Levy Supply (Control) Orders is not at all concerned with this aspect. As such there is no question of the field being completely occupied by the Essential Commodities Act and the Levy Sugar Supply (Control) Order so as to make the provisions of the Markets Act inapplicable so far sugar is concerned."

15. I have very carefully considered the aforesaid Division Bench decisions of this High Court. The very same contention was raised in the said decisions of this Court in its Division Bench. They are well considered judgments going into details the similar arguments made as it was made before us. I am in full agreement with the same and we do 'not hold any opinion to the contrary. There is no scope for differing with the same. Accordingly, in my opinion, this main point sought to be argued in the present case stands concluded by the aforesaid Division Bench judgments of this Court and cannot be allowed to be raised before us once again.

16. It is well settled by various decisions of the Supreme Court that in the hierarchical system of Courts, each lower tier, including the Court of Appeal, is bound by the decisions of the higher tiers. Particularly reference may be made in this connection to Shyamaraju v. U. V. Bhat, AIR1987 SC 2323. It is also well settled that a Bench cannot differ from a coordinate Bench. A single Judge is bound by the decision of another single Judge, similarly, a Division Bench judgment is also binding on another Division Bench of the same High Court. If the subsequent co-ordinate Bench does not hold the same viers (sic) it is not open to the subsequent co-ordinate Bench to differ from the earlier judgment of the co-ordinate Bench, but it must refer the same to a larger Bench. Reference may be made in this connection to the following: Mahadeolal Kanodia v. The Administrator General of West Bengal, AIR 1960 SC 936; Jai Kaur v. Sher Singh, AIR 1960 SC 1118; A. Ragha-vamma v, A. Chenchamma, AIR 1964 SC 136; Budhan Singh v. Babi Bux, AIR 1970 SC 1880 : (1970 All LJ 903); Mohar Singh v. Devi Charan, AIR 1988 SC 1365 and Sundarias Kanyalal Bhatia v. Collector, Thana, Maharashtra, (1989) 3 SCC 396 : (AIR 1990 SC 261).

17. Had the matter rested there, that would have been end of the same so far as the main points are concerned. This position is not disputed before us. However, that is sought to be argued before us was that in view of the law laid down by the Supreme Court in its decisions, some of which are subsequent to the Division Bench judgments of this Court, the aforesaid Division Bench decisions of this Court are not binding on us as they are not good law.

18. In that view of the matter we shall discuss some of the judgments of the Supreme Court,

particularly judgments subsequent to the decisions of the Division Bench of this Court indicated above, to ascertain whether such Division Bench decisions had directly been overruled by the Supreme Court or whether by necessary implications those Division Bench judgments had become unsustainable as pointed out in the Shyamaraju v. U. V. Bhat (ibid) and other decisions of Supreme Court.

19. In the case of the Kannan Devan Hills Produce Company Ltd. v. State of Kerala, AIR 1972 SC 2301, a five-Judge Bench of the Supreme Court considered the question of the legislative competency of the State Legislature in enacting Kanan Devan (Resumption of Land) Act. The Court held that in pith and substance it was a law dealing with Entry 18 of List II and Entry 42 of List HI. The Court further held that the State had legislative competence to legislate on Entry 18, List II and Entry 42, List III. This power cannot be denied on the ground that it has some effect on an industry controlled under Entry 52, List I. Effect is not the same thing as subject matter. If a State Act otherwise valid, has effect on a matter in List I, it does not cease to be a legislation with respect to an entry in List II or List III.

20. In the case of Ishwari Khatan Sugar Mills v. State of U.P., AIR 1980 SC 1955 : (1980 All LJ 950) a five-Judges' Bench of Supreme Court held with reference to I.D.R. Act that it was not correct to say that once a declaration is made in respect of an industry, that industry as a whole is taken out of Entry 24, List II, Schedule 7 of the Constitution of India. In this connection it was observed that before the State Legislature is denuded of power to legislate under Entry 24, List II in respect of a declared industry, the scope of declaration and consequent control assumed by the Union must be demarcated with precision and then proceeded lo ascer-ta'in whether the impugned State Legislation trenches upon the excepted field. It was further observed:-

"The declaration for assuming control is to be found in the same Act which provides for the limit of Control. The deducible inference is that Parliament made the declaration for assuming control in respect of declared industries set out in the Schedule to the Act to the extent mentioned in the Act. It is difficult to accept the submission that Section 2 has to be read dehors the Act and not forming part of the Act. This would be doing violence to the art of legislative draftmanship."

"As the declaration trenches upon the State Legislative power it has to be construed strictly. Therefore, even though the Act enacted under Entry 54 which is to some extent in pari materia with Entry 52 and in a parallel and cognate statute while making the declaration the Parliament did use the further expression "to the extent herein provided." while assuming control, the absence of such words in the declaration in Section 2 would not lead to the conclusion that the control assumed was to be something in abstract, total and unfettered and not as per various provisions of the I.D.R. Act. The lacuna, if any, is made good by hedging the power of making declaration to be made by law. Legislative intention has to be made by law. Legislative intention

has to be gathered from the Act as a whole and not by piecemeal examination of its provisions. It would, therefore, be reasonable to hold that to the extent Union acquired control by virtue of declaration in Section 2 of the I.D.R. Act as amended from time to time, the power of the State Legislature under Entry 24, List 11 to enact any legislation in respect of declared industry so as to encroach upon the field of control occupied by the I.D.R. Act would be taken away." (Para 10) "When validity of a legislation is challenged on the ground of want of legislative competence and it becomes necessary to ascertain to which entry in the three lists the legislation is referable to, the Court has evolved the theory of pith and substance. If in pith and substance a legislation falls within one entry on the other but some portion of the subject matter of the legislation incidentally trenches upon and might enter a field under another life, the Act as a whole would be valid notwithstanding such incidental trenching" (Para 12).

In this context is was observed as follows:-

"It can, therefore, be said with a measure of confidence that legislative power of the State under Entry 24, List II is eroded only to the extent control is assumed by the Union pursuant to a declaration made by the Parliament in respect of declared industry as spelt out by legislative enactment and the field occupied by such enactment is the measure of erosion. Subject to such erosion, on the remainder the State legislature will have power to legislate in respect of declared industry without in any way trenching upon the occupied field. State legislature which is otherwise competent to deal with industry under Entry 24, List II, can deal with that industry in exercise of other powers enabling it to legislate under different heads set out in Lists II and III and this power cannot be denied to the State" (Para 22).

21. In I.T.C. Ltd. v. State of Karnataka, 1985 (Supp) SCC 476 the Court was concerned with the question of interpretation of Entry 52 of List I of the Constitution with reference to the Tobacco Board Act, 1975, enacted by the Parliament. Under the Parliamentary Act there was similar declaration as contemplated by Entry 52 of List I, Karnataka State started levying fee on tobacco on its products. The question was whether or not the field was fully occupied and there could be any encroachment of the field by the Karnataka State. Fazal Ali, J. laid down the cardinal principles justifying the competency of the respective Legislatures with respect to the entries concerned as follows:-

"(1) Entries in each of the list must be given the most liberal and widest possible interpretation and no attempt should be made to narrow or whittle down the scope of entries. This is a well settled principle of law and was reiterated in a recent decision of this court in S. P. Mittal v. Union of India where this Court observed thus (SCC p. 80, para 64):

It may be pointed out at the very outset that the function of the Lists is not to confer powers.

They merely demarcate the legislative fields. The entries in the three Lists are only legislative heads or fields of legislation and the power to legislate is given to appropriate Legislature by Articles 245 and 248 (sic 246) of the Constitution.

(2) The application of the doctrine of pith and substance really means that where a legislation fails entirely within the scope of an entry within the competence of a State Legislature then this doctrine will apply and the Act will not be struck down. The doctrine of pith and substance has been summarised in the case of Delhi Cloth & General Mills Co. Ltd. v. Union of India, 1983 4 SCC 166: (AIR 1983 SC 937). Where Desai, J. speaking for the Court made the following observations (SCC p. 192, para 33) To resolve the controversy if it becomes necessary to ascertain to which entry in the three Lists, the legislation is referable, the Court has evolved the doctrine of pith and substance. If in pith and substance, the legislation falls within one entry or the other but some portion of the subject matter of the legislation incidentally trenches upon and might enter a field under another List, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence.

(3) The consideration of encroachment or entrenchment of one List in another and the extent thereof is also well established. If the entrenchment is minimal and does not affect the dominant part of some other entry, which is not within the competence of the State Legislature, the Act may be upheld as constitutionally valid.

(4) The nature and character of the scope of the entries having regard to the touchstone of the provisions of Articles 245 and 246.

(5) The doctrine of occupied field has a great place in the interpretation as to whether or not a particular Legislature is competent to legislate on a particular entry. This means that when the field is completely occupied by List I, as in this case, then the State Legislature is wholly incompetent, to legislate and no entrenchment or encroachment, minimal or otherwise, by a State Legislature is permitted. In other words, where the field is not wholly occupied, then a mere minimal encroachment or entrenchment would not affect the validity of the State Legislation (Para 17).

In this connection Mukherji, J. observed as follows:-

It appears that the principles of repugnancy in Indian Constitution are well settled. These are as follows:-

(1) A legislation, which in its pith and substance falls within any of the entries of List I of the Seventh Schedule to the Constitution, would be exclusively within the competence of the Parliament.

(2) A legislation falling exclusively, in its pith and substance, within any of the entries in List II of the Seventh Schedule, would be within the exclusive competence of the State Legislature.

(3) A Central law which in its pith and substance, falls within any entry in List I would be valid even though it might contain incidental provisions in List II which may contain ancillary provisions which might touch on an entry of List I incidentally.

(4) A State law, which in its pith and substance, within any entry in List 11 would be valid even though it might incidentally touch upon a subject falling within List I.

(5) A Central Law, which in its pith and substance dealt with a subject falling within List II would be bad and ultra vires the Constitution. Similarly, a State law which in its pith and substance dealt with a matter falling within List I would be invalid and ultra vires the Constitution.

(6) The concept of repugnancy arises only with regard to laws dealing with subjects covered by the entries falling in List III, in respect of which both Parliament and State Legislature are competent to legislate. Under Article 254 of the Constitution, a State law passed in respect of a subject-matter comprised in List III would be invalid if its provisions were repugnant to a law passed on the same subject by Parliament. The repugnancy arose only if both the laws could not exist together. Repugnancy does not arise simply because Parliament and the States pass law on the same subject. There cannot be any repugnancy in respect of State laws passed in respect of matters falling in pith and substance in List II or in respect of Central laws passed on subjects falling in List I. Parliament cannot legislate on a State subject and State cannot legislate on a Central subject. If either trenches upon the field of the other, the law will be ultra vires. See in this connection Hoechst Pharmaceuticals Ltd. v. State of Bihar (1983) 4 SCC 45, Ramesh Chandra v. State of U. P. (1980) 3 SCR 104 at page 135 and Calcutta Gas Company Pro-prietory Ltd. v. State of W. B. (1962) Supp 3 SCR I. Like Entry 25 of List II - Gas and Gas Works - without any limitation Entry 28 in List II - in respect of any legislation which is in substance and true nature deals with 'markets and fairs' read with Entry 66 of the said List has complete ascendency and there cannot be any intrusion of that field by another entry. See in this connection the discussion on 'Union and State Relation under the Indian Constitution' M. C. Setal-vad pp. 48,49. In Calcutta Gas Company case by comparison of Entry 7 and Entry 52 of List I with Entry 25 of List II, this Court upheld State legislation of take over of the Gas Industry in spite of declaration under Entry 52 (Para 230).

While it is true that in the spheres very carefully delineated the Parliament has supremacy over State Legislatures, supremacy in the sense that in those fields, Parliamentary legislation would hold the field and not the State legislation - but to denude that State Legislature of its power to

legislate where the legislation in question is in pith and substance, i.e. in its true nature and character, belongs to the State field, one should be chary to denude the State of its powers to legislate and mobilise resources - because that would be destructive of the spirit and purpose of India being a Union of States. States must have power to raise and mobilise resources in their exclusive fields. In the instant case by complying with the State Act, the Central Act can function to serve the purpose and object of the Central Act, but if only the Central Act was to prevail, the State Act of marketing for coffee would become non est - wholly unnecessary and undesirable. The Marketing Act is essentially an Act to regulate the marketing of agricultural produce control of coffee industry would not be defeated if the marketing of coffee is done within the provisions of the Marketing Act. It must, therefore, be held that the State Act should prevail. One should avoid corroding the States ambit of powers of legislation which will ultimately lead to erosion of India being a Union of States (Para 237).

22. In the case of Vijay Kumar Sharma v. State of Karpataka (1990) 2 SCC 562 : (AIR 1990 SC 2072) it was held that so far as Article 254 is concerned, the question of repugnancy can arise only in respect of legislations under the concurrent list. It was pointed out that in interpreting Article 254 it has to be kept in mind that clause (1) thereof lays down the general rule and clause (2) was an exception thereto and the proviso qualifies the exception. It was further held that when repugnancy is alleged between the two statutes, it was necessary to examine whether the two laws occupy the same field, whether the new or the later statute covers the entire subject matter of the old, whether Legislature intended to lay down an exhaustive code in respect of the subject matter covered by the earlier law so as to replace it in its entirety and whether the earlier special statute can be construed as remaining in effect as a qualification of or exception to the later general law, since the new statute is enacted knowing fully well the existence of the earlier law and yet it 'has not repealed it expressly. For examining whether the two statutes cover the same subject matter, what is necessary to examine is the scope and the Subject of the two enactments, and that has to be done by ascertaining the intention in the usual way and what is meant by the usual way is nothing more or less than the ascertainment of the dominant object of the two legislations. It was further held in that case that if it is open to resolve the conflict between two entries in different Lists, viz. the Union and the State List by examining the dominant purpose and, therefore, the pith and substance of the two legislations, there is no reason why the repugnancy between the provisions of the two legislations under different entries in the same List, viz., the concurrent list, should not be resolved by (SIC) the same by the same touchstone. That is to be ascertained in each case is whether the legislations are on the same subject matter or not. In both the cases the cause of (SIC) is the apparent identity of the subject(SIC).

23. In theatre of Government of Andhra Pradesh v. M. Hayagreev Sarma (1990) 2 SCC 682, it was observed by the Supreme Court that it is well settled that the question of repugnancy cannot

arise if the State makes law in exercise of its legislative powers in respect of an entry specified in List II of the Seventh Schedule, even though it may incidentally trench upon a law made by the Union in respect of a matter referable to an entry in Union List of the Seventh Schedule. It was held that Rule 5 of the A. P. Public Employment (Recording and Alteration of Date of Birth) Rules, 1984, and Section 9 of Births, Deaths and Marriages Registration Act, 1886, operate in different areas and, accordingly, there was no question of conflict in the two provisions,

24. In the case of State of U. P. v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139, the Supreme Court was considering the question of validity of U. P. Sales of Motor Spirit, Diesel Oil and Alcohol Taxation (Amendment) Act, 1976, which was declared to be null and void by the High Court of Allahabad in so far as it purported to levy purchase tax on industrial alcohol. By the said impugned U. P. Act levy of a tax at the first point of purchase of alcohol in the State was imposed. This levy was sought to be justified by the State, when challenged in the writ proceeding, as a valid exercise of its legislative power on a matter falling under Entry 54 of List II of the Seventh Schedule of the Constitution. The writ petitioners, challenging the levy, contended that the State Legislature was incompetent to levy tax with reference to Entry 54 of List 11 in respect of industrial alcohol in so far as that article was the subject of regulation by the Central Government in exercise of its power under Section 18-G of the IDR Act and that the price of that article was regulated by the relevant Price Control Orders made by the Central Government under the said Act. Any levy of sales tax or purchase tax by the State by recourse to Entry 54 of List II, it was contended, would come into direct conflict with the law made by Parliament and the control exercised by the Central Government under that law in regard to an industry falling under Entry 52 of List 1 read with Entry 33 of List III. The writ petitioner, relying upon the decision of a Constitution Bench of this Court in Synthetics and Chemicals Ltd. v. State of U. P. (1990) 1 SCC 109 : (AIR 1990 SC 1927) thereinafter referred to as the second Synthetics and Chemicals case) contended before the High Court that, in so far as industrial alcohol was concerned, the State was incompetent to levy sales tax by reason of the operation of the Ethyl Alcohol (Price Control) Orders made by the Central Government in exercise of its power under section 18-G of the IDR Act. The State contended before the High Court that the aforesaid decision of this Court did not deal with any levy of lax falling under Entry 54 of List II. The power of the State to levy taxes on the sale or purchase of goods was not the subject of consideration in that decision. What was considered was the power of the State to collect vend fee or transport fee or the like by recourse to Entry 8 or 51 of List II with reference to the production, manufacture, possession, transport, purchase and sale of industrial alcohol during the operation of the IDR Act and the Rules made thereunder. The High Court accepted the contention of the writ petitioners and held that the impugned purchase tax, if allowed to be levied on industrial alcohol, would have the effect of raising its price beyond the limit prescribed under the Price Control Orders made by the Central Government in relation to industrial alcohol in

exercise of its power under the IDR Act. The High Court accordingly declared that the impugned levy of purchase tax on industrial alcohol was, during the operation of the Price Control orders of the Central Government, beyond the legislative competence of the State.

The Supreme Court referred to the second Synthetics and Chemicals case wherein it was held that vend fee, transport fee and the like levied by Uttar Pradesh, Maharashtra and certain other States by recourse to Entry 8 or Entry 51 of List II were null and void in so far as such impost came into direct conflict with the exercise of power by the Central Govt. for the control of supply, distribution, price, etc. of industrial alcohol under Section 18-G of the IDR Act and the Rules or Orders made thereunder.

The Supreme Court quoted extensively from the judgment of the second Synthetic Chemical case with a view to show that the Court was concerned with only one question, and that was whether the States could levy excise duty or vend fee or transport fee and the like by recourse to Entry 51 or 8 in List II in respect of industrial alcohol. With reference to that case, it was pointed out that the States had no such power under either entry in respect of non-potable or industrial alcohol. It was pointed out that in that earlier judgment the Supreme Court did not deal with the taxing power of the State under Entry 54 of List II, which deals the taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92-A of List I. The power of the State to levy taxes on sale or purchase of goods under that entry was not the subject matter of discussion by the Supreme Court, although in paragraph 86 of the leading judgment of Sabyasachi Mukharji, J. as he then was, there was a reference to sales tax. In this connection the Supreme Court stated as follows:--

"Industry as a subject of legislation falls under Entry 24 of List II. But this provision is subject to Entries 7 and 52 of List I dealing respectively with "industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of the War" and 'Industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest'. It is Entry 52 of List 1 that is relevant for the present purpose for it is in respect of that entry that Parliament enacted the IDR Act, 1951, to provide for the development and regulation of certain industries. This Act contains a declaration by Parliament that 'it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule fermentation Industries' (i.e. alcohol and other products of fermentation industries) in (SIC) 26 of the First Schedule. Section I8-G the IDR Act confers upon the Central Government the power of control of supply distribution, price, etc. of the articles mentioned in the First Schedule of the Act. All powers vested in the Central Government under Section 18-G of the IDR Act are referable to Entry 52 of List I dealing with 'controlled' industries, read with Entry 33 of List III which pertains to Trade and commerce in, and production, supply and distribution of

the products of controlled industries' (Para 21).

"None of the entries in the concurrent List deals with tax but general subjects of legislation. No conflict can, therefore, arise between the taxing powers of the Union and the States. Parliament has the power to legislate in respect of a controlled' industry falling under Entry 52 of List I, and both Parliament and the States have the power to legislate in respect of the trade and commerce, in, and the production, supply and distribution of, the products of a 'controlled' industry (Entry 33 of List III). These are not taxing entries and do not, therefore, relate to taxes, but powers of regulation and control. The power to control industry being thus vested in Parliament (Entry 52 of List I) and the legislative power in respect of trade and commerce in such industry being concurrently vested in the Union and the States (Entry 33 of List III) any exercise of control by the State must be subject to the legislative power of Parliament and the power conferred on the Central Government by such legislation (Article 246). Any exercise of power by the State which transgresses upon the power of Parliament or of the Central Government, as its delegate, is to the extent of such transgression null and void." (Para 22) "The power of regulation and control is separate and distinct from the power of taxation. Legislative exercise of regulation or control referable to Entry 52 of List I or Entry 8 of List II is distinct and different from a taxing power attributable to Entry 54 of List II or Entry 92-A or 92-8 of List I. The power to levy taxes on sale or purchase or consignment is referable to these entries, and subject to the other provisions of the Constitution the taxing power of the State is not cut down by the general legislative control vested in Parliament and referable to the general topic of legislation." (Para 25) On the question of doctrine of pith and substance the Supreme Court held :

"The control exercised by the Central Government by virtue of Section 18-G of the IDR Act is in a field far removed from the taxing power of the State under Entry 54 of List II. So long as the impugned legislation falls in pith and substance within the taxing field of the State, the control of the Central Government in exercise of its power under the IDR Act in respect of a controlled industry falling under Entry 52 of List I cannot in any manner prevent the State from imposing taxes on the sale or purchase of goods which are the products of such industry and which are referable to Entry 33 of List III. As seen above, the taxing power of the State Entry 54 of List II cannot be cut down by the General legislative power of control of the Central Govt. (Para 33).

"The levy of fee, whether called vend fee or transport fee or duty or charge, whether levied by rules purportedly made under the Excise Act or the Prohibition Act or any other statute, otherwise than as a proper levy falling in pith and substance under a taxing entry, was not valid, to the extent that it lacked quid pro quo and applied to industrial alcohol. Any such fee or charge can be justified as a mode of control falling in pith and substance under Entry 8 read with Entry 66 of List II only to the extent that it remains within the bounds of the concerned subject matter,

namely 'intoxicating liquors', which must necessarily exclude industrial alcohol." (Para 34).

"We see no substance in the contention that the price control orders made by the Central Government in exercise of its power under the IDR Act fettered the legislative power of the State on a matter falling under Entry 54 of List II. Taxes on sale or purchase are not governed by the Price Control Orders, for the purpose of the latter is to prevent the seller from pricing his goods beyond the limit prescribed by the orders. That is a fetter on the free play of demand and supply. When supply is scarce, the prices are bound to rise and it is that price which is controlled by fixing the maximum price. But that does not in any manner curtail the power of the State to levy taxes on the sale or purchase of goods. It is no doubt true that the consumer of the article must, in addition to the price, pay purchase tax due in respect of them. But that is by reason of a valid levy which is within the constitutional power of every State and is dehors the price, though often referable to it." (Para 35).

Accordingly, it was held that the High Court was clearly in error in striking down the impugned provision which undoubtedly falls within the legislative competence of the State, being referable to Entry 54 of List II. It was made clear that in the second Synthetics and Chemicals case (supra) the Court had not and could not have intended to say that the Price Control Orders made by the Central Government under the IDR Act imposed a fetter on the legislative power of the State under Entry 54 of List II to levy taxes on the sale or purchase of goods.

This decision not only clarifies the scope of the second Synthetic Chemicals case. Judgment of the Supreme Court which was strongly relied upon in support of the contention before us, but also makes it clear the scope and effect of the IDR Act. It also makes clear that where the pith and substance of a State Act comes within any of the entries of the State list, the IDR Act or any regulatory order made under the IDR Act, does not affect the question of legislative competency of any such State Act.

25. In the case of B. Vishwanathiah and Company v. State of Karnataka, (1991) 3 SCC 358 the question involved was regarding the interpretation of Entry 27 of List II in that case, the scope of declaration as to the expediency of Union control made under Section 2 of the Central Silk Board Act in terms of Entry 52 of List I, was under consideration. In that case the validity of the provisions of Mysore Silkworm Seed and Cocoon (Regulation of Production, Supply and Distribution) Act, 1959 (5 of 1960) was in question. The challenge to the said Act was repelled by the Karnataka High Court. Thereafter that matter came before the Supreme Court. It was argued on behalf of the petitioners that any legislation in respect of silk industry can be enacted only by the Parliament and the State Legislature was incompetent to legislate in this matter in view of Section 2 of the Central Silk Board Act, which provided that it was expedient in the public interest that the Union should bring within its ambit the silk industry. This was a

declaration in terms of Entry 52 of List I. It was argued that this declaration removed the silk industry from the purview of the State Legislature, which was incompetent to legislate in respect thereof. The High Court held that it was well settled by a series of pronouncements of the Supreme Court that merely because an industry is a controlled industry, as declared by the Parliament under Entry 52 of List 1, the State is not deprived of its legitimate power to legislate within its own power in respect of such industry. It was held that all aspects of the industry did not fall within the scope of Entry 52 of List I. It was only one aspect of the industry, that is, process of manufacturing and produce, that falls under Entry 52 of List I. The Supreme Court pointed that an industry comprises of three important aspects:

(I) raw materials;

(II) the process of manufacture or production; and (III) the distribution of the products of the industry.

In this context it was observed that legislation in regard to raw materials would be permissible under Entry 26 of List II, notwithstanding declaration of the Industry under Entry 52 to be one within the purview of Parliamentary legislation. The process of manufacture or production can be legislated by States under Entry 24 of List II so long as the industry is not a controlled industry within the meaning of Entry 7 or Entry 52 of List I. So far as the third spect viz. the distribution of the products of the industry are concerned, the State Legislature would be quite competent to legislate in regard thereto under Entry 27 of List II. However, when the industry is also a controlled industry, legislation in regard to the products of the industry would be permissible by both the Central and the State Legislatures by virtue of Entry 33 of List III. The Supreme Court held that the decision in I.T.C. Ltd. v. State of Karnataka, (1985) Suppl SCC 476 was of limited effect. The Supreme Court supported the reasons of the Karnataka High Court and held that the control of the industry vested in Parliament was only restricted to the aspect of production and manufacture of silk yarn or silk and it did not obviously take in the earlier stages of the industry, namely, the supply of raw materials. The Supreme Court affirmed the judgment of the High Court. It held that the third aspect, i.e. the distribution of products of the industry, falls outside the purview of the control postulated under Entry 52. It was pointed out that 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 do 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. Accordingly, it was held that the limitation contained in Entry 52 does not affect the validity of the impugned legislation. Accordingly, it was held that the State legislation would be quite valid

unless it is repugnant to the provisions of a Central legislation on the subject. It was held that a perusal of the Central. Act made it clear that the pith and substance of the legislation is the constitution of a silk Board for research into the scientific, technological and economic aspects covered by Entry 33 in List III.

This decision of the Supreme Court explains the scope of the earlier decision in I.T.C. case (supra) which was strongly relied upon on behalf of the petitioners in support of their contention. The scopes and effect of Entry 52, List I, was clearly laid down in this Judgment. The impugned State legislation before us does not deal with the process of manufacture and production. It relates to the distribution of the products of the industry which, as indicated by this Supreme Court decision, falls outside the purview of Entry 52, List I. The pith and substance of the impugned State Act is covered by the relevant Entry in List II.

26. I have considered all the aspects of the matter very carefully. The Division Bench decisions of this Court, while upholding the validity of the State Act had carefully con- sidered various decisions of the Supreme Court. Further, in our opinion, there is nothing in any of the subsequent judgments of the Supreme Court which either directly or by necessary implication nullify the decisions of the Division Bench of this Court. On the other hand, not only the earlier but also the subsequent judgments of the Supreme Court, support the decisions of the Division Bench on the question involved. Upon independent application of mind also. I hold the same view.

Merely because a Central Act contains a declaration within the meaning of Entry 52 List I, the State does not totally lose its power to legislate on the subject. It is the question of application of the doctrine of pith and substance. If a State Legislation falls entirely within the scope of an entry within the competence of State Legislature, the State Act will not be struck down. If in pith and substance, the State Legislation falls within one entry or the other of the State List, then it must be held to be valid in its entirety, even though it might incidentally trench upon and enter a field in the Union List. If such entrenchment is minimal and that does not affect the dominant part which is within the competence of the State Legislature, the State Act must be upheld as constitutionally valid. Unless the field is completely occupied by List I, the State Legislature is not incompetent to legislate. On the contrary, if the field is not wholly occupied, a mere minimal encroachment or entrenchment would not affect the validity of the State Legislation. In the present case, having examined the scope and object of the State Act, I have no hesitation in holding that the pith and substance of the State Act is "Markets and Fairs "which is a State subject. The State Act is essentially an Act to regulate the marketing of agricultural produce. The pith and substance of the Central Acts are quite different even if it be held, which I do not hold, that there is some enchroachment by the State Act in the Union field, that is purely incidental and indirect and the same cannot and does not alter the pith and substance of the State Act and it does

not affect the validity of the State Act. Accordingly, I reject the first main contention regarding the legislative competency of the State Act. I hold that the same is a valid and competent piece of legislation by the State Legislature.

27. On the question of quid pro quo in the Belsand Sugar case (supra) it was contended before the Division Bench of this Court that there was no relationship between the amount realised as market fee and the service rendered by the Market Committee to the petitioner. In this connection the Division Bench held as follows :--

"It is well settled that fee is a sort of return or consideration for services rendered and as such there has to be an element of quid pro quo in the imposition of fee and if necessary the authority realising the fee may be called upon to show the correlationship between the fee levied and the services rendered by it to the person who is required to pay the fee and in this respect it differs from 'tax' where the amount realised merges into the general fund. However, it is not possible to show with mathematical exactitude the correlationship between the amount realised as fee from one particular person and the services rendered to him. Fee is realised from hundreds and thousands of persons and corresponding services are also rendered to hundreds and thousands. In that situation in many cases it may be impossible to show any direct correlationship except that the person who has paid the fee has derived benefit in return."

28. In the case of Raptokos Brett (supra), on the question of fee and quid pro quo it was argued before the Division Bench of this court that in order to levy the market fee the Market Committee was bound to render special services to the dealers in contradistinction to general services. In this context the Division Bench held as follows :--

"In my view, not much can be spun out from the expression 'special services'. It would only mean that services rendered to dealers must be different from Municipal services rendered by the Government or by Municipal Corporation. Every service rendered by a Market Yard must be held to be special service."

It was further held that the Act and Orders thereunder cannot be hled to be void for want of quid pro quo. Quid pro quo must exist but it need not be in mathematical proportion to the levy. A general relationship between the fee and the services rendered is enough to pass the test of validity. Accordingly, the contention on this point was also rejected, and it was held as follows:--

"The Market Committee does render some services to the producers. It may be that no service is being rendered to the petitioners but that is because they are not prepared to come within the umbrella of the Market Committees. If they had spelt out what facilities or services they requrie, we would have endeavoured to find out their feasibility and how far services could be rendered

to them, but the petitioners did not consider it appropriate, may be for a legal strategy to spell them out."

29. In the case of Kewal Krishan v. State of Punjab, AIR 1980 SC 1008, a five Judges' Bench of Supreme Court considered the imposition of fee under Punjab Agricultural Produce Markets Act. In this context it was observed as follows :--

"From a conspectus of the various authorities of this Court we deduce the following principles for satisfying the tests for a valid levy of market fees on the agricultural produce bought or sold by licensees in a notified market area:

(1) That the amount of fee realised must be earmarked for rendering services to the licensees in the notified market area and a good and substantial portion of it must be shown to be expended for this purpose.

(2) That the services rendered to the licensees must be in relation to the transaction of purchase or sale of the agricultural produce.

(3) That while rendering services in the market area for the purpose of facilitating the transactions of purchase and sale with a view to achieve the objects of the marketing legislation it is not necessary to confer the whole of the benefit on the licensees but some special benefits must be conferred on them which have a direct, close and reasonable correlation between the licensees and the transactions.

(4) That while conferring some special benefits on the licensee; it is permissible to render such service in the market which may be in the general interest of all concerned with transactions taking place in the market.

(5) That spending the amount of market fees for the purpose of augmenting the agricultural produce its facility of transport in villages and to provide other facilities meant mainly or exclusively for the benefit of the agriculturists is not permissible on the ground that such services in the long run go to increase the volume of transactions in the market ultimately benefiting the traders also. Such an indirect and remote benefit to the traders is-in no sense a special benefit to them.

6. That the element of quid pro quo may not be possible, or even necessary, to be established with arithmetical exactitude but even broadly and reasonably it must be established by the authorities who charge the fees that the amount is being spent for rendering services to those on whom falls the burden of the fee.

7. At least a good and substantial portion of the amount collected on account of fees, may be in the neighbourhood of two-thirds or three-fourths, must be shown with reasonable certainty as being spent for rendering services of the kind mentioned above."

30. In the case of Sourthern Pharmaceu-ticals & Chemicals v. State of Kerala, AIR 1981 SC 1863, the Supreme Court went into the question of the distinction between "Fee and Tax" and the concept of the execution fee and observed as follows :

"The distinction between a 'Tax' and a 'Fee' is well settled. The question came up for consideration for the first time in this Court in the Commissioner, H. R. E. Madras v. Lakhshmindra Thirtha Swamiar of Shirur Mutt, 1954 SCR 1005 : (AIR 1954 SC 282). Therein, the Court speaking through Mukherjee, J. quoted with approval the definition of 'tax' given by Latham, C. J. in Mathews v. Chicory Marketing Board, 60 Comm LR 263 (Aus.). In that case, the learned Chief Justice observed :

A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered.

Dealing with distinction between Tax and Fee the learned Judge observed, 1954 SCR 1005 at pp. 1040-2 : (AIR 1954 SC 282 at pp.295, 296):--

It is said that the essence of taxation is compulsion that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is as it is said, no element of quid pro quo between the tax payer and the public authority. Another feature of taxation is that as it is a part of the common burden the quantum of imposition upon the tax payer depends generally upon his capacity to pay."

Coming now to fees, a 'fee' is generally defined to be a charge for a special service rendered to inviduals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is

absolutely necessary that the levy of fees should on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services.

The same view was reiterated by this Court in Jagannath Ramanuj Das v. The State of Orissa, 1954 SCR 1046 : (AIR 1954 SC 400) and in Ratilal Panachand Gandhi v. The State of Bombay,1954 SCR 1055 : (AIR 1954 SC 388) (Para 24).

" 'Fees' are the amounts paid for a privilege, and are not an obligation, but the payment is voluntary. Fees are distinguished from taxes in that the chief purpose of a tax is to raise funds for the support of the Government or for a public purpose, while a fee may be charged for the privilege or benefit conferred, or service rendered or to meet the expenses connected therewith. Thus, fees are nothing but payment for some special privilege granted or service rendered. Taxes and taxation are, therefore, distinguishable from various other contributions, charges, or burdens paid or imposed for particular purposes and under particular powers or functions of the Government. It is now increasingly realised that merely because the collections for the services rendered or grant of a privilege or licence, are taken to the consolidated fund of the State and are not separately appropriated towards the expenditure for rendering the service is not by itself decisive. That is because the Constitution did not contemplate it to be an essential element of a fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realised that the element of quid pro quo stricto senso is not always a sine qua non of a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax.

The element of quid pro quo must be established between the payer of the fee and the authority charging it. It may not be the exact equivalent of the fee by a mathematical precision, yet, by and large or predominantly, the authority collecting the fee must show that the service which they are rendering in lieu of fee is for some special benefit of the payer of the fee.

It seems that the Court proceeded on the assumption that the element of quid pro quo must always be present in a fee. The traditional concept of quid pro quo is undergoing a transformation." (Para 25)

31. In the case of Municipal Corporation of Delhi v. Mohd. Yasin, AIR 1983 SC 617, it was held (at page 620):

"There is no generic difference between a tax and a fee, though broadly a tax is a compulsory exaction as part of a common burden, without promise of any special advantages to classes of tax payers whereas a fee is a payment for services rendered, benefit provided or privilege conferred. Compulsion is not the hallmark of the distinction between tax and a fee. That the money

collected does not go into a separate fund but goes into the consolidated fund does not also necessarily make a levy a tax. Though, a fee must have relation to the services rendered, or the advantage conferred, such relation need not be direct; a mere casual relation may be enough. Further neither the incidence of the fee nor the service rendered need be uniform. That others besides those paying the fees are also benefitted does not detract from the character of the fee. In fact the special benefit or advantage to the payers of the fees may even be secondary as compared with the primary motive of regulation in the public interest. Nor is the Court to assume the role of a cost accountant. It is neither necessary nor expedient to weigh too meticulously the cost of the services rendered etc., against the amount of fees collected so as to evenly balance the two. A broad correlationship is all that is necessary. Quid pro quo in the strict sense is not the one and only true index of a fee; nor is it necessarily absent in a tax." (Para 9)

32. On the question of "Fee" it was observed by Mukherji, J. in the case of I.T.C. Ltd. v. State of Karnataka (supra) as follows;--

Even on the basis of traditional concept it is well-settled that though there must be some special services to the payers of the fees, to be a fee it is not necessary that all the services must be to the payers of the fees nor can the correlation between payment of fee and services rendered be established with mathematical exactitude. It is permissible in the modern set up to take into account projections into future and not only the present services can be utilised for justifying the imposition of fee. All planning, projects into the future for its existence and survival. (Para 176).

Any incidental benefit to those other than the payers of the fee is not decisive of the fact whether it is a 'tax' or 'fee'. It is necessary to find out the primary object and essential purpose of the imposition. If the primary object and essential purpose of the imposition be service of some special kind to the users of the market or payers of fee, other consequences or other benefits to others do not in the least affect the position. The concept of benefit to the users of market must be looked at from a broad common sense point of view, taking an integrated view. In today's world you cannot build a good market if the accesses through which the produce comes to the market are not maintained. However, at what point the roads will begin and at what point the roads will end to be able to justify the roads necessary to maintain solely the market, appears to be highly theoretical and unreal question in the modern concept of integrated development. (Para 177)

33. A recent decision of the Supreme Court in the case of Sri Krishna Das v. Town Area Committee, Chirgaon (1990) 3 SCC 645, has also made the position clear. In that case the Supreme Court held as follows :--

"A fee is paid for performing a function. A fee is not ordinarily considered to be a tax. If the fee

is merely to compensate an authority for services performed or as compensation for the services rendered, it can hardly be called a tax. However, if the object of the fee is to provide general revenue of the authority rather than to compensate it, and the amount of the fee has no relation to the value of the services, the fee will amount to a tax. In the words of Cooley, 'A charge fixed by statute for the service to be performed by an officer, where the charge has no relation to the value of the services performed and where the amount collected eventually finds its way into the treasury of the branch of the Government whose officer or officers collect the charge is not a fee but a tax." (Para 22) "Under the Indian Constitution the State Government's power to levy a tax is not identical with that of its power to levy a fee. While the powers to levy taxes is conferred on the State Legislatures by the various entries in List II, in it there is Entry 66 relating to fees, empowering the State Government to levy fees 'in respect of any of the matters in this list, but not including fees taken in any court. The result is that each State Legislature has the power, to levy fees, which is co-extensive with its powers to legislate with respect to sub- stantive matters and it may levy a fee with reference to the services that would be rendered by the State under such law. The State may also delegate such a power to a local authority. When a levy or an imposition is questioned, the court has to enquire into its real nature inasmuch as though an imposition is labelled as a fee, in reality it may not be a fee but a tax, and vice versa. The question to be determined is whether the power to levy the tax or fee is conferred on that authority and if it falls beyond, to declare it ultra vires."(Para 23) "We have seen that a fee is a payment levied by an authority in respect of services performed by it for the common benefits conferred by the authority on all tax payers. A fee is a payment made for some special benefit enjoyed by the payer and the payment is proportional to such benefit. Money raised by fee is appropriated for the performance of the service and does not merge in the general revenue. Where, however, the service is indistinguishable from the public services and forms part of the latter it is necessary to inquire what is the primary object of the levy and the essential purpose which it is intended to achieve. While there is no quid pro quo between a tax payer and the authority in case of a tax, there is a necessary correlation between fee collected and the service intended to be rendered. Of course the quid pro quo need not be understood in mathematical equivalence but only in a fair correspondence between the two. A broad correlationship is all that is necessary." (Para 24) "Where it appears that under the guise of levying a fee the authority is attempting to impose a tax, the court has to scrutinise the scheme to find out whether there is a real correlation between the services and the levy whether it is co-extensive as to be a pretence of a fee but in reality a tax, and whether a substantial portion of the fee collected is spent in rendering the services." (Para 25)

34. The law in this regard is now well settled. It is not necessary that the services must be to the payers of the fees individually nor can the correlation between the payment of fees and the services rendered, be established with mathematical exactitude. If the primary and essential

purpose of the imposition be service of some special kind to the users of the market or payers of fees, even if there are other consequences or other benefits to others, these do not in the least affect the position. Any incidental benefit to those other than the payers of the fee, is not decisive of the fact whether it is a 'tax' or a 'fee'. The concept of benefit to the users of market must be looked at from a broad commonsense point of view, taking an inter grated view. A fee must have relation to the services rendered, or the advantage conferred. Such relation need not be direct but a mere casual relation may be enough. Further, neither incidence of the fee nor the service rendered need be uniform. Special benefit or advantage to the payers of the fees may even be secondary as compared with the primary motive of regulation in the public, interest. The cost of services rendered etc. against the amount of fee collected so as to evenly balance the two is neither necesssary nor expedient. A broad correlationship is all that is necessary.

35. Under section 29 of the State Act all the money received by the Market Committee is to be paid into a fund and all the expenditure incurred by the Market Committee for the purpose of this Act shall be defrayed out of the said amount. The fund may be utilised for the purpose specified in Section 30 of the State Act quoted above. An examination of the relevant provisions of the State Act and particularly purposes specified in Section 30 make it clear that the utilisation of the fund is substantially for the purpose of rendering service to the persons from whom funds are being collected. Moreover, a Board has been constituted under Section 33A of the State Act for the purpose of exercising superintendence over the control of Market Committee. Every Market Committee has to pay, out of its fund, to the Board as contribution, such percentage of its income derived from the licence fees and market fees as may be prescribed to meet expenses of the establishment of the Board and also those incurred in the interest of the Market Committee.

36. Having regard to the aforesaid and particularly applying the test laid down by 5-Judges Bench in the case of Kewal Krishna v. State of Punjab (supra), I am of the opinion that the test of a 'Fee has been fully satisfied in this particular case. I fully agree with the Division Bench decisions in Belsund Sugar case and Reptokose Brett (supra), which have dealt with this point and upheld the validity of the State Act on this question. I am of the opinion that there is relationship between the fee collected and the services intended to be rendered under the State Act. There is no attempt to impose any tax by the said Act. It is not only expressed as 'fee' but in reality and substance also it is a 'fee'. Accordingly, in my opinion, there is no merit in this contention and I reject the same.

37. Now we shall deal with some special points which were urged in some particular cases.

38. In CWJC Nos. 12227/87, 3863/88, 4623/88, 8705/88 and 5187/89 the petitioners are running some flour mills. Their case is that they purchased wheat which was ground in the mills to produce Atta, Maida, Suji and bran, which were sold by the petitioners. It was submitted that the

petitioners were made to pay market fee on purchase of wheat and fee was again realised from them on the sale of wheat products, namely, Atta, Maida, Suji and bran. This, it was alleged, amounted to "double point" or "multi point" taxation, which was not authorised by the State Act. In this connection our attention has been drawn to Section 27(3) of the State Act, which provides that market fee shall be realised not more than once in any market area on any agricultural produce. In this connection, reliance is placed on a Supreme Court decision in the case of Ram Chandra Kailash Kumar and Company v. State of U. P., AIR 1980 SC 1124 : (1980 All LJ 490). It was further submitted that there is no difference between Atta, Maida, Suji and , wheat which were the same commodity as 'wheat'; the only difference being that Atta, Maida and Suji were in crushed and ground form while wheat was in the form of grain. In this connection reliance was placed on the case of Dhanbad Roller Flour Mills v. State of Bihar, (1989) 75 STC 47 (Para 8).

39. I am unable to accept this contention. In the Schedule to the State Act, wheat, Atta, Maida and Suji have been entered and listed as separate and independent items of agriculture produce. Accordingly, there is no question of any multiple taxation. They are treated as different produce under the Act.

40. In this connection reference may be made to Sections 2(a) and 27 of the State Act. The Schedule relating to cereals 'wheat' is listed at serial No. 3; wheat Atta is at serial No, 14 and Suji and Maida are at serials Nos, 15 and 16 respectively. The fee is leviable on transaction of any agriculture produce. The liability to pay is on the buyer. The recovery of fee is from the buyer if he is a licensee and in case the buyer is not a licensee, the seller is to realise the same from the buyer. In case, however, neither the buyer nor the seller is a licensee, the fee is to be recovered by the staff of the Market Committee or the agents appointed by the Market Committee.

41. Under the charging section market fee is leviable on buying or selling of any agriculture produce only once in the same market area. In case, however, a commodity, which is an agriculture produce, undergoes certain manufacturing process and the resultant produce is another commodity, which is also an agriculture produce by itself, the question of multiple taxation cannot and does not arise. The State Act treats the two commodities as different and separate items of agriculture produce for the purpose of levy of fee.

42. Wheat is one of the items of agriculture produce. Atta and Maida are separate items of agriculture produce. Once market fee is levied on transaction of wheat in a particular market area, no further fee can be levied on subsequent transaction of the wheat itself in the same market area. However, where wheat is subjected to a process with the result that another agriculture produce comes into existence, e.g., Suji, fee can be levied on such ultimate produce, irrespective of the question of levy on wheat from which such produce is brought into existence.

43. In the case of Durgaji Rice Mills v. State of Bihar, 1989 PLJR 616, it was argued on behalf of the petitioners that rice being a product of paddy, which having already been subjected to levy of market fee, could not have further been made subject to payment of market fee as that would amount to imposition of double levy upon the same agricultural produce. This contention was rejected on the ground that the notification of paddy and rice are separately mentioned in the Schedule appended to the said Act and both paddy and rice are liable for levy as separate transaction within the market area. In that decision the Supreme Court's decision in M/s. Ram Chandra Kailash Kumar & Company, AIR 1980 SC 1124 : (1980 All LJ 490), on which strong reliance has been placed on behalf of the petitioners before us, was considered. The learned single Judge has also taken into consideration the subsequent decision of the Supreme Court in Srinivas General Traders v. State of Andhra Pradesh, AIR 1983 SC 1246 and the amendments brought about by Act No. 60 of 1982 in Sections 2(a) and 27 of the Act. The decision relied upon by the learned Counsel for the petitioners in Dhanbad Roller Flour Mills v. State of Bihar (supra) regarding wheat and its produce before the same commodity, came up for consideration not in connection with any Marketing Act but under the Central Sales Tax Act. These are two different types of Acts and they are not 'in pari materia' and, accordingly, a decision rendered under one Act can hardly be of any help insofar as the question of interpretation and scope of the other Act is concerned.

44. Accordingly, we reject this contention.

45. In C.W.J.C. No. 432 of 1983 another additional point has been taken. In this case the petitioner is a Company incorporated under the Indian Companies Act. The case of the petitioner-Company is as follows: The petitioner-Company is a manufacturer of Vanaspati and has a number of depots throughout the country, including one at Patna City, which serve as distribution points for the delivery of goods (Vanaspati) to the traders. The Agriculture Produce Market Committee, Patna City, (respondent No. 1) has raised a demand (vide Annexure V) for payment of market fee on sales of Vanaspati made by the petitioner to dealers on or before May 31, 1976. This is challenged in this proceeding. The petitioner's appeal against the assessment order (Annexure 1) was also turned down by the Appellate Authority and the appellate order (Annexure '2') is also under challenge. It is contended on behalf of the petitioner-Company first that the demand of market fee on Vanaspati for the period 1975-76 was wholly unauthorised, unwarranted and unreasonable, as during the material time Vanaspati was not an item of agriculture produce within the meaning of the State Act and was, therefore, completely beyond the purview of the said Act. It is further submitted that a demand notice (Annexure 4) was initially issued by the respondent-Market Committee asking the petitioner to deposit a sum of Rs. 83,834.95 as market fee on sale of Vanaspati for the period 1-4-1975 to 31-3-1976. After consideration of the reply of the petitioner, an assessment order was passed on 3-6-1976

whereunder the petitioner was held liable to pay a sum of Rs. 27,283.72 as market fee for the period in question. The petitioner deposited this amount. Thereafter the respondent-Market Committee suo motu reopened the assessment proceeding and purported to pass an assessment order on December 13, 1976 (impugned Annexure 'I1) raising a further demand of a sum of Rs. 89,073.26 for the same period. According to the petitioner, the Market Committee has no power or legal authority to reopen an assessment proceeding or review an assessment order that had already been passed and had become final.

46. As regards the first point, it was pointed out that at the material time 'Vanaspati' was not included as an item of agriculture produce in the Schedule appended to the State Act. What was then stated in the Schedule was only 'all vegetable oil'. It was submitted that Vanaspati was neither vegetable oil nor even processed vegetable oil. In market and trade it was known and recognised as a completely different commodity. It was actually a produce manufactured from vegetable oil. In other words, 'Vanaspati' came into being when vegetable oil was subjected to certain manufacturing process. Such being the position it was contended that notwithstanding the inclusive definition of 'agriculture produce', which empowered the State Government to notify various other commodities which might not be produce of agriculture as understood in market or trade, it was necessary that the specific produce, in this case Vanaspati, must be defined as an agriculture produce by being specifically included in the Schedule. It was submitted that unless it was so done, Vanaspati would not attract the provisions of the State Act merely because vegetable oil, which was used in the manufacture of Vanaspati, was defined as an item of agriculture produce by its inclusion in the Schedule. It was submitted that this position was altered only in 1982 when the word 'manufactured' was added to Section 2(a) of the State Act by an amendment. In support of this contention reliance is placed upon two Division Bench decisions of this Court, namely, Vir Bhan alias Vir Bhan Nangia v. State of Bihar, 1977 BBCJ 339 and Prabhat Zarda Factory v. State of Bihar, AIR 1985 Pat 241.

47-48. It is admitted that the contention of the petitioner would only succeed if it is held that Vanaspati is not the processed form of vegetable oil but it is manufactured from vegetable oil. In case it is held that Vanaspati is only a processed form of vegetable oil, then there cannot be any doubt that it would be covered by the definition 'agriculture produce'. If, on the other hand, Vanaspati is held to be a manufactured produce from vegetable oil, then the contention of the petitioner would succeed. In support of the assertion that Vanaspati is not a processed form of vegetable oil but is a manufactured produce from vegetable oil, learned Counsel for the petitioner relies upon a decision in Union of India v. Delhi Cloth and General Mills Co. Ltd., AIR 1963 SC 791. In this decision the question that fell for consideration before the Supreme Court was whether in course of production of Vanaspati from raw groundnut oil there came into existence, as an intermediate product, 'vegetable oil', which could be separately taxed and subjected to

excise duty under Item 23 of the First Schedule of the Central Excises Act. The Supreme Court answered the question in the negative but in this case it did not consider whether 'Vanaspati' was a manufactured produce or a processed form of vegetable oil. This case, in our opinion, does not support the petitioner's contention.

49. Reliance has been placed on behalf of the respondent-Market Committee on a decision inMessrs Tungabhadra Industries Ltd., Kurnool v. Commercial Taxes Officer, Kurnool, AIR 1961 SC 412. In this case the Supreme Court held that hydrogenated oil still continued to be groundnut oil notwithstanding the processing which was merely for the purpose of rendering the oil more stable thus improving its keeping qualities for those who desired to consume groundnut oil.

50. In view of the said Supreme Court decision in Tungabhadra Industries Ltd., Kurnool (ibid), in our opinion, 'Vanaspati is the processed form of the vegetable oil and such Vanaspati was fully covered by the definition of 'agriculture produce at the material time. Accordingly, the first contention is rejected.

51. As regards the second point, the same has been fully dealt with by the respondent-Committee in paragraphs 16 to 19 of the counter-affidavit on its behalf. In the counter-affidavit it is stated that the initial demand notice was not on the basis of any assessment order but was issued by the Secretary of the Market Committee as an interim demand. It was the assessment sub-Committee consisting of the Chairman, Vice-Chairman and the Secretary of the Market Committee which was the competent authority for passing the assessment order which was finally passed on 13-12-1976 for a sum of Rs. 1,11,356.98. Out of the assessed sum the amount already paid by the petitioner, that is, Rs. 27,283.00, was deducted and a final demand notice for a sum of Rs. 84,073.26 was issued on 23-12-1976. I accept this position and reject the second point raised.

52. An additional point was raised in C.W.J.C. No. 3920 of 1985 and in C.W.J.C. No. 5974/88 so far as sugar is concerned. It was submitted as follows. As the law stands today, no market fee can be levied on the sale or purchase of sugar. Sugar was originally listed in the Schedule to the State Act as an "agriculture produce" and was also covered by the relevant notifications issued under Sections 3 and 4 of the State Act. Under these circumstances the levy of market fee on the sale/purchase of sugar was justified. The situation was changed by the notification dated 2-5-1977 issued under Section 39 of the Act, whereby the Schedule to the State Act was amended by omitting 'sugar' as an item of agriculture produce. Shortly thereafter another notification was issued on 21-5-1977 which purported to rescind/cancel the aforesaid notification dated 2-5-1977. The subsequent notification dated 21-5-1977 was not in exercise of the powers conferred under Section 39 of the State Act, and it did not seek to add 'sugar' again as one of the items of agricultural produce included in the Schedule. It only sought to cancel/rescind the earlier

notification issued on 2-5-1977. Accordingly, there could not be any levy of sugar after 2-5-77 until sugar is properly included in the Schedule by a notification issued under Section 39 of the Act which has not yet been done. Alternatively it was submitted that even if it could be contended that the 21-5-1977 notification amounted to inclusion of sugar as an agriculture produce afresh, no fresh notification under Sections 3 and 4 of the State Act in relation to sugar having been issued after the subsequent notification dated 21-5-1977, there could not be any levy of sugar until that is done. It was submitted that the notification dated 2-5-1977 having excluded sugar from the list of agricultural produce within the meaning of the State Act, as a result of which sugar ceased to be an agricultural produce with effect from 2-5-1977, the earlier notifications issued under Sections 3 and 4 of the State Act, so far as 'sugar is concerned, also ceased to exist. Even assuming that the subsequent notification dated 21-5-1977 had the effect of re-introducing sugar as an item of agricultural produce, by no stretch of imagination it could be treated as revival of the earlier notifications issued under Sections 3 and 4 of the Act in relation to sugar while sugar was an agricultural produce. It was argued that notwithstanding that any particular commodity was an item of agriculture produce within the meaning of the Act, it will not attract levy of any market fee unless notification, as envisaged under Sections 3 and 4 of the Act in respect of that commodity, was issued, It was submitted that the admitted position being that no fresh notification under Sections 3 and 4 of the State Act having been issued in relation to sugar, after issuance of the subsequent notification dated 21-5-1977. Even if the subsequent notification could be treated to have had the effect of reintroducing sugar as an item of agricultural produce, without such fresh notification under Sections 3 and 4 of the Act thereafter, no such levy on sugar could be made.

53. On behalf of the respondents reference was made to Section 24 of the Bihar and Orissa General Clauses Act thereinafter referred to as 'G.C. At"), which is as follows :--

Sec. 24 : "Where, by any Bihar and Orissa Act (or Bihar Act) a power to make or issue notifications, orders, scheme, rules, bye-laws or forms is conferred, then that power includes a power exercisable in the like manner and subject to the like sanction and conditions (if any) to add to, amend, vary or rescind any notifications, orders, schemes, rules, bye-laws or forms so made or issued."

It was submitted that the State Government in exercise of this power had issued notification dated 21-5-1977 cancelling the earlier notification. The effect, according to him, was that the earlier notification become nonexistent, that is, as if it had never seen the light of the day. It was submitted that the notification dated 21-5-1977 restored the status quo ante as existing on 1-5-1977 and, thus, sugar continued to be an item of agriculture produce within the meaning of the State Act. It was further contended that the notifications issued earlier under Sections 3 and 4

continued to exist after cancellation of notification dated 2-5-77 by subsequent notification dated 21-5-1977 and that it was not necessary that once again the process of Sections 3 and 4 of the State Act should be gone through. According to him, the requirements of Sections 3 and 4 were one time requirement and once the powers were exercised and notifications were issued under Sections 3 and 4, the deletion and subsequent introduction of a particular commodity did not require that the procedure laid down under Sections 3 and 4 were to be followed again. In support of the same it was contended that as a matter of facts, even after the cancellation of notification dated 2-5-1977, all traders had been realising market fee and the fee was being paid to the Market Committee. Our attention was drawn in this connection to the counter-affidavit filed on behalf of the respondents. In this connection reliance was placed on two resolutions of the State Government in aid of his submission that what was actually intended had not been faithfully carried out in the notification dated 2-5-1977 and for that reason alone that notification should be deemed to be inoperative and not reflecting the decision of the State Government as the same was without any authority of law.

54. I am of the opinion that the conclusion made on behalf of the petitioners is sound, and that there is practically no answer to the same on behalf of the respondents. Section 24 of G.C. Act, even if applicable, does not support their contention regarding the effect of cancellation of the 2-5-77 notification by the notification dated 21-5-1977. Even if the 21-5-1977 notification attracted Section 24 of the G.C. Act, it did not revive the situation completely as sought to be argued on behalf of the respondents. Sugar having been excluded by the notification dated 2-5-1977 as an item of "agriculture produce" from the Schedule of the Act, the cancellation of the notification of 2-5-1977 did not have the effect of re-introducing 'sugar' as one of the item of agriculture produce. This is particularly so in view of the provisions of Section 39 of the State Act. Having regard to Section 39 of the State Act, Section 24 of the G.C. Act was not applicable and even if applicable, it did not have the desired effect of introducing 'sugar' as one of the scheduled commodities once again in view of 21-5-77 notification. Such intention could only be achieved by making a notification under Section 39 of the State Act and not by rescinding the earlier notification Accordingly, in our opinion since 2-5-77, sugar not being an "agricultural produce" no levy could be imposed in respect of the same since 2-5-77.

55. In any view of the matter I am of the opinion that even if the notification dated 21-5-77 could be treated as re-introduction of sugar as an agricultural produce within the meaning of the State Act, that by itself, without anything further, did not permit levy of fee on sugar. The scheme of the State Act makes it clear that merely being an item of agricultural produce within the meaning of the said Act does not authorise realisation of market fee in /espect of the same. A commodity may be an item of agriculture produce within the meaning of the Act but no market fee can be realised on the sale or purchase of this commodity, until and unless there are appropriate

notifications under Sections 3 and 4 of the Act in respect of the same. Tt is not in dispute that originally sugar was listed as an item of agriculture produce in the Schedule. It is also admitted that originally there were notifications issued under Sections 3 and 4 of the Act in respect of sugar. Accordingly, originally levy could be imposed on sugar. However, such notifications under Sections 3 and 4, insofar as sugar was concerned, ceased to have any effect and the same came to an end, when sugar ceased to be an item of agriculture produce by virtue of the 2-5-1977 notification, As a result of the notification dated 2-5-1977, not only that sugar ceased to be an item of agriculture produce within the meaning of the State Act but the notifications issued under Sections 3 and 4 of the State Act, so far as sugar was concerned, ceased to exist. Therefore, even if some time later sugar could again be sought to be treated as an 'agriculture produce' by virtue of the notification dated 21-5-1977, no market fee could be realised solely on that basis, as there was no fresh notification under Sections 3 and 4 of the State. Act to that effect. This being the position the mere fact that market fee on sugaar was actually paid by the petitioners and collected by the authorities is not of much relevance. In this connection, reference may be made to Section 4(3) of the State Act, which authorises the State Government to issue a notification to exclude in any market area any agricultural produce included in a notification issued under Sub-section (1) of Section 4. No such notification was issued either. I am not in a position to accept the contention that the notification dated 2-5-1977 was of no effect for the reasons stated. A notification properly issued could not be nullified by such alleged intention as propounded, by such purported resolutions.

56. Accordingly, I hold that since issue of notification dated 2-5-1977, no levy could be imposed under the said Act on 'sugar'.

57. In the result 1 find no substance or merit in any of the contentions raised in any of the writ petitions before us, excepting one of the contentions raised in C.W.J.C. No. 3920 of 1985 and C.W.J.C. No. 5974 of 1988, as indicated above. All the contentions raised and submissions advanced in all these cases are accordingly rejected and all the writ petitions, excepting C.W.J.C. Nos. 3920 of 1985 and 5974 of 1988, are dismissed.

58. So far as C.W.J.C. Nos. 3920 of 1985 and 5974 of 19°8 are concerned, the only contention relating to the levy of market fee on sugar after 2-5-1977 is upheld. I hold that after the issuance of the notification dated 2-5-1977, omitting sugar as an item of agricultural produce, no levy could he imposed under the State Act on the sale and purchase of sugar. These two applications are allowed only to this extent. No further order need be passed in these two applications as they do not merit any, having regard to the scope of the said two writ petitions and the facts and circumstances of the cases.

59. In the facts and circumstances of these cases, however, there shall be no order as to costs in

any of these applications.

Aftab Alam, J.

59. I agree.

 Patna High Court

Commissioner Of Income-Tax vs Bihar Cotton Mills Ltd. on 5 February, 1986

Equivalent citations: 1986 160 ITR 275 Patna

Author: N Ahmad

Bench: U Sinha, N Ahmad

JUDGMENT Nazir Ahmad, J.

1. A consolidated statement of the case has been submitted by the Income-tax Appellate Tribunal, Patna Bench "A", Patna (hereinafter referred to as the Tribunal), under Section 256(1) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"), referring the following two questions of law for the assessment year 1958-59 at the instance of the assessee :

"1. Whether, on the facts and in the circumstances of the case, the proceedings initiated under Section 147(a) were legal and valid ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in coming to the conclusion that Rs. 89,000 was to be added as the assessee's income from undisclosed sources ?"

2. For the assessment year 1959-60, the following question of law has been referred at the instance of the Commissioner of Income-tax :

"Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in quashing the assessment proceedings under Section 147(a) of the Income-tax Act, 1961, for the assessment year 1959-60?"

3. It is thus evident that Taxation Case No. 203 of 1976 is at the instance of the Commissioner of Income-tax, whereas Taxation Case No. 204 of 1976 is at the instance of the assessee, M/s. Bihar Cotton Mills Limited, Patna.

4. From the facts as found from the statement of the case, it is evident that for the assessment

year 1958-59, the original assessment was made under Section 23(3) of the Indian Income-tax Act, 1922 (hereinafter referred as the "old Act"), on February 19, 1959. Subsequently, the Income-tax Officer initiated proceedings under Section 147(a) of the Act, as according to him, he had reason to believe that by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of the company for the assessment year 1958-59, the income chargeable to tax had escaped assessment for that year. The initiation of proceedings under Section 147(a) was in respect of three credits in certain accounts as under :

Date Name Amount Rs.

2-1-1958 M/s. Shrikrishna Ghanshyamdas, Calcutta 29,000 5-2-1958 M/s. Ramkrishna Shyamsunder, Calcutta 31,000 24-2-1958 M/s. Ramkrishna Shyamsunder, Calcutta 29,000 89,000

5. After giving an opportunity to the assessee for establishing the genuineness of these credits, the Income-tax Officer added these amounts as the assessee's income from undisclosed sources. The order of the Income-tax Officer under Section 147(a) of the Act for the assessment year 1958-59 has been annexed and marked as annexure A forming part of the statement of the case.

6. The aforesaid order of the Income-tax Officer was challenged before the Appellate Assistant Commissioner on the ground that the initiation of the proceedings was illegal and there was no material on record on the basis of which the Income-tax Officer could have reason to believe that any income had escaped assessment. According to the assessee, the loans in question had originally been considered and accepted on the basis of evidence furnished. It was contended on behalf of the assessee that the action by the Income-tax Officer was the result of a mere change of opinion and a suspicion could not take the place of a reasonable belief. It was also submitted that as the assessment proceedings had been initiated under the provisions of the Act, the amounts in question could not be considered as the undisclosed income of the assessment year 1958-59 and if at all it could be assessed, it could be only in the year 1959-60. The Appellate Assistant Commissioner did not accept the plea of the assessee and he found that in so far as the assessment year 1958-59 was concerned, no copies of accounts of the two creditors had been filed and it was also not correct that confirmatory letters were filed during the course of the original proceedings before the Income-tax Officer. The Appellate Assistant Commissioner found that the accounting year for the business carried on by the assessee was the calendar year and these credits had appeared in the calendar year ending December 31, 1958, which was relevant to the assessment year 1959-60. According to the Appellate Assistant Commissioner, when the Income-tax Officer completed the assessment for the assessment year 1958-59, he had absolutely no occasion to look into the accounts of these creditors and could, therefore, not make any enquiry relating to the genuineness of these credits. As according tp the Appellate Assistant

Commissioner, these credits have been considered as income from undisclosed sources, they had to be considered only in the assessment year 1958-59 and the Income-tax Officer completed the original assessment without considering at all these credits or their genuineness.

7. The Appellate Assistant Commissioner rejected the plea of the assessee that the Income-tax Officer had no reason to believe that income had escaped assessment as a result of any omission on the part of the assessee. He found that in this case, one Gulabchand Jain, an income-tax advocate, had adopted a device for helping assessees to introduce their own secreted profits in their books of account in the names of fictitious persons. For this purpose, certain books of account were got prepared and some assessments were also got framed by filing imaginary returns. In these books of account, moneys were shown to have been advanced by such parties to the needy persons. The persons did not need the money as such because they had in their possession sufficient cash of their own but all that was undisclosed money which could not be brought into the books without inviting the attention of the tax authorities. Thus, those parties introduced their own undisclosed money in the names of these fictitious parties and in support of these book entries, confirmatory letters were issued on the letter-head of these fictitious parties. Ultimately, all the facts regarding these manoeuvres came to the knowledge of the Revenue Department and Shri Gulabchand Jain was confronted with those facts. Shri Gulabchand Jain admitted that the entries made in the names of a large number of parties were fictitious and, in fact, no money had passed from any of the parties, fictitious or real, to the debtors shown in the books of those parties. In the present case, the Income-tax Officer got the information that the assessee also resorted to the device of introducing money in the names of such parties with the aid of Shri Gulabchand Jain. On getting this information, the Income-tax Officer recorded the reasons and sent proposals to the Commissioner for taking action under Section 147(a) of the Act. In these proposals, it was mentioned that these loans had been introduced through ghost firms created by Shri Gulabchand Jain. On these proposals, the Commissioner recorded his satisfaction and proceedings were initiated. On these facts, the Appellate Assistant Commissioner was of the view that the Income-tax Officer had not only reason to believe that income had escaped assessment but had come to a prima facie conclusion on the facts of the case that it was so. The plea of the assessee that the provisions of Section 147(a) were not attracted was rejected. The Appellate Assistant Commissioner further found that the assessee had been called upon to prove the genuineness of these cash credits, The Income-tax Officer had once again written a detailed letter to the assessee stating that the entries made in the names of those parties were merely hawala entries and he, therefore, wanted to examine the two parties in whose names the deposits appeared. It was clarified in this letter that mere confirmatory letters would not suffice as a piece of evidence. To this letter, the assessee replied that the parties were genuine and the credits had been accepted originally after proper verification. It was also submitted on behalf of the assessee that the parties were not ghost parties but real parties. The Income-tax Officer issued

notices in the names of these parties to the addresses given by the assessee and these letters were sent by registered post and they came back with the remarks that there was no such person by that name and thus the notices could not be served. None of the parties had either appeared or were caused to be produced before the Income-tax Officer on the date fixed for that purpose.

8. On the aforesaid facts, the Appellate Assistant Commissioner held that adequate opportunities had been given to the assessee but except for stating that the credits were genuine, the assessee had not adduced any evidence to prove their genuineness. The Appellate Assistant Commissioner also found that there was no question of these credits having been accepted in the original assessment for the assessment year 1958-59, as no such facts were given by the assessee in that year. The addition of Rs. 89,000 was, therefore, confirmed by him. The Appellate Assistant Commissioner also rejected the plea of the assessee that the amount in question could not be assessed in the assessment year 1958-59. As these credits had appeared on the dates falling in the financial year 1957-58 and the amounts were to be treated as income from undisclosed sources, the proper year for their assessment, according to the Appellate Assistant Commissioner, was the assessment year 1958-59 and it could not be considered in the assessment year 1959-60. The order of the Appellate Assistant Commissioner for the assessment year 1958-59 has been annexed and marked as annexure B forming part of the statement of the case.

9. It was submitted before the Tribunal that the provisions of Section 147(a) were not applicable to this case and the Income-tax Officer had not recorded any reason for initiating the proceedings. It was also submitted that this was a case of a mere change of opinion. It was pointed out that the details about these credits had been submitted in the original assessment for the assessment year 1959-60 when confirmatory letters from the parties had been filed and interest claimed in these accounts was allowed. It was further argued that any general information received by the Income-tax Officer could not form the basis for the initiation of the proceedings and the information for this purpose should have been specific. It was submitted that action, if any, could have been taken under Section 147(a) of the Act. It was also submitted that for the assessment year 1958-59, the assessee was not bound to give any information as these credits appeared only in the accounting period relevant to the assessment year 1959-60. It was also argued that once action was taken under Section 147(a) of the Act, the provisions of Section 68 of the Act could be applicable. Regarding merits, it was pointed out that the confirmatory letters were furnished at the time of the original assessment and it was not possible for the assessee to trace out the creditors after a lapse of 8 or 10 years. It was also pointed out that the return of the amount was by cheque which showed that there was a bank account to which these amounts must have gone.

10. On behalf of the Department, it was submitted that the assessee had claimed interest only in the assessment year 1959-60 and no information had been given in the assessment year 1958-59. It was also pointed out that the information given at the time of the original assessment was shown to be false as a result of the information received by the Income-tax Officer about these creditors. It was argued on behalf of the Department that the set of facts had changed and, therefore, the Income-tax Officer could also change his conclusion. It was also pointed out that the Income-tax Officer had clearly recorded reasons and it was not necessary to show these recorded reasons to the assessee as it was not required by law. The information received by the Department was specific and it related to the credits in the names of these two parties and the information clearly indicated that these two parties were ghost parties and had, in fact, not given any money to any party. Reference was made to the letter received from the Directorate of Investigation which gave details of the racket and also the fact regarding the non-existence of these two parties. The relevant files were placed before the Tribunal.

11. The Tribunal looked into the records and the files produced and found that the Income-tax Officer had clearly recorded the reasons and these reasons made reference to the information received by the Income-tax Officer about the nature of the credits in the names of these two parties. The Tribunal found from the communication received from the Directorate of Investigation that there was an all India racket of ghost firms which were used for accommodating the concealed incomes of many parties in the form of loans to such parties. As a result of raids conducted, the facts regarding this racket were found out and Shri Gulabchand Jain surrendered with the books and documents and also issued circular letters to his client regarding these ghost firms. The names of M/s Ramkrishna Shyamsundar, Calcutta, and Shrikrishna Ghanshyamdas, Calcutta, were mentioned among the ghost firms and it was stated that their names were merely used for showing certain credits in the books of different parties. On the basis of this information, the Commissioner of Income-tax informed the Income-tax Officer concerned about the specific assessees in whose accounts credits in the names of these ghost firms appeared. In the case of the assessee also, such specific information was extracted and given to the Income-tax Officer and on the basis of the information received, the Income-tax Officer initiated proceedings and submitted proposal to the Commissioner in which a specific observation was made that the assessee had introduced concealed profits through ghost firms created by Shri Gulabchand Jain. The Income-tax Officer had also stated that the income of the assessee had escaped assessment by suppression of material facts on its part. On the basis of these materials, the Tribunal came to the conclusion that these proceedings had not been initiated for making fresh enquiry and the reason to believe that income had escaped assessment was based on specific information received by the Income-tax Officer. The information received was specific regarding these two parties and, therefore, the Tribunal held that the reasons had properly been recorded and the Income-tax Officer had reason to believe for initiation of

proceedings under Section 147(a) of the Act.

12. The Tribunal rejected the plea of the assessee that they had disclosed all the relevant information in the original proceedings. The Tribunal held that strictly under the law, in so far as the assessment year 1958-59 was concerned, no materials had been furnished about these credits and, therefore, there was no question of any change of opinion. The Tribunal considered the materials given in the case of the assessment year 1959-60 and found that they were in the shape of confirmatory letters from the above two parties. In view of the information given to the Income-tax Officer, the Tribunal held that the Income-tax Officer had not merely changed his opinion on the same set of facts but in view of the fact that the information furnished earlier was false. The Tribunal, therefore, held that action under Section 147(a) was justified. The Tribunal further rejected the plea of the assessee that the amount was taxable (only) in the assessment year 1959-60 as provisions of Section 68 of the Act were applicable. The Tribunal held that for any assessment year prior to the assessment year 1962-63, the previous year for assessing any income from undisclosed sources had to be the financial year. The Tribunal further held that when action under Section 147 is taken, the substantive law applicable is the law which was in force in respect of the assessment year and only the procedural law of the Act could be applied. According to the Tribunal, any other view would create an anomalous position and would not be in keeping with the rule of harmonious construction. In this view of the matter, the Tribunal held that the amount in question could be considered as income from undisclosed sources: only for the assessment year 1958-59 and not for the assessment year 1959-60.

13. On merits, the Tribunal considered the letters written by the Income-tax Officer to the assessee and also the fact that the assessee did not do anything to prove the genuineness of the credit and merely stated that the confirmatory letters had already been furnished, copies of which were filed again. It was submitted before the Tribunal that it was not possible for the assessee to establish the genuineness of these credits or these parties after several years of the transactions. The Tribunal held that the assessee had not been able to discharge the onus which lay on him by establishing the genuineness of the credits and the proof of their sources. The Tribunal held that when the existence of the parties was disputed by the Department, any letter from such non-existent parties could not go to any extent in establishing the fact that the assessee did genuinely receive any money from any outside sources. The Tribunal further found that the assessee had merely chosen to rely on the legal aspect of the matter and there was hardly anything of substance in the assessee's case in so far as the merits are concerned. The Tribunal further held that where books of account were manufactured, bank accounts were opened and other necessary formalities were gone through, the mere issue of cheque did not prove anything and could not establish the genuineness of the receipt of the amount. The Tribunal, therefore, held that the addition of the amount as income from undisclosed sources in the assessment year 1958-59 was

justified and so the addition was confirmed. This order of the Tribunal has been annexed and marked as annexure-C forming part of the statement of the case.

14. In the assessment year 1959-60, the Income-tax Officer had assessed an amount of Rs. 4,12,646 as income from undisclosed sources and this was represented by several credits in the accounts of several parties. This included the amount of Rs. 89,000 also, the facts regarding which have already been discussed in the statement of the case for the assessment year 1958-59 and these additions were made on the ground that the credits in various names had not been proved to be genuine and the accounts of these parties had not been authenticated by those parties. The assessment order for the assessment year 1959-60 has been annexed and marked as annexure-D forming part of the statement of the case.

15. The Appellate Assistant Commissioner found that the assessee had filed confirmatory letters from M/s. Shrikrishna Ghanshyamdas and M/s. Ramkrishna Shyamsundar in the original proceedings. However, he held that in view of the letter and information received by the Income-tax Officer, the confirmatory letters had no value. He further held that though the amount itself could not be assessed in the assessment year 1959-60, the amount of interest of Rs. 5,096 credited in these accounts on December 31, 1958, was a wrong claim because the credit itself was not genuine. The Appellate Assistant Commissioner, therefore, upheld the action of the reopening of the assessment. Regarding the other addition of Rs. 3,18,549, the Appellate Assistant Commissioner set aside the assessment for further enquiry. This order of the Appellate Assistant Commissioner has been annexed and marked as annexure-B forming part of the statement of the case.

16. In respect of the assessment year 1959-60, it was submitted before the Tribunal that the Income-tax Officer could not have reason to believe that income had escaped assessment for the assessment year 1958-59 as well as for the year 1959-60. It was further argued that the provision of Section 147(a) of the Act had no application in this case and only Section 147(b) of the Act could apply. It was further argued that the claim of interest by the assessee was not one of the reasons for initiating the proceedings under Section 147(a) of the Act and there was no reason recorded relating to escapement of Rs. 3,18,549.

17. The Tribunal looked into the reasons recorded and found that the Income-tax Officer had mentioned only those three credits totalling Rs. 89,000 as the reason for reopening the assessment and there was no mention of the claim of interest on the credits as reason for reopening the assessment. It was also mentioned in the proposal of the Income-tax Officer that the reopening was being made as a protective measure as the assessee was challenging the assessment of the amount for the assessment year 1958-59. Considering these facts, the Tribunal held that it could not be held that the Income-tax Officer had reason to believe that the income of

Rs. 89,000 had escaped assessment for the assessment year 1959-60. As the claim of interest was not one of the reasons for reopening the assessment, the initiation itself was not valid. The assessment made in the assessment year 1959-60 was, therefore, quashed by the Tribunal. This order of the Tribunal is annexure-C as already pointed out earlier. On these facts, various questions for the assessment years 1958-59 and 1959-60 have been referred as mentioned above.

18. On the aforesaid facts, it has to be first seen whether the amount of Rs. 89,000 was income from undisclosed sources for the assessment year 1958-59 or for the assessment year 1959-60. It cannot be doubted that in the original assessment for the assessment year 1958-59 which was made on February 19, 1959, the amount of Rs. 89,000 was not shown by the assessee nor was any addition made in this connection. In the assessment year 1959-60, the amount of Rs. 89,000 relating to the various cash credits was shown by the assessee and when the original assessment was made on December 11, 1959, this amount was not added. However, when the assessments were reopened under Section 147(a) of the Act, then both in the assessment years 1958-59 as well as 1959-60, the amounts were added by the Income-tax Officer. The reassessment order for the assessment year 1958-59 is annexure-A and the reassessment order for the assessment year 1959-60 under Section 147(a) of the Act is annexure-D before us.

19. I have already mentioned the details of credits of Rs. 89,000 in paragraph 2 of my judgment and it shows that the cash credits of Rs. 89,000 were shown on January 2, 1958, February 5, 1958, and February 24, 1958. Thus these credits related to the financial year 1957-58. It cannot be doubted that the original assessment for the assessment year 1958-59 was made under Section 23(3) of the old Act for calendar year 1957 on February 19, 1959, and the original assessment for the assessment year 1959-60 was made for calendar year 1958 under Section 23(3) of the old Act on February 11, 1959. Mr. B. P. Rajgarhia has filed copies of the original assessment orders for the assessment years 1958-59 and 1959-60. The original assessment orders show that the accounting period of the assessee is calendar year and on this basis the assessee showed cash credits of Rs. 89,000 on January 2, 1958, February 5, 1958, and February 24, 1958, in the assessment year 1959-60 for the calendar year 1958 and the Income-tax Officer considered these cash credits in the assessment year 1959-60 and accepted the cash credits as genuine as no addition relating to the cash credits was made in the assessment year 1959-60.

20. Now, it cannot be doubted that under the old Act cash credits were to be added according to the financial year. The cash credits were shown in the financial year 1957-58 and so the amount should have been shown in the assessment year 1958-59. The Tribunal has also taken the same view and I am supported in my view by the various decisions on which Mr. B. P. Rajgarhia, senior standing counsel for the Revenue, has relied.

21. It has been held in the case of Bhogilal Virchand v. CIT [1981] 127 ITR 591, by the Bombay

High Court that before the Income-tax Act, 1961, came into force, the position under the Indian Income-tax Act, 1922, in respect of income from undisclosed sources was that such income from an undisclosed source could be assessed or reassessed by making an assessment on the basis that the previous year for such an income would be the financial year. It has also been held in this decision that the effect of Section 68 of the 1961 Act is that statutorily a sum which is found credited in the books of the assessee maintained for any previous year in respect of which either the assessee offers no explanation or the explanation offered by him is not accepted by the Income-tax Officer is to be charged to income-tax as the income of the assessee of that previous year and, therefore, Section 68 is a charging provision in so far as the particular sum, which is a subject of legislation, is concerned. It has also been held in this decision that the words "all the provisions of this Act shall apply accordingly" in Section 297(2)(d)(ii) of the 1961 Act referred only to the machinery provided in that Act for assessment of escaped income and they do not apply to the substantive provisions of the new Act which create rights or liabilities and that Section 68 of the Act being a substantive charging section, it cannot be applied to a case of reassessment governed by the 1922 Act.

22. It has also been held in the case of CIT v. Dharamchand Anandkumar [1981] 128 ITR 219, by the Madhya Pradesh High Court that the settled law under the 1922 Act was that the only possible way in which income from an undisclosed source could be assessed or reassessed was to make the assessment on the basis that the previous year for such income was the ordinary financial year and that Section 68 of the 1961 Act makes a departure on this point in respect of amounts found credited in the books of the assessee. It has also been held in this decision that the section provides that where any sum is found credited in the books of an assessee for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered is not, in the opinion of the Income-tax Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year and that the section has application where any sum is found credited in the books of an assessee maintained for any previous year. It has also been held in this decision that if the amount is credited in the books of the assessee maintained for any previous year is not the business income of the assessee but is held to be income from undisclosed sources, the income so discovered will, under Section 68, be deemed to be the income of that previous year for which accounts were maintained and that the position in this respect under the 1922 Act was different, as such income from undisclosed sources under that Act could be assessed only on the basis that the previous year for such income was the relevant financial year. It has also been held in this decision that the scheme of the charging provisions of the 1922 Act and the 1961 Act is the same and that the charging provisions were contained in sections 3 and 4 of the 1922 Act and the corresponding provisions of the 1961 Act are sections 4 and 5 and that income-tax is charged for any assessment year in respect of the total income of the previous year and the previous year of an

assessee, which, in substance, means the accounting year, is intimately connected with the charging provisions of the Act and that a change in the previous year by Section 68 of the new Act is a change in the substantive law and not merely a change in the machinery or procedural provision. It has also been held in this decision that the words "all the provisions of this Act shall apply accordingly" occurring in Section 297(2)(d)(ii) of the Income-tax Act, 1961, merely refer to the machinery provided in the new Act for the assessment of escaped income and they do not import any substantive provisions of the new Act which create rights or liabilities and that the word "accordingly" in the context means nothing more than "for the purpose of assessment" and it suggests that the provisions of the new Act which are made applicable are those relating to the machinery of assessment. Similar view has been taken in the case of CIT v. N.L. Satyanarayan Setty [1981] 129 ITR 226 (Kar).

23. Thus it is evident that the cash credits of Rs. 89,000 relating to January 2, 1958, and February 5, 1958, February 24, 1958, as mentioned in paragraph 2 of my judgment, are liable to be assessed in the assessment year 1958-59, as these cash credits were covered by the old Act and Section 68 of the Act was not applicable to these cash credits, and so the cash credits of Rs. 89,000 have to be added in the assessment year 1958-59, as they relate to the financial year 1957-58.

24. Mr. K. N. Jain, for the assessee, fairly conceded that if the financial year is taken to be the basis, then the amount of Rs. 89,000 relating to the credits have to be added in the assessment year 1958-59.

25. Once it is held that the cash credits of Rs. 89,000 have to be added in the assessment year 1958-59, then the entire finding of the Tribunal relating to the assessment year 1958-59 has to be accepted. It has to be held that the Income-tax Officer came to know on the basis of the statement of Shri Gulabchand Jain, Income-tax Advocate, that he had resorted to a device for helping the assessee to introduce his own secreted profits in his account books in the names of fictitious persons and for this purpose certain books of account were got prepared and some assessments were also got framed by filing fictitious returns. In view of the statement of Shri Gulab-chand Jain, the Tribunal rightly came to the finding that these proceedings had not been initiated for making a fishing enquiry and the reason to believe that the income had escaped assessment was based on specific information received by the Income-tax Officer and that the information received was specific regarding these two parties and so the Tribunal held that the Income-tax Officer had reason to believe that initiation of proceedings under Section 147(a) of the Act was justified. I also hold that the Tribunal was right in rejecting the plea of the assessee that they had disclosed all the relevant information in the original proceedings. The Tribunal rightly held that strictly under the law in so far as the assessment year 1958-59 was concerned, no information

had been furnished about these credits and, therefore, there was no question of any change of opinion. The Tribunal also came to a finding that it was not a case of mere change of opinion in the assessment year 1959-60. The Tribunal also rightly did not accept the plea of the assessee that the amount was taxable in the assessment year 1959-60, as the provisions of Section 68 of the Act were not applicable. The Tribunal also rightly held that on merits also the assessee had no case. The Tribunal has given detailed reasons for coming to this finding as has been mentioned in paragraph 11 of my judgment. Under such circumstances, I agree with the reasons given by the Tribunal for holding that the initiation of proceeding under Section 147(a) of the Act for the assessment year 1958-59 was valid and the addition of Rs. 89,000 relating to the cash credits was also justified.

26. The assessee's plea that the confirmatory letters had been filed in the assessment year 1959-60 and so the proceeding for the assessment year 1959-60 could not be reopened under Section 147(a) of the Act, as in the original assessment, the cash credits and the interest paid relating to the cash credits of Rs. 89,000 have been accepted, in that connection, Mr. B. P. Rajgariha has relied on various decisions,

27. It has been held in the case of Bhimraj Panna Lal v. CIT [1957] 32 ITR 289, by the Patna High Court that in the ordinary course, an order of assessment made after investigation by a particular officer should not at his sweet will and pleasure be allowed to be revised and there must exist something, either suppressed by the assessee, or a fact or a point of law which was inadvertently or otherwise omitted to be considered by the Income-tax Officer before he can proceed to act under Section 34 and that a mere change of opinion on the same facts and law is not covered by that section and that action can be taken with reference to the events which happened subsequently, these events having relation to the facts on which the original assessment had been made. It has also been held in this decision by the Patna High Court that under Section 34(1) of the old Act, the belief of the Income-tax Officer that income has escaped assessment or has been underassessed must be that of an honest and reasonable person, based upon reasonable grounds ; the Income-tax Officer may act under this section on direct or circumstantial evidence, but not on mere suspicion,

gossip

or rumour. It is evident from this decision that if no new facts have come to light after the original assessment, the Income-tax Officer has power to reopen the assessment.

28. Mr. B. P. Rajgarhia, for the Revenue, has also relied on the case of Sujir Ganesh Nayak and Co. v. ITO [1974] 97 ITR 372 (Ker), where it has been held that on the assurance given by the petitioner during the assessment proceedings, the officer was apparently content to act and made

the assessment and that it was only subsequently on receipt of the information from the income-tax authorities in Bombay that the officer had "reason to believe" that the petitioner had not made a full and true disclosure of the material facts and that the officer was not precluded from taking action under Section 147(a) read with Section 148, Thus it is evident that if a full and true disclosure is not made of a material fact, then the Income-tax Officer has a right to initiate proceeding for reassessment under Section 147(a).

29. Mr. B. P. Rajgarhia has also relied on the case of M. Varadarajulu v. ITO [1974] 97 ITR 476 (Mad). In this case, on the basis of certain investigations conducted by the Income-tax Department in respect of hundi transactions, it came to light that the "creditors'" who had advanced monies on hundis to various businessmen were merely name-lenders who had no means for making the advances and the amounts shown were the assessee's own monies brought into the account in the banker's names. In pursuance of this information, the petitioner's assessments for 1960-61 and 1961-62 were sought to be reopened under Section 147(a) and notice therefor was issued under Section 148. In those circumstances, the Madras High Court held that the case fell under Section 147(a) and the Department had some material for reopening the assessment and hence the reopening was valid.

30. Mr. B.P. Rajgarhia has also relied on the case of ITO v. Mahadeo Lal Tulsian [1977] 110 ITR 786, which is a decision of the Calcutta High Court. In this decision, it was held that the Income-tax Officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Act only where he arrives at a positive conclusion that he has reason to believe that by reason of the omission or failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for his assessment, any part of his income, profits or gains chargeable to income-tax has escaped assessment and that the belief being that of the Income-tax Officer, it is not open to the asscssee to dispute the propriety thereof by disputing the sufficiency of the reasons, though it is always open to the assessee to claim that there exists no belief or that the belief is not at all a bona fide one. It has also been held in this decision that to the limited extent as aforesaid, the conclusion of the Income-tax Officer is open to challenge in a court of law and in considering whether the belief is a bona fide one or not, the court can examine whether there exists any material for the belief to be formed with reference thereto and whether such materials have any rational connection or a relevant bearing on the formation of the belief and are not extraneous or irrelevant to the particular belief specified in the section. It was also held in this decision by the Calcutta High Court that though it was clear from the materials on record that the assessee did disclose the hundi loans in the original assessment proceedings, this fact by itself did not lead to the conclusion that the escapement of assessment, if any, was merely the result of a different view taken by the successor Income-tax Officer, and that the assessee was required not only to make full disclosure of all facts relevant to the assessment but also a true

disclosure thereof and that it is wholly immaterial whether the Income-tax Officer making the original assessment could or could not have found the same to be faked or not. It has also been held in this decision that when the successor Income-tax Officer arrived at a conclusion that the assessee concealed a part of his income by falsely representing the same as loan at the time of the original assessment, he was certainly not proceeding merely on the change of his opinion or view and that, on the other hand, he was proceeding on actual facts as subsequently found out, leading to the conclusion that a part of the income has escaped assessment due to untrue disclosure of material facts and that it was not a case where the assessee, having made a full and true disclosure of facts, the two Income-tax Officers were arriving at two different conclusions, taking either two different views of law or facts fully and truly disclosed or making two different inferences therefrom. Thus it is evident that if true facts are not disclosed at the time of the original assessment, then the assessment can be reopened under Section 147(a) of the Act. Similar view has been taken by the Calcutta High Court in the Appendix judgment ITO v. Textile Mills Agents P. Ltd. [1981] 130 ITR 733 (Cal).

31. It has been held in the case of CIT v. Ess Ess Kay Engineering Co. Pvt. Ltd. [1982] 137 ITR 446, by the Punjab and Haryana High Court that it is well settled that though the assessee may have disclosed fully the facts at the time of the original assessment, if they are found to be untrue on the basis of material discovered later on by the assessing authority, the assessment can be reopened under Section 147(a) of the Act, because in such a case the assessee had failed to disclose truly all material facts necessary for assessment and it could not be a case of a mere change of opinion. It was held in this decision that, in the instant case, the assessing authority had formed an opinion from the facts disclosed later and the primary facts disclosed were untrue and so the reassessment proceedings under Section 147(a) of the Act were valid.

32. It has been held in the case of CIT v. Nathuram Gokulka [1983] 141 ITR 791, by the Calcutta High Court that if at the time of the original assessment, true materials or facts had not been disclosed, the initiation of reassessment proceedings was valid.

33. It has been held in the case of Basti Sugar Mills Co. Ltd. v. CIT [1983] 142 ITR 487, by the Delhi High Court that in the original assessment, the Income-tax Officer had merely assumed that what was true about one company belonging to the same group was true with regard to other companies as well and it was subsequently found that the alleged selling agents had rendered no service and, consequently, it was rightly held by the Tribunal that the assessee had failed to disclose truly the primary facts necessary for assessment and so the reassessment proceedings were valid.

34. In the case of A. Shanmugham Chetty v. CIT [1985] 154 ITR 331 (Mad), subsequent to the original assessment, there was investigation and that investigation revealed that the assessee had

undertaken the reconstruction of two buildings at a cost of Rs. 87,300 and had not effected mere repairs for Rs. 21,235 as claimed by him. Under such circumstances, the Madras High Court held that though the assessee had returned the cost of improvements made to the building and had furnished at the time of the original assessment, account books and other details, those materials which were straightaway accepted by the Income-tax Officer were found to be not true and hence the assessee could not be taken to have disclosed materials fully or truly and this would attract Section 147(a) and that the Tribunal was, accordingly, right in its view that the assessee had not furnished all the materials necessary for assessment and hence reopening of the assessment under Section 147(a) of the Act was justified.

35. Thus, from the various decisions relied on by Mr. B.P. Rajgarhia for the Revenue, it is evident that even if materials are placed at the time of the original assessment, but subsequently it is found that the assessee had not disclosed full and true facts, then reassessment can be made under Section 147(a) of the Act. In the present case before us, the assessee had furnished confirmatory letters and had disclosed cash credits but subsequently on the basis of the statement of Shri Gulabchand Jain, it was found that the assessee had not disclosed true facts and had claimed falsely that the cash credits were genuine and so the reassessment even for the assessment year 1959-60 can be rightly reopened by the Income-tax Officer in the present case. However, it cannot be doubted that no assessment was made in the assessment year 1958-59 and so when the materials came to the knowledge of the Income-tax Officer that cash credits were bogus and not genuine, he could initiate reassessment proceedings under Section 147(a) of the Act for the assessment year 1958-59 as well as for the assessment year 1959-60 and so it has to be held that the proceedings under Section 147(a) of the Act for the assessment year 1958-59 as well as for the assessment year 1959-60 were valid.

36. Now, Mr. K.N. Jain, on behalf of the assessee, has submitted that the assessee had shown cash credits relating to the amount of Rs. 89,000 in the assessment year 1959-60 on the basis of the calendar year as the credits were found in January and February, 1958, and confirmatory letters were also filed and, so it was for the Income-tax Officer to make investigation and if the Income-tax Officer failed to make necessary investigation, he could not have reopened the assessment for the assessment year 1956-60 and could not have made addition in the assessment year 1958-59. For this purpose, he has relied on various decisions.

37. Mr. K.N. Jain, for the assessee, has relied on the case of ITO v. Madnani Engineering Works Ltd. [1979] 118 ITR 1, which is a decision of their Lordships of the Supreme Court. Of course, in this decision it was held that the respondent had produced in the original assessment proceedings all the hundis on the strength of which it had obtained loans from the creditors as also entries in the books of account showing payment of interest and it was for the Income-tax

Officer to investigate and determine whether these documents were genuine or not; the respondent could not be said to have failed to make a true and full disclosure of the material facts by not confessing before the Income-tax Officer that the hundis and the entries in the books of account produced by it were bogus. However, their Lordships of the Supreme Court have also pointed out that, as the Income-tax Officer had in the second affidavit merely stated his belief but did not set out any material on the basis of which he had arrived at such belief, there was nothing on the basis of which the court could be satisfied on the affidavit that he had reason to believe that a part of the income of the respondent had escaped assessment by reason of its failure to make a true and full disclosure of the material facts. Thus, it is evident that if there are materials to show that the disclosure is not true, then the reassessment proceeding would be valid In this case, the appeal had been filed against the writ petition which had been filed immediately after issue of notice of reassessment. In the case of before us, the assessment had already been made on the materials available to show that the assessee had not made a true disclosure relating to the cash credits in the assessment year 1959-60 and so the reassessment could be made even in view of this decision of their Lordships of the Supreme Court.

38. Mr. B. P. Rajgarhia, against the aforesaid decision of the Supreme Court, relied on the decision of their Lordships of the Supreme Court in the case of Kantamani Venkata Narayana and Sons v. First Addl. ITO [1967] 63 ITR 638, where it has been held that the assessee does not discharge his duty to disclose fully and truly material facts necessary for the assessment of the relevant year by merely producing the books of account or other evidence. He has to bring to the notice of the Income-tax Officer particular items in the books of account or portions of documents which are relevant and that even if it be assumed that, from the books produced, the Income-tax Officer, if he had been circumspect, could have found out the truth, he is not on that account precluded from exercising the power to assess income which had escaped assessment. It was also held in this decision that the Income-tax Officer had, prima facie, reason to believe that the assessee had omitted to disclose fully and truly all material facts and that in consequence of such non-disclosure, income had escaped assessment and he had, therefore, jurisdiction to issue the notice. It has also been held in this decision that in proceedings under Article 226 of the Constitution of India challenging the jurisdiction of the Income-tax Officer to issue a notice under Section 34(1)(a) of the old Act, the High Court is only concerned to decide whether the conditions which invested the Income-tax Officer with power to reopen the assessment did exist, it is not within the province of the High Court to record a final decision about the failure to disclose fully and truly all material facts bearing on the assessment and consequent escapement of income from assessment and tax.

39. Mr. B. P. Rajgarhia has also relied on the case of S. Narayanappa v. CIT [1967] 63 ITR 219 (SC), where it has been held that there is no requirement in any of the provisions of the old Act

or any section laying down as a condition for the initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under Section 34 must also be communicated to the assessee and that the Income-tax Officer need not communicate to the assessee the reasons which led him to initiate the proceedings under Section 34 of the old Act. Thus, the Supreme Court decision relied on by the assessee is not helpful to the assessee.

40. Mr. K. N, Jain has also relied on the case of Dwarka Dass and Brothers v. ITO [1979] 118 ITR 958 (Delhi). This is a decision of the Delhi High Court by a single judge in a writ petition under article 226 of the Constitution. Moreover, in that case, it was held that this was a case of suspected untruthful disclosure where the primary facts to arrive at the reason to believe did not exist and, therefore, the notice issued under Section 147(a) was held to be bad. I have already pointed out that the Delhi High Court in the decision in Basti Sugar Mills Co. Ltd. v. CIT [1983] 142 ITR 487, has already clearly held that if there is no true disclosure, then assessment can be reopened. Under such circumstances, this decision also is not helpful to the assessee.

41. Mr. K. N. Jain has also relied on the case of Asa John Devanathan v. Addl. CIT [1980] 126 ITR 270 (Mad). In this case, in the course of the original assessments for the years 1957-58 to 1963-64, the assessee produced the books of account and also gave a list of various creditors from whom borrowings had been effected on the security of hundis. Interest paid to these parties as well as their full addresses were furnished. The discharged hundis were also produced. The original assessments were completed by making certain additions for cash credits with no addition on account of any hundis. Reassessment proceedings under Section 147(a) of the Act were initiated on the basis of a general circular of the Commissioner which indicated that many of the bankers who were supposed to have lent monies were purely name-lenders. It was in those circumstances that it was held that as the circular of the Commissioner and the statement available with the Department did not refer to the assessee specifically but were general in nature, it could not be held that there was information available to the Income-tax Officer which detracted from the truth of the assessee's disclosure made originally. In the present case before us, Shri Gulabchand Jain stated that the creditors of the assessee were bogus. Under such circumstances, this decision also will not be applicable to the facts of the present case before us.

42. Mr. K. N. Jain has also relied on the case of Sujir Ganesh Nayak and Co. v. ITO [1976] 104 ITR 524 (Ker). This case related to a writ matter where issue of notice was quashed. It this decision, it was held that once primary facts have been disclosed and assessments have been made on that basis, then no action under Section 147(a) of the Act can be taken as it will be a mere change of opinion. However, in the present case before us, entire evidence has been led which shows that true facts were not disclosed by the assessee and so it cannot be said to be a case of mere change of opinion.

43. Mr. K. N. Jain has also relied on the case of Calcutta Credit Corporation Ltd. v. ITO [1971] 79 ITR 483 (Cal). In this case also, a single judge of the Calcutta High Court held that it was impossible to accept the view that by failing to disclose the alleged fact that no services were rendered by P.C. & Co. during the relevant years, the petitioner had failed to disclose fully and truly all material facts within the meaning of Section 147(a) of the Act and that it was for the Income-tax Officer to investigate that claim and find out whether the amount was actually spent for the purpose of the assessee's business in order to qualify for allowance under the provisions of the Act and that having made a claim for deduction it cannot possibly be the assessee's duty to disclose at the same time that the deduction was not permissible and that the impugned notices under Section 147(a) were not sanctioned by the provisions of that section and should be quashed. I have already referred to the decisions of the Calcutta High Court in ITO v. Mahadeo Lal Tulsian [1977] 110 ITR 786, ITO v. Textile Mills Agents P. Ltd. [1981] 130 ITR 733 and CIT v. Nathuram Gokulka [1983] 141 ITR 791, which have laid down that if the facts are not disclosed and there is misrepresentation of facts, then reassessment proceedings can be initiated under Section 147(a) of the Act. In view of the latter Calcutta decisions, it is difficult to follow the decision in Calcutta Credit Corporation Ltd. v. ITO [1971] 79 ITR 483.

44. Mr. K.N. Jain has also relied on the case of CIT v. Hemchandra Kar [1970] 77 ITR 1, which is a decision of their Lordships of the Supreme Court. In this case, it was held that because the primary facts were within the knowledge of the Income-tax Officer when he completed the first reassessment, the escapement of income took place by reason of the failure of the Income-tax Officer to include the sum of Rs. 1,10,000 in the assessment of the Hindu undivided family when he was in full possession of all the necessary and material facts and in those circumstances, it was held that the requirements of Section 34(1)(a) of the old Act were not satisfied. The facts of this case are not helpful to the assessee. In the present case before us, it has to be held that in the assssment year 1959-60, the assessee had not disclosed true facts to the Income-tax Officer and so the Income-tax Officer accepted cash credits of Rs. 89,000 and interest paid thereon and so it cannot be doubted that he could reopen the assessment for the assessment year 1959-60. However, I have already held above that after reopening the assessment for the assessment year 1959-60, the Income-tax Officer found that the assessments relating to cash credits of Rs. 89,000 were to be made in the assessment year 1958-59. I have already agreed with the finding of the Tribunal that the cash credits of Rs. 89,000 were to be added on the financial year basis in the assessment year 1958-59 as the cash credits related to January and February, 1958, and that the creditors were fictitious and not genuine, as in spite of the service of notices, none of the creditors appeared nor were they produced before the Income-tax Officer and the assessee failed to prove the genuineness of the cash credits in the reassessment proceeding for the assessment year 1958-59. Thus, it has to be held that the additions relating to cash credits of Rs. 89,000 were validly made in the assessment year 1958-59 after reopening the assessment under Section

147(a) of the Act.

45. In view of my findings above, I hold, relating to the assessment year 1958-59, that the proceedings initiated under Section 147(a) were legal and valid and the Tribunal was justified in coming to the conclusion that Rs. 89,000 was to be added as the assessee's income from undisclosed sources. Questions Nos. 1 and 2 referred at the instance of the assessee for the assessment year 1958-59 are accordingly answered in favour of the Revenue and against the assessee.

46. Now the question is whether the Tribunal was justified in law in quashing the assessment proceeding under Section 147(a) of the Act for the assessment year 1959-60. In the assessment year 1959-60, the Income-tax Officer reopened the assessment under Section 147(a) on the ground that the cash credits of Rs. 89,000 were not truly disclosed by the assessee. It cannot be doubted that on this ground the Income-tax Officer was also justified in reopening the assessment for the assessment year 1959-60 for the reasons I have already discussed in respect of the assessment year 1958-59. The Appellate Assistant Commissioner held that the Income-tax Officer was justified in reopening assessment as the cash credits of Rs. 89,000 had been accepted in the assessment year 1959-60 on disclosure of untrue facts. The Appellate Assistant Commissioner found that the assessee filed confirmatory letters from the creditors in the orginal proceedings, but in view of the findings of the Income-tax Offier, the confirmatory letters had no value. It cannot be doubted that unless the reassessment proceeding for the assessment year 1959-60 was initiated, it cannot be found whether this amount should be added in the assessment year 1959-60 or in the assessment year 1958-59. It was only after the initiation of Section 147 proceeding in the assessment year 1959-60 that the Income-tax Officer made assessment of the cash credits of Rs. 89,000 both in the assessment year 1959-60 as well as in the assessment year 1958-59. However, once it is held that cash credits of Rs. 89,000 has to be added in the assessment year 1958-59, the addition had to be deleted for the assessment year 1959-60 and so the Appellate Assistant Commissioner rightly held that the amount of Rs. 89,000 could not be added in the assessment year 1959-60 and so it cannot be doubted that the amount of Rs. 89,000 cannot be held to be rightly added by the Income-tax Officer in the reassessment proceeding under Section 147(a) for the assessment year 1959-60.

47. The Appellate Assistant Commissioner upheld the action of reopening of the assessment for the assessment year 1959-60 on the ground that the amount of interest of Rs. 5,096 which was allowed in the assessment year 1959-60 could not be allowed as the cash credits of Rs. 89,000 were found to be not genuine and which have been added in the assessment year 1958-59. As regards the other cash credits which were added in the assessment year 1959-60 after reopening of the assessment under Section 147(a) of the Act, the Appellate Assistant Commissioner set

aside the reassessment for further enquiry. The Tribunal in the assessment year 1959-60 took the view that the Income-tax Officer had mentioned only these three credits totalling Rs. 89,000 as the reason for reopening the assessment and there was no mention of claim of interest on the credits as the reason for reopening the assessment. It was also mentioned in the proposal of the Income-tax Officer that the reopening was made as a protective measure as the assessee was challenging the assessment of the amount for the assessment year 1958-59. The Tribunal held that the Income-tax Officer had no reason to believe that the income of Rs, 89,000 had escaped assessment for the assessment year 1959-60 and the claim of interest was not one of the reasons for reopening the assessment and so the initiation itself was not valid and so the Tribunal quashed the reassessment made for the assessment year 1959-60.

48. It cannot be doubted that the Income-tax Officer had reopened the assessment for the assessment year 1959-60 as well on the ground that the cash credits of Rs. 89,000 related to ghost parties and the facts were not truly disclosed by the assessec. Under such circumstances, the Income-tax Officer was justified in reopening the assessment for the assessment year 1959-60 relating to the amount of Rs. 89,000. However, he subsequently found that this amount should be added in the assessment year 1958-59 and so he reopened the assessment for the assessment year 1958-59 also and added these cash credits. Thus, reopening in the assessment year 1959-60 was also justified. Of course, it has to be held that the amount of Rs. 89,000 to be added was rightly added in the assessment year 1958-59 and so the Appellate Assistant Commissioner rightly deleted the addition of Rs. 89,000 for the assessment year 1959-60. However, it has to be held that the Income-tax Officer was justified in reopening the assessment for the assessment year 1959-60 as originally the cash credits were shown by the assessee in the assessment year 1959-60.

49. Mr. B.P. Rajgarhia has relied on the case of V. Jaganmohan Rao v. CIT/EPT [1970] 75 ITR 373, where their Lordships of the Supreme Court have held that once proceedings under Section 34 are validly initiated, the jurisdiction of the Income-tax Officer is not restricted to the portion of the income that had escaped assessment and that Section 34 in terms says that once the Income-tax Officer decides to reopen the assessment, he could do so within the period prescribed by serving on the person liable to pay tax a notice containing all or any of the requirements which may be included in a notice under Section 22(2) and may proceed to assess or reassess such income, profits or gains and, therefore, once assessment is reopened by issuing a notice under Sub-section (2) of Section 22, the previous underassessment is set aside and the whole assessment proceedings start afresh. It has also been held in this decision that once valid proceedings are started under Section 34(1)(b) of the old Act, the Income-tax Officer not only had the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year.

50. Mr. B. P. Rajgarhia has also relied on the case of New Kaiser-I-Hind Spinning and Weaving Co. Ltd. v. CIT [1977] 107 ITR 760, where their Lordships of the Bombay High Court have held that if a notice is specifically given under Clause (a) or Clause (b) of Section 34 in respect of a particular item covered by that clause, all other items covered by the same clause which have escaped assessment can also be reassessed. Thus it is evident that once it is held that the Income-tax Officer was justified in initiating proceedings under Section 147(a) for the assessment year 1959-60, then he is entitled to look for other items also and then the interest amount of Rs. 5,096 paid relating to cash credits of Rs. 89,000 which had been allowed as deduction in the assessment year 1959-60 and the other 13 cash credits which were added by the Income-tax Officer could also be looked into and although the addition of Rs. 89,000 relating to cash credits could not be upheld in the assessment year 1959-60, once assessment is reopened, the Income-tax Officer is entitled to add the amount of interest relating to cash credits of Rs. 89,000 and he is also entitled to consider 13 other cash credits which he added in the assessment year 1959-60. Under such circumstances, the Appellate Assistant Commissioner was justified in setting aside the assessment for the assessment year 1959-60 for considering other cash credits for further enquiry relating to other cash credits and the Tribunal was not justified in quashing the reassessment proceeding for the assessment year 1959-60.

51. Once it is held that cash credits of Rs. 89,000 were not genuine and their addition as income from undisclosed sources in the assessment year 1958-59 is upheld, then the interest allowed on these cash credits in the assessment year 1959-60 has to be disallowed and the other cash credits which are not proved to be genuine can also be added in the reassessment proceeding under Section 147(a) of the Act for the assessment year 1959-60.

52. In view of my findings above, I hold that for the assessment year 1959-60, the Tribunal was not justified in law in quashing the reassessment proceedings under Section 147(a) of the Act and so the question referred at the instance of the Commissioner of Income-tax for the assessment year 1959-60 is answered accordingly in favour of the Revenue and against the assessee and questions Nos. 1 and 2 for the assessment year 1958-59 as referred at the instance of the assessee are answered in favour of the Revenue and against the assessee. However, in view of the peculiar circumstances of the case, the parties will bear their own costs.

Uday Sinha, J.

53. I agree.