

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

The State of Bihar and ors. Vs. Pratappur Sugar and Industries Limited and Etc.

The State of Bihar and ors. Vs. Pratappur Sugar and Industries Limited and Etc.

SooperKanoon Citation : sooperkanoon.com/138021

Court : Patna

Decided On : Sep-23-2005

Judge : J.N. Bhatt, C.J. and Nagendra Rai, J.

Acts : Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1981 - Sections 2, 7, 8, 9, 10, 48, 48(1), 48(2), 49, 51 and 65; Companies Act; Bihar Sugar Mills Control Act, 1937; Bihar Sugarcane (Regulation of Supply and Purchase) (Amendment) Act, 1993; Bihar and Orissa General Clauses Act, 1917 - Sections 27; Bihar Sugarcane (Regulation of Supply and Purchase) Rules, 1978 - Rule 35, 35(1) and 35(2); Bihar and Orissa Co-operative Societies Act, 1935; Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966; [Constitution of India](#) - Article 266; Sugarcane (Control) Order, 1966

Appeal No. : L.P.A. Nos. 420 and 422 of 2005

Appellant : The State of Bihar and ors.

Respondent : Pratappur Sugar and Industries Limited and Etc.

Advocate for Def. : Y.V. Giri, Sr. Adv. and Jyoti Sharan, Adv.

Advocate for Pet/Ap. : R.K. Dutta, S.C. IV

Disposition : Appeal allowed

Judgement :

Nagendra Rai, J.

1. The factual matrix and the question of law being the same in both the appeals, they have been heard together and are being disposed of by a common order.

2. Two writ applications, one being CWJC No. 7147 of 2004 by Bihar Sugar Mills Association and eight individuals Sugar Mills and other being CWJC No. 8089 of 2004 by Pratappur Sugar & Industries Limited were filed wherein they had challenged the notification dated 9th March, 2004 published in the Bihar Gazette, extra-ordinary part of March 17, 2004 (Annexure-9 to LPA No. 422 of 2005) which was issued by the State Government in exercise of powers conferred by Sub-section (1) of Section 48 of the Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1981 (hereinafter referred to as the Act) fixing amount of commission at the rate of 1.80 per cent of the cane price per quintal actually paid to the supplier of sugarcane by each occupier of the factory on the purchase of sugarcane. By the said notification, the earlier notification dated 14-12-2001 and S.O. No. 38 dated 8-3-2002 by which the commission was fixed at the rate of two per cent of the cane price per quintal actually paid to the suppliers of sugarcane was quashed.

3. The learned Single Judge by order dated 24-1-2005 allowed the writ application being CWJC No. 7147 of 2004 and quashed the notification on the grounds mentioned therein and disposed of other writ application being CWJC No. 8089 of 2004 on the same date by a separate order in the light of the order passed in the earlier writ application. The State of Bihar has filed the appeals challenging the impugned orders.

4. To appreciate the point involved in this case, it is apt to mention the facts in brief leading to the filing of the present appeals.

5 The Sugar Mills are the companies within the meaning of the Companies Act and having their sugar factories in the State of Bihar, they are engaged in manufacture and sale of sugar for which raw material, i.e. sugarcane is supplied

by the agriculturist and co-operative societies.

6. The Bihar Sugar Mills Control Act, 1937 was enacted to deal with the sugar cane. However, the Act was temporary one and the same was made permanent in 1955. The amendment Bill by which the Act was made permanent was not made reserved for assent of the President and on that ground, the provision concerning production, supply and distribution of sugarcane of that Act was held to be inoperative by this Court and in order to remove the difficulties several ordinances were passed and lastly the Bihar Sugarcane (Regulation of Supply and Purchase) Act, 1981 was enacted with a view to regulate the production, supply and distribution of sugarcane intended for use in sugar factories and Khandsari sugar manufacturing units and taxation of sugarcane and matters incidental thereto after repealing the earlier ordinances. Under Section 48 of the Act, there is a provision for payment of commission on purchase of cane by the occupier of factory and tax on sugarcane under Section 49 of the Act and mode and manner is prescribed under the Act and the Rules and the notification issued from time to time. The Act was amended by Bihar Act II, 1994 (known as The Bihar Sugarcane (Regulation of Supply and Purchase) (Amendment) Act, 1993 whereby amendments were effected in several provisions including Sections 48 and 49.

7. Vide notification dated 14-12-2001 the rate of the commission in terms of Section 48(1) was enhanced at the rate of two per cent of the cane price per quintal actually paid to the suppliers of sugarcane payable by the occupier of the factory on the purchase of sugarcane by such occupier which was 13 times more than the earlier commission. The said notification was challenged before a learned Single Judge of this Court in CWJC No. 1552 of 2002 and other analogous cases on five grounds namely, (i) there being no publication in the official gazette as per Section 48 (1) of the Act, the said notification is invalid in the eye of law; (ii) Rule 35 of the Bihar Sugarcane (Regulation of Supply and Purchase) Rules, 1978 (hereinafter referred to as the Rules) not having been amended, the notification under Section 48(1) of the Act is unworkable, hence no demand can be made from the sugar factory on the basis of such notification; (iii) there is lack of quid pro quo and as such the enhancement of commission is arbitrary and cannot be enforced; (iv) the enhancement is itself confiscatory in nature and (v) the notification is bad

as fee has been notified to be charged on the actual price of cane sold and not on the basis of statutory price.

8. The learned Single Judge quashed the notification on the grounds that the notification as required under Section 48(1) of the Act was not published; in absence of amendment of Rule 35 of the Rules, the notification cannot be given effect to, there being absence of quid pro quo for enhancement of commission and the commission cannot be charged on actual price. The learned Single Judge did not deal with the point with regard to the notification being of confiscatory nature. The said judgment is reported in 2002 (3) PLJR 746.

9. Thereafter, it appears that the matter was considered by the State Government and it issued the aforesaid notification dated 9th March, 2004 fixing the commission at the rate of 1.80 per cent of the cane price per quintal actually paid to the supplier of sugarcane which, as stated above, was challenged before the learned Single Judge.

10. The learned Single Judge allowed the writ application after coming to the conclusion that three of the grounds given in the earlier judgment, namely, that in absence of amendment of Rule 35 of the Rules, the notification is not workable; there is absence of quid pro quo for justifying the enhancement of the commission and the commission cannot be on actual price but on statutory price, are still valid ones for nullifying the notification and accordingly quashed the same.

11. learned Counsel appearing for the appellants submitted that in view of the amendment of Section 48 of the Act by Bihar Act II, 1994, the notification issued under Section 48(1) will be valid even without amendment of Rule 35 of the Rules and this aspect was not considered by the learned Single Judges of this Court. Elaborating his submission, he submitted that under the unamended provision of Section 48(1) of the Act the rate of commission itself was fixed and the collection was to be made in the prescribed manner and the payment to the Co-operative Societies and the Zonal Development Council (hereinafter referred to as the Council) was to be made in such proportion and in such manner as may be prescribed. By amendment the rate of commission as prescribed earlier in the section itself has been omitted and the rate has to be prescribed by the State

Government by issuance of notification in the official Gazette and the collection has to be made in the prescribed manner as provided earlier but the share for payment between the Council and the Co-operative Societies has to be determined by the State Government and as such the earlier provision that the determination should be made in the prescribed manner was done away with. Rule 35 of the Rules contains a provision for payment of commission on cane and according to Sub-rule (1) of Rule 35 the collection is to be made by the occupier or manager of the factory as detailed therein and they have to deposit the amount to the Council and the Co-operative societies as the case may be in terms of Sub-rule (2). The second proviso to Sub-rule (2) of Rule 35 however provided the rate of commission to be payable to the Cooperative societies. The second proviso after the amendment of Section 48 of the Act has to be ignored as the same being inconsistent with the statutory provision contained in the Act by taking recourse to the provision of Section 27 of the Bihar and Orissa General Clauses Act. In other words, he submitted that as the State Government has been authorized to prescribe the rate of commission by issuance of a notification under the amended provision of Section 48 of the Act, no amendment of Rule 35 of the Rules is required. So far as the collection and deposit of commission is concerned that is consistent with the amended provision and second proviso being inconsistent or in other words having become redundant in view of the rate having been prescribed by the notification in terms of Section 48 of the Act, there is no need of amendment of Rule 35 of the Rules and the notification is workable one.

12. learned Counsel for the State - appellants further submitted that the finding arrived at by the learned Single Judge that there is an absence of quid pro quo in levying commission is not valid as there is sufficient quid pro quo with regard to levy of commission. Several facilities are being provided to the cane growers out of the amount of commission. The scheme of the Act specially Section 8 of the Act which contains a provision regarding function of the Council clearly show that the income is utilised in defraying the expenditure to be incurred by the council for several developmental programmes which will be for the benefit of cane growers.

13. It is to be mentioned here that the writ petitioners - respondents have not challenged the power of the State Government to levy commission and their

grievance is only with regard to increase of levy of commission and in this connection the stand of the State is that the commission payable under the provisions of the Act remained 7 to 8 paise per quintal in case of cane supplied by the Co-operative Societies and 13 to 15 paise per quintal in case of cane supplied by the cane grower for more than two decades i.e. from the year 1978 to 2001. In the meantime, the cost of each and every commodity required and used by the Councils in discharge of their statutory functions and for undertaking various developmental activities had increased. For example the rate of sand (including carriage) was notified by the Government at Rs. 140/- per 100 cubic feet for the year 1979-80 and in the year 1999 the said rate was notified by the Government at Rs. 398.85 per 100 cubic feet which was effective up to the year 2002, thus there was an increase of 184.18% in the notified price of sand per 100 cubic feet from the year 1979-80 to 1999-2000. The price of bricks including carriage increased more than 637.82% from 1979-80 to 1999-2002. The price of cement increased to 447.17% between the aforesaid period. The wages of labourer (unskilled) to 755.70% within the said period. The wages of the head Mason increased to 496.38% during that period. Similarly price of iron rods also increased at the same rate. On account of increasing the prices of the materials, the cost of construction and maintenance of roads, culverts etc. have been increased alarmingly to high proportions. The details of which have been stated in the memorandum of appeal. The cost of agricultural implements, insecticides etc. which are being distributed to the cane growers by the Council at the subsidized rates has gone up to 268.15%. A detail chart showing the percentage of increase in price was appended with the memorandum of appeal. The administrative expenses of Council also increased many fold from 1980 onwards. The details of which have also been mentioned in the memorandum of appeal. It was also stated that entire commission received is spent on the developmental work and the chart is appended with the memorandum of appeal as Annexure-3. It is stated that because of shortage of funds available with the Councils and meagre collection of commission, few developmental work could be taken and taking into consideration the said fact, even the State Government has come to the rescue of the Council and granted financial help. Thus taking into consideration the large number of cane growers, shortage of funds available with the Councils and steep rise in the prices of

commodities, amount of commission was increased to 2 per cent which was quashed by this Court and thereafter the matter was considered again by the State Government and amount of commission was fixed at the rate of 1.80 percent of the cane price per quintal actually paid to the suppliers of sugarcane by each occupier of the factory on the purchase of sugarcane taking into consideration the relevant factors. Thus, it cannot be said that there is absence of quid pro quo for enhancing the commission.

14. learned Counsel appearing for the appellants also submitted that levy of commission of the cane price per quintal actually paid to the suppliers of sugarcane also does not suffer from unreasonableness, arbitrariness. The minimum price of sugarcane is controlled by the Sugarcane (Control) Order and no maximum price has been fixed and as such actual price has been taken to be the basis for levy of commission. It is not the case that higher price has been fixed by the State Government on the basis of which levy of commission is demanded. The actual price paid by the occupier of the factory to the cane growers, which may either be a minimum price fixed by the Sugarcane (Control) Order or the price agreed between the cane growers and the occupier of the factory, will be the basis for fixation of commission.

15. learned Counsel appearing for the writ petitioners-respondents raised a preliminary objection at the outset and submitted that the appeals filed by the State are not maintainable as the earlier fixation of commission by 2001 Notification issued under Section 48(1) of the Act was quashed by this Court and the State Government did not challenge the said judgment in LPA or before the Apex Court and as such subsequent judgment of this Court quashing the subsequent notification on the basis of the earlier judgment cannot be challenged by the State Government on the principle of res judicata.

16. On merits, learned Counsel appearing for the writ petitioners-respondents submitted that unless Rule 35 of the Rules is amended, the notification issued under Section 48(1) of the Act cannot be given effect to and the reasoning given by a learned Single Judge of this Court in earlier judgment for quashing the 2001 Notification still holds the field. Elaborating his submission, he stated that Rule 35

inter alia provides the rate of commission to be charged from the Co-operative societies and unless that rule is amended, the notification issued by the State Government under Section 48(1) of the Act either is not workable or cannot be given effect to. He further submitted that before the writ Court nothing was brought on behalf of the State that any amount received towards the Commission was given to the Council or to the Co-operative Society or spent for any of the developmental works or other activities for the welfare of the cane growers etc. and as such the learned Single Judge rightly held that there was clear absence of quid pro quo in this case and enhancement of levy of commission was unjustified. He further submitted that once the price has been fixed by the Sugarcane (Control) Order, the levy of commission on the basis of cane price is arbitrary and unjust.

17. The parties have also relied upon the decisions of the Apex Court and this Court which will be referred to while discussing the points.

18. Before proceeding to consider the points raised by the parties it is apt to quote relevant provisions of the Act, rules and the notification having a bearing on the points to be decided.

19. Co-operative Society has been defined under Section 2(g) of the Act which means a society registered under the Bihar and Orissa Co-operative Societies Act, 1935 having the object to sell cane grown by its members and includes a union of such societies etc. Council has been defined under Section 2 (h) which means a Zonal Development Council established under Section 7. Section 8 of the Act prescribes the functions of the Council which are as follows :

8. Functions of the council-The functions of the council shall be as follows :-

(a) to consider and prepare the programme for the development of communications, irrigations, soil analysis and other agricultural facilities relating to sugarcane:

(b) to devise ways and means for executing development plan in all its essential including improvement and development of communications, cane varieties,

supply of good quality seeds, fertilisers and manures, plant protection and prevention and control of diseases and pests;

(c) to render all possible help in agricultural extension work of cane:

(d) to assist in arrangements for the training of cultivators in improved methods of sugarcane cultivation; and

(e) to perform such other functions pertaining and conducive to the general development of the reserved area as may be prescribed.

20. Section 9 of the Act deals with fund of council which provides inter alia any sum placed at its disposal by the State Government in form of grant under Section 48 or 49 or otherwise:

21. Section 10 of the Act provides inter alia with regard to existence of the councils as a body corporate and audit of accounts etc.

22. Section 48 of the Act deals with payment of commission on purchase of cane and unamended provision and amended provisions of Section 48 are as follows.

Unamended

48. Payment of Commission on purchase of cane.- (1) The State Government may, by notification in the official Gazette require the occupier of a factory to pay in the prescribed manner a commission not exceeding fifteen paise per quintal on the purchase of cane made by him or on his behalf and may, by a like notification exempt the occupier of any new factory to be specified in the notification, from the payment of such commission for prescribed period.

(2) The Commission payable under Sub-section (1) shall be collected in the prescribed manner and the amount so collected shall be paid to the Co-operative society and the council in such proportion and in such manner as may be prescribed :

Provided that no amount in excess of the amount at the rate of seven paise per quintal on the cane supplied by a Co-operative society shall be payable to it and

the whole of the remaining amount shall be paid to the council concerned.

(3) The arrears of the commission payable under Sub-section (1) shall bear interest at the rate specified in Section 51 and shall be recoverable together with interest as a public demand or as an arrear of land revenue.

48. Payment of commission on purchase of cane.- (1) The State Government may, by notification in the official Gazette, determine the amount of commission payable by the occupier of the factory on the purchase of sugarcane by such occupier or on his behalf and may by a like notification exempt the occupier of a new factory to be specified in the notification, from the payment of the amount of such commission for a prescribed period.

(2) The commission payable under Sub-section (1) shall be collected in the prescribed manner and the State Government shall determine the share of Zonal Development Council and Co-operative Society.

Section 49 of the Act deals with tax on sugarcane.

23. The Bihar Sugarcane (Regulation of Supply and Purchase) Rules 1978 have been framed under Section 65 of the Act and Rule 35 which deals with payment of commission on cane runs as follows :

35. Payment of Commission on cane.-

(1) The occupier or manager of every internal or external factory shall maintain, in Form XX a correct daily account of cane purchased by or on his behalf at every purchasing centre operated by him in the State.

(2) Such occupier or manager shall, within the first fortnight of every month, pay into the account of the Co-operative society or the Council (by crossed cheque or Bank Draft), as the case may be, on their bill for payment of commission in respect of the cane purchased in the preceding month by or on behalf of the occupier of the factory concerned, provided that all arrears in respect of any period before the enforcement of these rules shall be paid within a month of such commencement:

Provided further that the commission payable in respect of cane supplied to the occupier of a factory by any Co-operative society shall be paid to such society at the rate of six paise per quintal for so long as the rate of commission, notified under Sub-section (1) of Section 48 does not exceed thirteen paise per quintal and thereafter the Co-operative society shall be entitled to payment at the rate of seven paise per quintal of cane supplied and the remainder shall be paid to the Council. The commission payable in respect of cane supplied by any person other than a Co-operative society shall be paid wholly to the Council concerned.

(3) The occupier or manager shall maintain a register in Form XXI, of all payments made under Sub-rule (2).

(4) A new factory shall ordinarily be entitled to exemption from payment of the commission to the Council concerned for a period of five years from the date of its commissioning :

Provided that the State Government may on the expiry of a period of two years from the date of the commissioning of such factory review the position with regard to the capacity of the factory to pay the commission and after giving a reasonable opportunity of Council concerned reduce the period of exemption.

(5) Immediately after any payment of commission is made under the Sub-rules by the occupier of any factory, he shall send to the Cane Officer concerned a consolidated return of payments in Form XXII. Copies of the return submitted under this rule shall also simultaneously be sent to the Cane Commissioner and the Collector and to the Assistant Cane Commissioner, specially appointed for the area.

24. The notification issued under Section 48(1) of the Act on 9th March, 2004 fixing the commission which has been quashed runs as follows.

S.O. 12 dated the 17th March 2004.-- In compliance of order passed the Hon'ble Patna High Court dated 7th August, 2002 in C.W.J.C. Nos. 1552, 4983, 1821, 1925 and 1927 of 2002, in exercise of power conferred by Sub-section (1) of Section 48 of the Bihar Sugarcane (Regulation of Supply and Purchase) Act,

1981, the State Government of Bihar is pleased to fix the amount of commission at the rate of 1.80 per cent of the cane price per quintal actually paid to the suppliers of Sugarcane by each occupier of the factory on the purchase of sugarcane by occupier or on his behalf and is pleased to give order to pay in the prescribed manner quashing Memo No. 2655 dated 14th December, 2001 and S.O. No. 38 dated 8th March, 2002 of this department.

This notification shall come into force at once.

25. The preliminary objection has to be dealt with first. Now it is an admitted fact that earlier when the rate of commission was fixed as two percent of the cane price per quintal actually paid to the supplier of sugarcane, the same was challenged before this Court and that was quashed on four grounds including three grounds which have been raised in this subsequent writ application, out of which the present matter arises. The State did not prefer an appeal against the said judgment as such the said judgment has attained finality. The question is as to whether the subsequent decision rendered by a learned Single Judge of this Court relying upon the earlier judgment will be treated to be final not amenable to the appellate jurisdiction of this Court.

26. There are two reasons to reject the aforesaid contention. The first is that in the earlier case, the notification of 2001 was challenged, where the rate of commission was different and dealing with the said matter, this Court quashed the notification. The subsequent notification was not the subject matter of adjudication in the said case and as such the subsequent determination by the learned Single Judge cannot be held to be final preventing the State from challenging the same on the ground of principle of *res judicata*. The other ground is that non challenging to the earlier decision by the State Government does not stand in the way of the State to challenge the subsequent judgment concerning the same matter if it involves a policy matter or affects the public interest. In this connection, reference may be made to two decisions of the Supreme Court.

27. In the case of *State of Maharashtra v. Digambar* reported in AIR 1995 SC 1991, an objection was raised that as the judgment of the High Court in similar matter was upheld by the Apex Court by dismissing the S.L.P. as such subsequent

challenge to the similar matter is not maintainable in law. The Apex Court held that (Para 14) :

Therefore, the circumstance of the non-filing of the appeals by the State in some similar matters or the rejection of some S.L.Ps. in limine by the Supreme Court in some other similar matters by itself, in our view, cannot be held as a bar against the State in filing an S.L.P. or S.L.Ps. in other similar matters where it is considered on behalf of the State that non-filing of such S.L.P. or S.L.Ps and pursuing them is likely to seriously jeopardise the interest of the State or public interest.

28. In ITC Ltd. v. Person Incharge, Agricultural Market Committee, Kakinada reported in : AIR 2004 SC1796 , a Division Bench of the Andhra Pradesh High Court had held that even if fish is considered to be an animal, dry fish cannot fall within the sweep of the definition of 'livestock' and, therefore, 'dry fish' could not be included under the provisions of Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966. The State did not challenge the aforesaid decision but later on challenged the another matter having taken the similar view and the Apex Court relying upon the aforesaid judgment of the Supreme Court in the case of Digambar AIR 1995 SC 1991 (supra) held that non-filing of an appeal in one matter would not act as a bar against the State in filing appeal in another matter where similar point may be involved.

29. Thus, the preliminary objection raised on behalf of the private respondents, in our view, is devoid of any substance and is, accordingly, rejected.

30. Coming to the first point, learned Single Judge relying upon the earlier judgment held that unless Rule 35 of the Rules is amended, the notification in question is unenforceable. The reasoning given is that unless a notification determining the share of Council and the Co-operative Societies is determined, notification issued under Section 48(1) will not be sufficient.

31 Recording to Section 48 prior to amendment by Act II of 1994, Sub-section (1) of Section 48 of the Act fixed the rate of commission and provided that the manner of payment of commission has to be prescribed by the notification. Sub-section (2)

of Section 48 provided that collection of the commission is to be made in the prescribed manner and apportionment of the commission to the Co-operative societies and the Council is also to be made in a manner as may be prescribed. So the collection, apportionment and the manner of payment were to be prescribed whereas the rate of commission was fixed by the section itself. The legislature by amending the provision of Section 48 of the Act has delegated the power to the State Government to fix the quantum of commission by issuance of a notification in the official Gazette under Sub-section (1) of Section 48 and under Sub-section (2), the State Government has been delegated power to determine the share of Council and the Co-operative Societies, whereas in the earlier provision, the same was to be provided in such proportion and in such manner as may be prescribed. Under the amended provision, the notification has been issued under Section 48(1) of the Act wherein the State Government has fixed the amount of commission and it has also issued the notification dated 8-8-2002 making apportionment between the Co-operative societies and Council under Section 48(2) of the Act. It is to be stated here that was also challenged and the LPA with regard to the same is pending before this Court.

32. Even after amendment of Section 48 of the Act the manner of collection and payment of commission has to be made in the prescribed manner and the word 'prescribed' has been defined under Section 2(m) which means prescribed by rules. Rule 35(1) prescribed the manner of collection and Sub-rule (2) prescribed the manner how the occupier or manager shall make the payment of the amount to the Co-operative societies and the Council which, as stated above, has been determined by issuance of notification under Section 48(2). Second proviso to Rule 35(2), as quoted above, fixed the amount of commission to be paid to the Co-operative Societies. In view of amendment of Section 48(1) of the Act which provides determination of amount of commission by issuance of notification in the official Gazette which has been done and impugned before this Court now the proviso has no role to play. This proviso has to be ignored for two grounds. When the notification which is a part of the section itself fixes the amount of commission, the amount fixed by a rule cannot hold the field and secondly as the notification being a part of the Act provides for determination of the rate of enhanced commission, any contrary provision with regard to fixation of commission in the

previous rule will be inapplicable in view of the provisions contained under Section 27 of the Bihar and Orissa General Clauses Act which provides inter alia that if a new Act has been passed and no rule has been made thereunder, then the rules framed earlier will continue except the provisions which are inconsistent with the provisions re-enacted. It is settled law that the notification issued in terms of provisions of Act is a part of the Act and amendment of any provisions is also treated as repeal and re-enactment and in that view of the matter Section 27 of the Bihar and Orissa General Clauses Act is fully attracted and the part of proviso to Rule 35(2) being inconsistent with the provision of Section 48 with the notification will not continue and will be treated to have ceased to operate in the eye of law. If the second proviso is ignored, as quoted above, then there is no conflict between the provisions of the Act read with the notification impugned and the other provisions of Rule 35 which deals with only the collection and payment with regard to which Section 48 of prescribed manner, i.e. according to rule. Thus, learned Single Judge was not right in coming to the conclusion that in absence of Rule 35 of the Rules, the notification issued under Section 48(1) of the Act is unworkable.

33. Coming to the second point regarding quid pro quo, learned Single Judge has held that there was no quid pro quo on two grounds. Firstly, no where it was shown that what developmental work has been taken by the State to justify quid pro quo and secondly how much from the tax as collected under Section 49 of the Act has been debited to the Council to judge as to whether even after payment of tax under Section 49 of the Act to the Council there will be shortage for the purpose of enhancing the levy of commission. In our view, the basic principle to judge the quid pro quo has not been noticed before deciding the question. Earlier view was that to decide the question of quid pro quo, there must be actual quid pro quo in the sense that whole or substantial amount of fee collected should be shown to have been spent on rendering services. In *Kewal Krishan Puri v. State of Punjab* reported in : [1979]3SCR1217 , the Apex Court held that; '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 in the market to the payer of fee.' However, this traditional view went sea change in the subsequent decision and it has been held that there is no generic difference between a tax and a fee. In both

the cases, there is element of compulsory exactions of money by public authorities. The tax is levied as a result of common burden while a fee is for the benefit or privilege. It has been held that services rendered for levying a fee should not be measured with mathematical accuracy in the sense that unless a service is rendered to the extent of substantial amount of levy of fee or commission collected, the element of quid pro quo will be lacking. There may be only corelationship between the levy and services rendered and that should be of general character and not of mathematical exactitude. This matter was considered in depth in the case of Sreenivasa General Traders v. State of Andhra Pradesh reported in : [1983]3SCR843 and it is apt to quote lucid proposition of law laid down in Paragraphs 30 to 32 of the judgment.

30. The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for general purpose of the State predominates, the levy becomes a tax. In regard to fees there is and must always be, correlation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area or class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any legislature to levy a fee is conditioned by the fact that it must be 'by and large' a quid pro quo for the services rendered. However, corelationship between the levy and the services rendered expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a 'reasonable relationship' between the levy of the fee and the services rendered. If authority is needed for this proposition, it is to be found in the several decisions of this Court drawing a distinction between a 'tax' and a 'fee'. See : The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt : [1954]1SCR1005 supra; H.H. Sudh Indra Thirtha Swarniar v. Commr. for Hindu Religious and Charitable Endowments, Mysore : AIR 1963 SC966 ; Hingir Rampur Coal Co. Ltd. v. State of

Orissa : [1961]2SCR537 ; H. H. Shri Swamiji of Shri Admar Mutt v. The Commr. Hindu Religious and Charitable Endowments Dept : [1980]1SCR368 ; Southern Pharmaceuticals and Chemicals, Trichur v. State of Kerala : [1982]1SCR519 and Municipal Corporation of Delhi v. Mohd.

Yasin : [1983]142ITR737(SC) .

31. There is no generic difference between a tax and a fee. Both are compulsory exactions of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person in spite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. It is now increasingly realized 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 not separately appropriated towards the expenditure for rendering the service is not by itself decisive. Presumably, the attention of the Court in the Shrir Mutt case was not drawn to Article 266 of the Constitution. The Constitution nowhere contemplates it to be an essential element of fee that it should be credited to a separate fund and not to a consolidated fund. It is also increasingly realised that the element of quid pro quo in the strict sense is not always a sine qua non for fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax: Constitutional Law of India by H.M. Seervai, Vol. 2, 2nd, Edn., Page 1252, Para 22.39.

32. Viewed from this perspective, the conclusion is inevitable that the observation made in Kewal Krishan Puri's case AIR 1980 SC 1008 that '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-fourth must be shown with reasonable certainty as being spent for rendering services in the market to the payer of fee' was not intended to lay down a rule of universal application but it was a decision which must be confined to the special facts of that case. Otherwise it may affect the validity of many similarly marketing legislations undertaken during the past 50

years relating to the regulation of purchase and sale of agriculture produce, livestock and products of livestock and the establishment of markets in connection therewith and the levying of market fee in lieu thereof towards the cost of rendering such service by different States on the recommendation made in the report of Royal Commission on agriculture in India, 1928 and of those of many high powered bodies of expert constituted from time to time by the Centre and different States. In the subsequent decision in

Ramchandra v. State of U.P. : [1980]3SCR104 . Untwalia J. speaking for the Court has considerably narrowed down his observations in Kewal Krishan Puri's case at p. 116 (of SCR) : at page 1129 of AIR of the report saying that the fee realised from the payer of fee has, by and large, to be spent for his special benefit and for the benefit of other persons connected with the transaction of purchase and sale in the various Mandies.' If the quantum of quid pro quo was to be quantified to the extent as indicated in Kewal Krishan Puri's case for the levy of a fee or cess, it may affect many other beneficent legislations brought in by the Centre and the States for rendering services to a specified area or specified class of persons or trade or business in any local area. There are many other observations in Kewal Krishan Puri's case which were really not necessary for purposes of decisions in that case and need to be clarified. The word 'fee' cannot be said to have acquired a rigid technical meaning during the past three decades and should not be given such a narrow construction.

34. The same view has been reiterated in the case of B.S.E. Brokers Forum, Bombay v. Securities and Exchange Board of India reported in : AIR 2001 SC1010 wherein it was held that it is not necessary for a quid pro quo that the benefit should go to the contributory alone. The fee is justified if the benefit is given to the entire group. In this connection, it is useful to quote paragraph 30 of the judgment. (Para 29 of AIR).

This Court in the case of Sreenivasa General Traders v. State of A.P. : [1983]3SCR843 has taken the view that the distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is

secondary to the primary motive of regulation in public interest. This Court said that in determining whether a levy is a fee or not emphasis must be on whether its primary and essential purpose is to render specific services to a specified area or class. In that process if it is found that the State ultimately stood to benefit indirectly from such levy, the same is of no consequence. It also held that there is no generic difference between a tax and a fee and both are compulsory exactions of money by public authorities. This was on the basis of the fact that the compulsion lies in the fact that the payment is enforceable by law against a person in spite of his unwillingness or want of consent. It also held that a levy does not cease to be a fee merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have a direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. It also held that the element of quid pro quo in the strict sense is not always a sine qua non for a fee, and all that is necessary is that there should be a reasonable relationship between the levy of fee and the services rendered. That judgment also held that the earlier judgment of this Court in *Kewal Krishan Puri v. State of Punjab* : [1979]3SCR1217 is only an obiter.

35. Thus, in view of the settled law it has to be considered as to whether quid pro quo is present or not in enhancing the amount of commission. For that purpose it has to be seen as to whether the commission collected is co-related to the purposes mentioned under the provisions of the Act.

36. Section 8 of the Act, as quoted above, gives the functions of the council and it shows that the amount received as a commission has to be spent to consider and prepare the programme for the development of communications, irrigations, soil analysis and other agricultural facilities relating to sugarcane; to devise ways and means for executing development plan in all its essential including improvement and development of communications, cane varieties, supply of good quality seeds, fertilisers and manures, plant protection and prevention and control of diseases and pests; to render all possible help in agricultural extension work of cane; to assist in arrangements for the training of cultivators in improved methods of sugarcane cultivation and to perform such other functions pertaining and conducive to the general development of the reserved area as may be prescribed.

These purposes mentioned are all for the developmental work and for the benefit of cane growers in the reserved area to provide all the facilities and the benefit is for the entire category of cane growers and thus purpose is co-related with the enhanced amount of commission. It cannot be said that there is no quid pro quo. On factual side also, no doubt before the learned Single Judge, the entire facts were not placed but in this appeal facts have been placed (which has not been controverted) which has been indicated before that there is many fold increase in the cost of prices for developmental work and for other activities in the last 20 to 24 years whereas the amount of commission was only 15 paise. When the prices of other commodities required for developments work have been increased manifold, corresponding increase in the commission was long due. As a matter of fact, the increase in commission is less than the increase in the cost of the materials required for developmental activities as provided under the Act. In that view of the matter quid pro quo is present for enhancing the amount of commission and the view taken by the learned Single Judge in this regard, in our view, is not according to law.

37. The third ground for nullifying the notification is that percentage of commission is fixed on the actual price and not on the fixed price. The price of sugarcane is controlled by the Sugarcane (Control) Order and Clause 3 of the Control Order empowers the Central Government to fix the minimum price of sugarcane to be paid by producers of sugar for the sugarcane purchased by them. No maximum price has been fixed. If the occupier or the purchaser pays more price than the minimum price fixed as agreed between the occupier and the cane growers, then the same cannot be said to be either impermissible or invalid. It is not the case of the writ petitioners-respondents that the actual price has been fixed by the State Government. In that case, different consideration would have arisen whether the State Government has power to fix the price or not in view of the provision contained under the relevant Act. If the mill owners pay the minimum price to the cane growers, then that would become actual price or any higher price is paid by the sugar mills owners to the cane growers either out of their own volition or agreed between them, then that will become the actual price. There can be no difficulty in charging the commission on the actual price paid.

38. Similar question came for consideration before the Apex Court in the case of B.S.E. Brokers' Forum, Bombay : AIR 2001 SC1010 (supra) where the fee was being charged on the basis of actual turn over of the brokers which was challenged that the same would amount to tax on turn over. Repelling the said submission, the Apex Court held that 'it is a settled principle in law that if the State has the authority to impose a levy then it has a wide discretion in choosing the measure of levy, provided of course, it withstands the test of reasonableness.

39. Thus, the State has wide discretion in the matter of choosing the measure of levy and it has chosen the actual price for determining the amount of commission and as such the same cannot be termed as unreasonable and unworkable. Thus, all the three grounds given for quashing the notification are not tenable in law.

40. Accordingly, the judgment rendered by the learned Single Judge is set aside and it is held that the notification dated 9th March, 2004 issued under Section 48(1) of the Act fixing 1.80 per cent commission is valid one.

41. In the result, both the appeals are allowed.

J.N. Bhatt, C.J.

42. I agree.