

CASE NO.:
Appeal (civil) 2258 of 2008

PETITIONER:
Mahalakshmi Sugar Mills Co. Ltd. & Anr

RESPONDENT:
Union of India & Ors

DATE OF JUDGMENT: 31/03/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2258 OF 2008
(Arising out of SLP (C) No.481 of 2007)
With
Civil Appeal Nos. 2260 AND 2261-2272 of 2008
(Arising out of SLP (C) NOs.14130 and 14967-14978 of 2007)

S.B. Sinha, J.

1. Leave granted.
2. What are the factors which are required to be taken into consideration by the Central Government for determining the price of levy sugar in exercise of its power under Section 3(3C) of the Essential Commodities Act, 1955 (the Act) is the question involved herein.
3. Before us, there are various owners of sugar mills who purchased sugarcane from the farmers.
4. Section 3(2)(f) of the Act empowers the Central Government to fix compulsory quota of sugar produced by a sugar producer in the manner prescribed by the Central Government including the price thereof at which the same is to be sold. It is known as "levy sugar". The rest of the sugar, however, can be sold by the producers in free market. It is known as "free sugar".
5. The factors which are relevant to be taken into consideration by Central Government is contained in Section 3(3C) of the Act which includes:
 - (a) The minimum price, if any fixed for Sugarcane by the Central Government.
 - (b) The manufacturing cost of sugar.
 - (c) The duty or tax, if any, paid or payable thereon; and
 - (d) Securing a reasonable return on the Capital employed in the business of manufacturing,and different price may be determined from time to time for different areas or for different factories or for different kind of sugar.
6. In these appeals, we are concerned with the determination of price of sugar for the sugar years 1983-84 and 1984-85.
7. The Central Government, in exercise of its power conferred upon it under Section 3 of the Act, made an order known as the Sugarcane Control Order. Clause 5A of the said order reads, thus :
"Clause 5A. Additional price for sugarcane purchased on or after 1st October 1974:
 - (1) Where a producer for sugar or his agent purchases sugarcane, from a sugarcane grower during each sugar year, he shall, in addition to the minimum sugarcane price fixed under Clause 3, pay to the sugarcane grower an additional price, if found due, in accordance with the provisions of the second

Schedule annexed to this Order.

XXX XXX XXX

(4) The additional price determined under sub-clause (2) or sub-clause (3) as the case may be, shall be paid by the producer of sugar to the sugarcane grower, at such time and in such manner as the Central Government or the State Government, as the case may be, from time to time, direct.

(5) No additional price determined under sub-clause (2) or sub-clause (3), as the case may be, shall become payable by a producer of sugar who pays a price higher than the minimum sugarcane price fixed under clause (3) to the sugarcane grower.

Provided that the price so paid shall in no case be less than the total price comprising the minimum sugarcane price fixed under clause (3) and the additional price fixed determined under sub-clause (2) or sub-clause (3), as the case may be.

(6) Where any extra price is paid by the producer of sugar to the sugarcane grower for the supply sugarcane in addition to the minimum sugarcane price fixed under clause (3), the extra price so paid shall be adjusted against the additional sugarcane price determined under sub-clause (2) or sub-clause (3), as the case may be, and the balance, if any, shall be paid to the sugarcane grower.

(7)** Subject to the provisions of sub-clause (4), the additional price shall become payable to a sugarcane grower, if he, in performance of his agreement with a producer of sugar, supplies not less than 85% of the sugarcane so agreed:

(* Provided that the Central Government or the State Government as the case may be, may if it is satisfied that the appellant had sufficient cause for not preferring the appeal within a further period of thirty days, admit if presented within a further period of fifteen days.

(**Provided that the additional price shall become payable to a sugar grower even when he supplies less than 85% of the sugarcane so agreed, if for the same supply he has not been subjected to any penalty by or under any Central or State Act or any rules or orders made thereunder for his failure to supply 85% of sugarcane so agreed."

8. Some of the States in India, however, even prior to coming into force of the said Parliamentary Act, had enacted Legislative Acts, inter alia, providing for to regulation and control of production of sugar.

9. We may notice that in the State of Uttar Pradesh, the Government of Uttar Pradesh enacted Sugar Control Act, 1938. The Legislature of the State of Uttar Pradesh, furthermore, enacted UP Sugarcane (Regulation of Supply and Purchase) Act, 1953.

10. We may divide the mode and manner in which the prices for levy sugar were to be fixed by the Central Government in three different periods.

11. Prior to 1.10.1974, the Central Government, for arriving at the price

of levy sugar, used to mop up the entire excess realization of amount received by the owners of the sugar mills out of sale of free sugar as no restriction thereupon was imposed.

12. Levy sugar price also used to be premised on Statutory Minimum Price (SMP), a factor specified in clause (a) of Section 3(3C) of the Act which is to be determined in terms of clause (3) of the Sugarcane Control Order, 1966 and not on the actual cane prices paid by the sugar factories to the cane growers.

13. The Central Government, however, appointed a Committee commonly known as Bhargava Commission. It gave its recommendations, inter alia, opining that mopping up of the extra sale realization should be confined to 50%.

14. The Central Government, relying on or on the basis of the recommendations of the said Commission, introduced clause 5A in the said Order as a result whereof additional price came to be paid to the growers of sugarcane (1) over and above the SMP by the sugar producers; (2) equivalent amount from free market sales realization came to be retained by the sugar producer.

15. In terms of the said amendment carried out in Sugarcane Control Order in the year 1974, while determining the levy sugar price, 50% of the mopping up was permitted provided the liability of sugar producers towards cane growers to the extent of 50% of excess realization was also taken to be a factor as a part of cost of production. To put it differently, in the earlier scenario whereas entire extra sales realization was applied to reduce the price of levy sugar, upon amendment of the said Order, only 50% of the entire sales realization was considered to be permissible to reduce the price of levy sugar provided the liability of excess realization was also considered as a part of cost of production.

16. Post October 1974, therefore, apart from the levy sugar being based on the SMP only, the same was based on the actual cane price payable by the sugar producer. However, according to the sugar mill owners, the Central Government continued with the exercise of determination of the price of levy sugar on the basis of 100% mopping up and had not been considering the said changed scenario.

17. We may also notice that the State of Uttar Pradesh in purported of its power conferred upon it under Section 16 of the 1953 Act enforced a price to be paid by the owners of the sugar mill to the producers known as State Advisory Price (ASP). Indisputably, the SMP as also the ASP for sugarcane varied from year to year.

18. Questioning the mode of calculation resorted to by the Central Government in determining the price of levy sugar, particularly, the effect of clause 5A of the Sugarcane Control Order, as also the price levied by the State known as ASP, Mahalakshmi Sugar Mills and Hari Nagar Sugar Mills filed writ applications before the Delhi High Court in the year 1985.

19. Indisputably, similar writ applications for different sugar mills were filed by different owners of the sugar mills.

20. One of the contentions raised in the said writ applications was that 100% mopping up was illegal and the liability of the sugar producers towards the cane growers was to be considered before arriving at the price of levy sugar.

21. One of the matters which came up before this Court is Shri Malaprabha Cooperative Sugar Factor v. Union of India (Malaprabha-I) since reported in [(1994) 1 SCC 648] wherein this Court, inter alia, held : "102. In paragraph 2.15 the details of the scheme were given as follows:

"SUGARCANE SUPPLIES STABILISATION
SCHEME

2.15 The details of the scheme are as follows:

(1) A statutory minimum price for sugar-cane related to a basic recovery of 8.6 per cent with a premium for every 0.1 per cent increase in recovery on proportionality basis will be fixed by the Government of India.

(2) The minimum price payable by individual

factories will be fixed on the basis of the recovery of the factory for the normal crushing period of the previous season.

(3) The statutory minimum price as fixed above shall be paid to all the cane growers subject to clauses (18) and (19) of this scheme.

(4) The factories shall share their extra sales realisation from sugar with the cane growers who execute agreements for supply of cane and fulfil contracts.

(5) The extra sales realisations shall be calculated according to the following formula:

$$S=R-L$$

Where S stands for the amount shareable; R stands for the sales realisations ex-factory excluding excise duty paid or payable to the factory by the purpose; and L stands for sugar price as calculated on the basis of the statutory minimum cane price and according to the Tariff Commission schedules in force at the time. (In periods of control and partial control, L stands for the final levy price of sugar fixed by Government.)

(6) The sales realisations will be in respect of the sugar produced during the season.

(7) The sales realisations will comprise\027

(i) the actual amount realised up to and inclusive of September 30; and

(ii) the estimated value of the unsold stocks held at the end of September 30.

In case (ii) the value of the stocks will be calculated at the average rate of the sales made during the last fortnight of September.

(8) The excess or shortfall in realisation from the actual sale of the unsold stock of the season after September 30 shall be carried forward to and adjusted in the extra sales realisations of the following season.

(9) The extra realisation shall be divided equally between the factory and the cane growers. ..."

104. It is true that Clause 5-A deals with additional price payable to the sugar-cane grower. However, if the recommendations made by the Bhargava Commission and the method of computation are taken into consideration, it will be clear that the producer of sugar will be entitled to retain an amount equivalent to the amount paid to the cane grower under Clause 5-A. That amount cannot be taken into consideration for determination of the price of levy sugar. This will be evident from paragraphs 2.17, 2.20, 2.21 and 2.39 of Chapter II of Bhargava Commission Report."

It was furthermore observed :

"108. We are unable to agree with the submissions advanced on behalf of the Government that Clause 5-A deals only with the amount payable to the cane grower and that it cannot have any relevance for determination of levy sugar. If the determination of minimum price of sugar and fixation of the price of levy sugar under quantity of sugar to be supplied by the producer are inter connected, then they must be read as a whole and not separately as though each is distinct. While fixing the price of levy sugar regard is had only to the minimum cane price as spoken to under Section 3(3-C)(a). This minimum cane price is referable to clause (3) of Sugar-cane (Control) Order. The additional price payable to the cane grower under Clause 5-A will arise after the expiry of the sugar year. Sugar price will have to be met only from the extra realisation made by the producer by the sale of sugar in free market which will naturally be more than the levy price.

109. In view of the above discussion, the impugned notifications except the one dated November 28, 1974 cannot be upheld. The reason why we leave out the notification dated November 28, 1974 is that the same came to be issued before the new pricing policy was introduced. We hereby direct the Union of India to amend the notifications taking into account the liability of the manufacturers under Clause 5-A of the Sugar-cane (Control) Order as regards cane price and re-fix the price of levy sugar having regard to the factors mentioned in Section 3(3-C) of the Act. The Government will have time to issue the amended notifications as directed above till December 31, 1993."

22. Indisputably, a review application filed thereagainst was dismissed by this Court by an order dated 23.2.1994. The Central Government filed an application praying for clarification as also for extension of time so as to enable it to re-determine the price of levy sugar which by an order dated 22.2.1995 was dismissed but the time for re-fixation of the price was extended as prayed for. It appears that during the pendency of the said writ petitions, in the said appeals before this Court in Malaprabha-I, a transfer application came to be filed by Modi Industries Ltd. The sugar year involved therein was 1982-83. In that case, the Central Government stated that additional cane price payable under clause 5A of the Sugarcane Control Order, 1966 had not been taken into consideration and furthermore no mopping up of excess realization on levy free sale sugar having been resorted to while fixing the levy price for the year 1982-83 by a judgment and order dated 30.1.1996 opined that Malaprabha-I was not applicable. The said decision is since reported in Modi Industries Ltd. & Anr. v. Union of India & Ors. [1999] 9 SCC 245]. This Court therein opined : "In compliance with our order dated 30.1.1996, an additional affidavit on behalf of the Union of India has been filed by Shri Deepak Khandekar, Deputy Secretary to the Government of India. In the additional affidavit, it has been expressly stated that while determining the minimum cane price of levy sugar in regard has been had only to the minimum cane price as spoken to in Section 3(3-C)(a) of the Essential Commodities Act, 1955 and the additional cane price payable under clause 5-A of the Sugar (Control) Order, 1966, has not been

taken into account, and that also there has been no mopping up of excess realization on levy-free sale sugar while fixing the price of levy sugar for the season 1982-83.

In view of the above further statement made in the additional affidavit filed on behalf of the Union of India, we are satisfied that this matter is not covered by the decision of this Court in *Shri Malaprabha Coop. Sugar Factory Ltd. v. Union of India* [(1994) 1 SCC 648]."

23. We may notice that similar orders were passed by this Court on 19.8.1998 in the case of *Bharat Sugar Mills Ltd. & Anr. v. Union of India & Ors.* and *Union of India & Ors. v. Triveni Engg. Works Ltd. & Ors.* by a judgment and order dated 2.2.1999 which are since reported in (1999) 7 SCC 246 and (1999) 7 SCC 244 respectively. In *Bharat Sugar Mills* (supra) as also in *Triveni* (supra), this Court followed the decision in *Modi* on the premise that the sugar year involved therein was also 1982-83.

24. It is, however, of some significance to notice that in the case of *Bharat Sugar Mills*, the Central Government in its counter affidavit filed on 16.4.1998, in response to the Court's order in regard to the sugar year 1983-84 and 1984-85 to re-fix the price, stated :

"It is submitted that in regard to the Levy Sugar (Price Determination 1982-83 Production) Order, the Supreme Court has already upheld the notification issued under Essential Commodities Act in *M/s Modi Industries Ltd. v. Union of India & Anr.* [TC (C) No.9 of 1990 (Annexure-I)]. In the case of *Malaprabha Co-operative Sugar Factory Ltd. v. Union of India* the Supreme Court had in their order dated 22.9.1993 [(1994) 1 SCC 648] and order dated 28.1.1997 directed the re-fixation of ex-factory price of levy sugar for the season 1974-75 to 1979-80. The Supreme Court had in its order dated 28.1.1997 held that their order dated 20.2.1996 in TC (C) No.9 of 1990 was applicable only in respect of sugar year 1982-83 and it cannot have any bearing for the years 1975-76 to 1979-80.

Based on the judgment delivered by the Supreme Court Order dated 28.1.1997 in the case of *M/s Malaprabha Co-operative Sugar Factor Ltd. & Ors. v. Union of India & Ors.*, the Government is considering the question of revision of levy sugar prices for the years 1974-75 to 1979-80 and other subsequent years with the exception of the sugar year 1982-83 in accordance with the directions contained in the aforesaid judgment."

25. Relying on or on the basis of the said assertion made by the Central Government, this Court, by an order dated 21.4.1998, directed :

"T.C. (Civil) Nos. 18-20, 23-28, 30, 32-36 and 38-39/9 are disposed of in the light of the judgments of this Court in *Malaprabha Co-operative Sugar Factory Ltd. Vs. Union of India & Anr.* (1994) (1) SCC 648) read with 1997 (1) SCC 216. The respondents 2 and 3 in their counter dated 16.4.98 have also stated that for these years they are revising sugar prices in the light of the above two judgments. It is, therefore, ordered accordingly. The prices will be fixed within 12 weeks from today. In respect of the year 1982-83 the respondents shall file an additional affidavit setting out the basis on which the prices have been fixed

for the zones with which we are concerned in the Transferred Cases. The affidavit will be filed within six weeks. Rejoinder may be filed within two weeks thereafter. Rest of the TCs. are adjourned till after the summer vacation."

26. The Central, Government, therefore, in no uncertain terms took the stand that they would follow Malaprabha-I in the involving relevant sugar years except for the year 1982-83.

27. The question of implementation of Malaprabha-1 vis-à-vis Modi again came up for consideration before this Court, as some interlocutory applications were filed in Shri Malaprabha Co-op. Sugar Factory Ltd. v. Union of India & Anr. (Malaprabha-II) [(1997) 10 SCC 216]. This Court noticed the wrong attitude on the part of the Central Government to find excuses for not complying with the judgment of this Court as the same was not palatable to them. It therein moreover noticed several notifications issued by the Central Government from time to time. Upon consideration of several contentions raised by the Central Government in Malaprabha-I, this Court pointed out how the Union of India had been making attempt(s) to misconstrue and misinterpret the earlier judgments. It, upon noticing the contentions of the Central Government that Section 3(3C) of the Act and clause 5A were totally independent, in Malaprabha-I, held :

"If the determination of minimum price of sugar and fixation of the price of levy sugar under quantity of sugar to be supplied by the producer are interconnected, then they must be read as a whole and not separately as though each is distinct".

28. The factors which were to be taken into consideration, therefore, were necessary to depress and reduce the levy sugar price. It was also noticed that clause 5-A was introduced as a new pricing policy creating a new liability upon the owners of the sugar mills observing :

"In view of this new liability this Court held that the Government was bound to take that also into account while fixing the price of levy sugar, without specifying as to whether the liability became component of Factor A' or Factor 'B' or both those factors of Section 3(3-C)."

29. Dealing with a new contention which was raised by the Union of India visa-vis the decision in Modi, it was observed that the direction given in paragraph 109 of Malaprabha-I was quite clear and did not lend itself to two interpretations and there was no confusion in relation thereto as thereby this Court had directed the Central Government to take into account the liability of the manufacturer under clause 5A of the 1996 order as regards cane price for re-fixation of the price of levy sugar. It was commented :

"The doubt or confusion, if any, appears to us to be the result of unwillingness of the Government to give up its views and accept and implement the decision of this Court."

30. It was furthermore clarified that the issue as to whether the entire or only 50% of the free sugar price could be mopped up in view of the new price policy contained in clause 5A for depressing the levy of the price, stating :

"Since by the new pricing policy a benefit was sought to be conferred on the producer of sugar by making him entitled to retain 50% of the extra realization, this Court held that the said amount cannot be taken into consideration for determination of the price of levy sugar. That was entirely a different aspect. The observation which

is made in para 109 and the direction given therein is with respect to the aspect of sugar producer's liability to pay additional sugarcane price. Clause 5-A being interconnected with Section 3(3-C), this new liability would certainly get projected into Factors 'A' and 'B' of Section 3(3-C). As earlier pointed out mopping up of extra realization is an element of Factor 'D' of Section 3(3-C). Thus, the contentions raised on behalf of the respondents even otherwise also do not deserve to be accepted."

31. Distinguishing Modi (supra), the law was stated in the following terms :

"Even if the Government has omitted to take into consideration one unfavourable element, namely, mopping up of excess realization it cannot justify its omission to take into consideration another relevant element which is favourable to the producer of sugar."

32. It was, therefore, emphasized that whereas an unfavourable element, namely, mopping up of excess realization is to be taken into consideration, the favourable element, namely, liability created towards cane growers for the purpose of determination of the price could not have been ignored.

33. Two different Benches of the Delhi High Court, however, reacted differently to the aforementioned decisions of this Court by reason of the judgments which are impugned before us in the case of Hari Nagar Sugar Mills disposed of on 16.3.2005 and in the case of Mahalakshmi Sugar Company disposed of on 9.11.2006.

34. Before noticing the respective contentions of the learned counsel appearing for the parties herein, we may notice two other decisions of this Court.

35. In The Godavari Sugar Mills Ltd. v. Union of India & Anr. [JT 2001 (10) SC 527] wherein the relevant sugar year was 1985-86, a question arose as to whether after a long lapse of time, the petitioner therein should be permitted to raise new contentions through a writ petition. This Court refused to exercise its discretionary jurisdiction in permitting the petitioner therein to do so holding that the same will have great financial impact on the Central Government. The Bench chose to follow Modi (supra).

36. A contempt petition was also filed by Malaprabha-I for non-implementation of the decisions of this Court wherein a Bench of this Court opined that no contempt has been committed by the Central Government.

The said decision is reported in Malaprabha Coop. Sugar Factory Ltd. v. Union of India & Anr. (Malaprabha-3) [(2002) 9 SCC 716]. It was held :

"This Court in the aforesaid two decisions has said that the retention of 50 per cent is a factor which can be taken into consideration in determining element (d) in Section 3(3C) of the Essential Commodities Act. The working statement given before us shows that this has been done, not to the extent as desired by the petitioners, but the result of this is that the levy price fixed at Rs.163.780 in respect of West U.P. has gone up to Rs.172.430. In our opinion, the said fixation is in accordance with law and the directions given by this Court have been complied with. Neither a case for contempt has been made out nor is there any justification, in our opinion, for giving any direction to the Government to refix the levy price under Section 3(3-C) of the Essential Commodities Act."

37. To complete the narration of facts, we may also notice that validity of the orders passed by the State of U.P. in purported exercise of its power under Section 16 of the 1953 Act was questioned before a Division Bench of the Allahabad High Court in West UP Sugar Mills Association & Ors. v. State of U.P. & Ors. [1997 (1) UPLBEC 541]. A Division Bench of the said Court noticed that the purported policy of the State of Uttar Pradesh which had been prevailing from 1973 was ultra vires, the legislative field being covered under the Essential Commodities Act. The UP Cooperative Cane Union Federations came up before this Court questioning the correctness of the said judgment. The matter was referred to a Constitution Bench. The majority reversed the decision of the Allahabad High Court holding that the State in exercise of its power of regulation and control of sugar industries could fix a higher price for the sugarcane, stating :

"These cases clearly lay down that under the 1966 Order, the Central Government only fixes the minimum price and it is always open to the State Government to fix a higher price. Under the enactments made by the State Legislatures, areas are reserved for the sugar factories and the cane-growers therein are compelled to supply sugarcane to them and therefore, the State Government has incidental power to fix the price of sugarcane which will also be the statutory price. They further lay down that the Cane Commissioner can direct the cane-growers and the sugar factories to enter into agreements for purchase of sugarcane at a price fixed by the State Government and such agreements cannot be branded as having been obtained by force or compulsion."

It was furthermore held :

"The second reasoning given by the High Court is that even if the State Government had the power to fix the minimum cane price under Section 16 of the 1953 Act, this power came to an end in view of Article 254(1) of the Constitution on the enactment of the EC Act and the promulgation of the Sugarcane (Control) Order, 1955 (later replaced by the 1966 Order), which now gives exclusive power to the Central Government to fix the minimum price. As discussed earlier, we are not in agreement with the aforesaid reasoning as the question of repugnancy does not arise. The High Court has also held that the Central Government, while fixing the price of sugar under Section 3(3-C) of the EC Act, takes into consideration the minimum price of sugarcane fixed under the 1966 Order and if the sugar mills are compelled to pay a higher price than that fixed by the Central Government, it will disturb the price of the levy sugar and such an eventuality could not have been contemplated by the legislature. Over a period of time, the quota of levy sugar has gone down from 40 per cent to 10 per cent of the total production of sugar and the sugar mills are now free to sell 90 per cent of their production in open market. Under Section 3(3-C) of the EC Act, the Central Government has to determine the price of the levy sugar having regard to several factors enumerated in the sub-section and the minimum price fixed under the 1966 Order is only one of the factors. The manufacturing cost of sugar and securing of reasonable return on the capital employed in the business of manufacturing sugar are also relevant factors under clause (b) and (d) of Section 3(3-C)

of the EC Act and, therefore, the fixation of higher price for sugarcane by the State Government by itself cannot have any major or substantial impact on the fixation of the price of the levy sugar by the Central Government."

38. We have noticed hereinbefore the divergent views taken by two Division Benches of the Delhi High Court.

39. In the case of Mahalakshmi Sugar, the Delhi High Court framed three issues :

"(a) Whether, in view of the judgments of the Hon'ble Supreme Court in Malaprabha-I and Malaprabha-II the impugned order of the Central Government fixing the price of levy sugar for 1984-1985 is liable to be struck down inasmuch as it admittedly does not account for the additional price payable by the sugar manufacturer under Clause 5A of the Control Order?

(b) Is the Central Government, while fixing the price of levy sugar under Section 3(3C) EC Act, liable to account for the SAP fixed by the State of UP and mandatorily required to be paid by the sugar manufacturer to the sugarcane grower?

(c) Is the State of UP liable to bear the liability arising out of the difference between the SAP and the combination of the SMP and the additional price?"

40. In regard to the first issue, it was held that the decision in Modi (supra) covers the field in regard to the application of the factor of payment of additional price to the cane growers. In regard to the factor of State Advice Price (SAP), the High Court upon noticing paragraph 44 of the judgment in Cane Growers Federation (supra) held that the same was not a relevant factor for the purpose of determination of the price of levy sugar. In regard to the issue (c), it was held that the State of Uttar Pradesh is not liable to pay the difference of price to the writ petitioners.

41. Mr. Nageshwar Rao, learned senior counsel appearing on behalf of the appellant in CA @ SLP (C) No.481/07 (Mahalakshmi) urged :

1. Determination of price of levy sugar being a statutory legislative function, the Central Government could not have ignored any of the factors laid down therefor.

2. As in Malaprabha-I, levy of additional price in terms of Clause 5A of the order was held to be a relevant factor within the meaning of clause (b) of Section 3(3C) of the Act, the Central Government could not have ignored the same only on a specious plea that the mopping up of the excess amount realized by the sugar mill owners have come down from 100% to 50%.

3. In view of the clear and unambiguous directions of this Court in Malaprabha-I, as clarified in Malaprabha-II, the Central Government was obligated to take into consideration the fact that the liabilities of the owner towards the cane grower in terms of Clause 5A of the Order as also the State Advice Price would follow in purview of clauses (b) and (d) of Section 3(3C) of the Act.

4. A Constitution Bench of this Court having opined that imposition of SAP being statutory in nature and as the same enhanced the liability of the sugar mill owners to be a relevant factor for determination of the price of levy sugar both under clauses (b) and (d) thereof, the High Court committed a serious error in passing the impugned judgment.

5. The High Court misread and misinterpreted the observations of this

Court in paragraph 44 of the UP Cane Growers' case wherein it had categorically been held that SAP for the purpose of determination of the price of levy sugar would come within the purview of clause (b) of Section 3(3C) of the Act.

6. Price of sugarcane for being 70% component of the price of sugar, the total liability of the owner in relation thereto was mandatorily required to be considered by the Central Government.

7. In view of the stand taken by the Central Government itself in the case of Bharat Sugar Mills for the sugar years 1983-84 and 1984-85 which was not confined to the case of the petitioners therein, the Central Government could not have taken a different stand in the instant cases.

42. Mr. Mohan Parasaran, learned Additional Solicitor General appearing on behalf of the Union of India, on the other hand, urged :

1. In view of the decisions of this Court in Malaprabha-I, the Central Government sought to rectify the mistake by introducing Clause 5A in the Sugar Control Order in terms whereof the additional price required to be paid to the cane growers was to be adjusted with the 50% mopping up from the excess amount realized by the owners of the sugar mills.

2. This Court in Malaprabha-3 having found the action on the part of the Central Government to be in terms of the decision of this Court in Malaprabha-I, no case has been made out for interference with the impugned judgment.

3. There being no difference in determination of the price for levy sugar for the years 1982-83 and 1985-86 vis-à-vis sugar year 1983-84 and 1984-85, this Court should affirm the decision of the Delhi High Court dismissing the writ petition of the owners, particularly, when a similar view has been taken in Bharat Sugar Mills (supra) and Triveni (supra).

4. In any event, even on equitable considerations, this Court should not interfere with the decision of the High Court after such a long time.

5. Power of judicial review in the case of the price fixation being limited, this Court should not interfere in the matter particularly having regard to the fact that fixation of price is a legislative function.

43. The Parliament enacted the Essential Commodities Act, 1955 to provide in the interest of general public, the control of production, supply and distribution of, and trade and commerce, in certain commodities. Section 3(3C) of the Act reads as under :

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

- (a) the minimum price, if any, fixed for sugarcane by Central Government under this section ;
- (b) the manufacturing cost of sugar;
- (c) the duty or tax, if any, paid or payable thereon;

and

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

Explanation.-For the purposes of this sub-section,

"producer" means a person carrying on the business of manufacturing sugar."

44. A direction by the Central Government to the owners of the sugar mills that a part of their products would be sold at a price determined by it was within its realm. Such a quota could be fixed by the Central Government in exercise of its power under Section 3(2)(f) of the Act.

45. Indisputably, determination of price in terms of the provisions of the Act is a legislative function. The Superior Courts ordinarily would not interfere therewith. But when such a function is carried out in contravention of the statutory requirements, the courts are not powerless. In a case of this nature, it becomes the duty of the Court to interpret its earlier judgments and refer the one which is applicable.

46. Determination of a price is required to be carried out keeping in view certain factors specified therein. The term "having regard to" plays an important role in the matter of construction of the relevant provisions of the Act. If a price is determined without applying the principles underlying the factors enunciated in Section 3(3C) of the Act, the superior courts can issue requisite direction.

47. When the validity a notification issued by the Central Government in exercise of its power under a statute is questioned, even if the provision is directory in nature, substantial compliance thereof must be shown to have been made. The statutory authority must apply its mind.

48. The directions issued in the decisions of this Court must be demonstrated to have been complied with. {See Shri Sita Ram Sugar Company Ltd. v. Union of India [(1990) 3 SCC 223]}. [See also Commissioner of Income-Tax, West Bengal, Calcutta v. Gungadhar Banerjee & Co. (P) Ltd. [(1965) 3 SCR 439, Page 444, Placitum E to Page 445, Placitum C]; The Panipat Co-operative Sugar Mills v. The Union of India [(1973) 1 SCC 129, Para 30]; The State of Karnataka & Anr. v. Shri Ranganatha Reddy & Anr. [(1977) 4 SCC 471], Paras 22 to 24; State of U.P. & Ors. v. Renusagar Power Co. & Ors. [(1988) 4 SCC 59, Paras 80-84]; Shri Sitaram Sugar Company Ltd. & Anr. v. Union of India & Ors. [(1990) 3 SCC 223, Paras 28-30]; Kuldip Chand & Anr. v. Advocate-General to Government of HP & Ors. [(1990) 4 SCC 356, Para 15]; Delhi Farming & Construction (P) Ltd. v. Commissioner of Income Tax, Delhi [(2003) 5 SCC 36, Para 26].

49. Section 3(3C) of the Act specifies four factors. The Statutory Protected Price, as specified by the Order, would be a factor which would be covered by clause (a). The Central Government, however, cannot ignore the other factors.

50. How the statutory direction to pay additional price to the cane growers, as envisaged under clause 5A of the Order or the State Advisory Price as mandated by the States in exercise of their regulatory power, would be applied in determining the price of levy sugar was the subject matter of various decisions of this Court.

51. In Malaprabha-I, this Court noticed the statutory change effected by reason of insertion of Clause 5A in the Order w.e.f. 1.10.1974. The question raised before this Court was that in price fixation, the Central Government had not taken into consideration the relevant criteria laid down under Section 3(3C) of the Act while issuing notifications in regard to the fixation of price of levy sugar. Noticing the decision of this Court in Indian Express Newspapers (Bombay) Private Ltd. and Ors. v. Union of India and Ors. [(1985) 1 SCC 641], it was held that subordinate legislation can be questioned on any ground on which the primary legislation could be questioned. The premise of judicial review may be glanced from the following observations made by this Court in Bombay Dyeing & Manufacturing Co. Ltd. v. Bombay Environmental Action Group [(2006) 3 SCC 434] :

"80. A policy decision, as is well known, should not be lightly interfered with but it is difficult to accept the submissions made on behalf of the learned counsel appearing on behalf of the Appellants that the courts cannot exercise their

power of judicial review at all. By reason of any legislation whether enacted by the legislature or by way of subordinate legislation, the State gives effect to its legislative policy. Such legislation, however, must not be ultra vires the Constitution. A subordinate legislation apart from being intra vires the Constitution, should not also be ultra vires the parent Act under which it has been made. A subordinate legislation, it is trite, must be reasonable and in consonance with the legislative policy as also give effect to the purport and object of the Act and in good faith."

52. Judicial review of subordinate legislation has also been dilated upon by the Court recently in *Vasu Dev Singh v. Union of India* [2006 (11) SCALE 108, Paras 12 to 23]. {See also *Life Insurance Corporation of India & Ors. v. Retired L.I.C. Officers Association & Ors.* [2008 (2) SCALE 484]}.

53. From these decisions, it may be deduced that validity of subordinate legislation may be questioned on the ground that :

- a) it is ultra vires the Constitution;
- b) it is ultra vires the parent Act;
- c) it is contrary to the statutory provisions other than those contained in the parent Act;
- d) law-making power has been exercised in bad faith;
- e) It is not reasonable; and
- f) it goes against legislative policy, and does not fulfill the object and purpose of the enabling Act.

54. In *Malaprabha-I*, Statutory Minimum Price statutorily required to be paid by the sugar producers to the sugarcane grower was held to be an element so far as factor (b) of Section 3(3C) of the Act is concerned. This Court took notice of the recommendations of Bhargava Commission. This Court, despite its limited power of judicial review, held that the Central Government cannot ignore any of the factors specified in Section 3(3C) of the Act for the purpose of fixation of price for levy sugar. What was relevant was the actual cane price paid and excess realization from free market sales therefor.

55. In *Sitaram Sugar* (supra) payment of price of sugarcane to the growers has been found to constitute 70% of the total price. Therefore, it indisputably had a great role to play for determining the price of levy sugar. Only with a view to determine the price, it was also necessary to take into consideration the manufacturing cost and reasonable return on the capital employed. The Essential Commodities Act does not contemplate that manufacturers of sugar must continue their activities although the units were running at a loss. Purported object for which Clause 5A was introduced was to see that the sugar industry became entitled to excess realization of free sugar which would give them a reasonable margin for meeting their requirements including modernization and expansion of the Plant.

56. Sub-clause (iv) of Clause 5A of the Order mandates that the additional price determination under sub-clause (ii) shall be paid by the producer of sugar to the sugarcane grower. It is, therefore, mandatory in character and added to the price of the sugarcane. It was clearly held that 50% of the mopping up amount could not be taken into consideration for determination of the price of levy sugar. Admittedly, mopping up of 100% was held to be illegal.

57. It was in the aforementioned premise, this Court followed the decision of Justice E.S. Venkataramiah in *Writ Petition No.432* filed in the High Court of Karnataka (quoted in *Malaprabha-I* (1994) 1 SCC 648), wherein it was observed that if the additional price under Clause 5A is allowed to be done, the producer of sugar would be compelled to carry on production of sugar without having an idea of the price that is likely to be determined by the Central Government under Section 3(3C). A producer must draw an object, having regard to his assets and liabilities, income and expenditure, whether he would be able to have a reasonable amount of profit or not. It was in that situation, the Central Government was directed to refix the price

of levy sugar. The jurisdiction of this Court to interfere in the matter had clearly been spelt out.

58. Modi, Bharat Mills and Triveni dealt with sugar year 1982-83 only. It proceeded on the basis that in that year, the mopping up having not been done and levy in terms of Clause 5A had not been applied, the factors laid down under Section 3(3C) stood complied with. It is for the aforementioned limited extent, Malaprabha-I was distinguished. No reason has been assigned in support of its decision. Rival contentions had not been noticed. The effect of payment of additional price as also SAP effect in determining the price did not fall for consideration therein. Godavari (supra), as noticed hereinbefore, was decided on the same line, particularly, having regard to the fact that the prayers made by the appellant therein are sought to be amended which was not allowed.

59. It is in the aforementioned situation, Malaprabha-II assumes significance. It not only explained the ratio laid down in Malaprabha-I but also took into consideration Modi Industries (supra) as also fresh arguments advanced on behalf of the Central Government. All contentions of the Central Government were specifically rejected.

60. The decision in Malaprabha-II that while taking into consideration the unfavourable factor, the Central Government cannot refuse to consider the factor which is favourable to the mill owner assumes significance. We say so for two reasons (1) it is possible that while confining mopping up to the extent of 50%, the fact of additional price paid in terms of Clause 5A of the Order would be neutralized or adjusted but the same would not mean that the exercise shall not be carried into effect; and (2) the effect of payment of an extra amount in terms of State Advisory Price cannot be refused to be taken into consideration.

61. We are not unmindful of the fact that the learned counsel for the appellant in Mahalakshmi before the High Court confined its case only to SAP but then in Hari Nagar Sugar Mills, the Delhi High Court accepted the contentions which have been raised before us.

62. When the legislative policy is reflected in a statutory provision, the Court, while being called upon to determine as to whether the same has been complied with or not, must apply the rule of purposive construction. It is idle, in a case of this nature, to contend that as the element of additional price paid under Clause 5A of the Order and SAP had not been specifically provided for in Section 3(3C), they should be kept out of consideration for the purpose of determination of the price of levy sugar. If the actual price payable to the cane growers is absolutely relevant for determining the price of levy sugar, we have no doubt in our mind that consideration of the said elements would come either under clause (b) or clause (d) of Section 3(3C) of the Act. It was so held in Malaprabha-I. It is interesting to note that the Constitution Bench of this Court in UP Coop. Cane Unions Federations rejected a contention raised by the parties that in the event the State is held to have the legislative competence to impose the same, it will have an adverse effect on the price of levy sugar required to be determined under Section 3(3C) of the Act as noticed supra.

63. Clauses (b) and (d) of Section 3(3C) were, therefore, clearly held to be attracted by the Constitution Bench also.

64. The importance of applying the Rule of purposive construction has recently been noticed by this Court in New India Assurance Co. Ltd. v. Nusli Neville Wadia [2007 (14) SCALE 556] in the following lines :

"48. Section 5 of the Act, on a plain reading, would place the entire onus upon a noticee. It, in no uncertain terms, states that once a notice under Section 4 is issued by the Estate Officer on formation of his opinion as envisaged therein Page 0183 it is for the noticee not only to show cause in respect thereof but also adduce evidence and make oral submissions in support of his case. Literal meaning in a situation of this nature would lead to a conclusion that the landlord is not required to adduce any evidence at all nor it is required even to make any oral submissions. Such a literal construction would lead to an anomalous situation

because the landlord may not be heard at all. It may not even be permitted to adduce any evidence in rebuttal to the one adduced by the noticee nor it would be permitted to advance any argument. Is this contemplated in law? The answer must be rendered in the negative. When a landlord files an application, it in a given situation must be able to lead evidence either at the first instance or after the evidence is led by the noticee to establish its case and/ or in rebuttal to the evidence led by the noticee.

49. The literal interpretation of the statute, if resorted to, would also lead to the situation that it would not be necessary for the landlords in any situation to plead in regard to its need for the public premises. It could just terminate the tenancy without specifying any cause for eviction.

50. Except in the first category of cases, as has been noticed by us hereinbefore, Sections 4 and 5 of the Act, in our opinion, may have to be construed differently in view of the decisions rendered by this Court. If the landlord being a State within the meaning of Article 12 of the Constitution of India is required to prove fairness and reasonableness on its part in initiating a proceeding, it is for it to show how its prayer meets the constitutional requirements of Article 14 of the Constitution of India. For proper interpretation not only the basic principles of natural justice have to be borne in mind, but also principles of constitutionalism involved therein. With a view to read the provisions of the Act in a proper and effective manner, we are of the opinion that literal interpretation, if given, may give rise to an anomaly or absurdity which must be avoided. So as to enable a superior court to interpret a statute in a reasonable manner, the court must place itself in the chair of a reasonable legislator/author. So done, the rules of purposive construction have to be resorted to which would require the construction of the Act in such a manner so as to see that the object of the Act fulfilled; which in turn would lead the beneficiary under the statutory scheme to fulfill its constitutional obligations as held by the court *inter alia* in *Ashoka Marketing Ltd. (supra)*.

51. Barak in his exhaustive work on 'Purposive Construction' explains various meanings attributed to the term 'purpose'. It would be in the fitness of discussion to refer to Purposive Construction in Barak's words:

'Hart and Sachs also appear to treat 'purpose' as a subjective concept. I say 'appear' because, although Hart and Sachs claim that the interpreter should imagine himself or herself in the legislator's shoes, they introduce two elements of objectivity: First, the interpreter should assume that the legislature is composed of reasonable people seeking to achieve reasonable goals in a reasonable manner; and second, the interpreter should accept the non-rebuttable presumption that members Page 0184 of the legislative body sought to fulfill their constitutional duties in good faith. This

formulation allows the interpreter to inquire not into the subjective intent of the author, but rather the intent the author would have had, had he or she acted reasonably.'

(Aharon Barak, Purposive Interpretation in Law (2007) at pg. 87)

52. In *Bharat Petroleum Corporation Ltd. v. Maddula Ratnavalli and Ors.* [(2007) 6 SCC 81], this Court held:

'The Parliament moreover is presumed to have enacted a reasonable statute (see Breyer, Stephen (2005): *Active Liberty: Interpreting Our Democratic Constitution*, Knopf (Chapter on Statutory Interpretation - pg. 99 for Reasonable Legislator Presumption)).'

53. The provisions of the Act and the Rules in this case, are, thus required to be construed in the light of the action of the State as envisaged under Article 14 of the Constitution of India. With a view to give effect thereto, the doctrine of purposive construction may have to be taken recourse to. [See *Oriental Insurance Co. Ltd. v. Brij Mohan and Ors.* [2007 (7) SCALE 753] .

65. We are of the opinion that the same principle should be applied herein.

66. That is how the Central Government itself understood the decision of this Court in *Malaprabha-I*. It explicitly said so in the counter affidavit filed in *Bharat Sugar Mills*. Indisputably, for the purpose of determination of the price of levy sugar, it called for the relevant materials from each of the owner of the sugar mill. It is, therefore, too late in the day for the Central Government to contend contra.

67. Rules of executive construction in a situation of this nature may also be applied where a representation is made by the maker of legislation at the time of introduction of the Bill or construction thereupon is put by the executive upon its coming into force, the same carries a great weight.

68. In this regard, we may refer to the decision of the House of Lords in the matter of *R.V. National Asylum Support Service* [(2002) 1 W.L.R.2956] and its interpretation of the decision in *Pepper v. Hart* [(1993) A.C. 593]. on the question of 'executive estoppel'. In the former decision, Lord Steyn stated:-

"If exceptionally there is found in the Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court."

69. A similar interpretation was rendered by Lord Hope of Craighead in *Wilson v. First County Trust Ltd.*, [2004] 1 A.C. 816, wherein it was stated:-

"As I understand it [*Pepper v. Hart*], it recognized a limited exception to the general rule that resort to 'Hansard' was inadmissible. Its purpose is to prevent the Executive seeking to place a meaning on words used in legislation which is different from that which ministers attributed to whose words when promoting the legislation in Parliament\005"

70. See for a detailed analysis of the rule of executive estoppel in a writing of Francis Bennion entitled "*Executive Estoppel: Pepper v. Hart*"

revisited", published in Public Law, Spring 2007 issue, pg. 1.

71. Reliance placed by the learned Additional Solicitor General on Malaprabha-III is not apposite. This Court therein found the action of the Central Government to be not an act of contempt presumably because the directions were held to have been substantially complied with. We are not exercising any contempt jurisdiction. Contempt is a matter between the Court and the contemnor. We are herein called upon to determine as to which view of Delhi High Court in Hari Nagar or Mahalakshmi is correct. We cannot refuse to lay down the law having been called upon to do so. We must lay down a law for the future. We, therefore, while directing the Central Government to refix the price of levy sugar, would keep this direction confined only to the parties before us including the interveners. The reason therefor is that the other mill owners were not aggrieved thereby. The parties before us are fighting their grievance for more than 22 years. They should not be allowed to go empty handed.

72. We are, therefore, of the opinion that Mahalakshmi has wrongly been decided whereas Hari Nagar has correctly been decided.

73. Appeals arising out of SLP (C) Nos.481/2007 and 14130/2007 filed by Mahalakshmi Sugar Mills Co. Ltd. and Govind Nagar Sugar Ltd. respectively are consequently allowed and Appeals arising out SLP (C) Nos.14967-14978 of 2007 filed by Union of India & Ors. are dismissed. No costs.