

PETITIONER:
SASA MUSA SUGAR WORKS ETC. ETC.

Vs.

RESPONDENT:
STATE OF BIHAR AND OTHERS ETC. ETC.

DATE OF JUDGMENT: 06/07/1996

BENCH:
G.N. RAY, B.L. HANSARIA

ACT:

HEADNOTE:

JUDGMENT:

W I T H

Civil Appeals Nos. 9092/94, 9093/94, 9094/94, 9095/94,
7437/94, 7438/94, 7439/94, 7433/94, 7434/94, 7436/94,
8570/94, 9171/94, 9172/94, 9173/94, 9174/94, 1332/95,
1333/95, 6310-6322/95 and S.L.P. No. 9466/92.

J U D G M E N T

G.N. Ray, J.

These appeals and the special leave petition involve common question of law and they arise out of the common judgment dated January 20, 1994, passed by the Division Bench of the Patna High Court. By the impugned judgment, the Division Bench of the Patna High Court allowed in part the writ petitions filed by several sugar mills of Bihar challenging the validity of Section 4A and 4B inserted by the Bihar Agricultural Produce Markets (Amendment) Act, 1993, Section 33M as inserted by the Bihar Agricultural Produce Markets (Amendment) Act, 1992; notification dated August 31, 1992 issued under Section 4 of the Bihar Agricultural Produce Markets Act, 1960 (hereinafter referred to as the Markets Act), and also challenging the validity of imposition of market fee under the Markets Act in view of exemption of all the sugar mills in Bihar from the provision of Section 15 of the Markets Act under notification dated March 22, 1976. The High Court on the basis of respective contention of the parties in the said Writ Petitions formulated the following points for the decision of the Court :

- a) Whether sub-section (1) and (2) of Section 4A is valid or constitutional so far as prospective part of the same is concerned?
- b) If answer to (a) is in the affirmative, whether the said provisions are valid and constitutional so far as the retrospective part of the same is concerned?
- c) Whether Section 4B is valid and constitutional?
- d) Whether Section 33M of the Markets Act as introduced by amendment of 1992 is valid and constitutional?
- e) Whether Rule 68 (iii) of the Bihar Agricultural Produce Markets Rules (hereinafter referred to as the Rules) as inserted by Notification No. 4 dated November 30, 1992 is valid?

- f) What is the effect of grant of exemption made under Section 15 of the Markets Act?
- g) What is the effect of Bihar Ordinance No. 8 of 1988 having lapsed so far as levy of market fee is concerned?
- h) Whether a limited and restricted meaning can be given to the expression agricultural produce by excluding the industrial products produced by industry from the scope and ambit of the Markets Act?
- i) Is the Notification dated June 31, 1992 a valid Notification under Section 4 of the Markets Act?

The High Court by the impugned judgment answered the said points formulated by it in the following manner :

- i) Neither sub-section (1) nor sub-section (2) of Section 4A is valid or constitutional prospectively. Both the sub-sections are ultra vires of Article 14 and 19 (1) (g) of the Constitution and not protected by Article 19 (6) of the Constitution.
- ii) Even if it is assumed that prospective part of Section 4A is valid, the retrospective part is ultra vires of Articles 14 and 19 (1) (g) of the Constitution.
- iii) Section 4B is partly valid and partly invalid. Section 4B can be divided into four parts. The first part of Section 4B is invalid and cannot be given effect to. The second part is valid and can be given effect to. The third and fourth part of Section 4B are merely ancillary and consequential to first and second part.
- iv) Section 33M of the Markets Act as sought to be introduced by the Amending Act of 1912 by replacing the amending Ordinances is invalid and ultra vires the Constitution. The said legislation lacks legislative competence.
- v) Rule 68 (iii) of the Rules is invalid in view of the invalidity of Section 33M.
- vi) The grant of exemption made under Section 15 of the Markets Act so far as sugar is concerned does not affect the applicability of the other provisions of the Act, rules and by laws, if they are otherwise valid and applicable.
- vii) Bihar Ordinance No. 8 of 1988 having lapsed, the rate of market fee provided under Section 27 of the Act before the Ordinance No. 8 of 1988 was promulgated, revived. The rate will be Re. 1/- and it will continue to be so until and unless it is modified according to law.
- viii) No limited or restricted meaning can be given to the expression "agricultural produce" by excluding industrial products from the ambit of the Markets Act.
- ix) In view of the decisions on various points formulated, no opinion need be expressed on the validity of Notification dated June 31, 1992 issue under Section 4 of the Markets Act.

For the purpose of appreciating the rival contentions of the parties, the following facts need be noted :

- i) On August 6, 1960, the Markets Act, 1960 (Act No. 16 of 1960) came into force and at the time of enforcement of the said Act, sugar was one of the scheduled items in respect of which the provisions of the Markets Act were made applicable. On March 22, 1976, all sugar mills were exempted from the provisions of 15 of the Markets Act.
- ii) By Notification dated May 2, 1977 bearing no. 80 75, sugar and some other items were deleted from the Schedule under the Markets Act in exercise of the power under Section 39 of the Act.
- iii) On May 21, 1977, by another Notification bearing No. 857, issued in exercise of power under Section 39, the previous Notification dated May 2, 1977 was cancelled.
- iv) Till July 23, 1976, four notifications were issued

under Section 39 of the Markets Act by which various items like rice bran, milk (only liquid milk) etc. were deleted from the Schedule under the Act.

v) Section 27 of the Markets Act was amended by Bihar Ordinance No. 8 of 1988 by substituting the word "at the rate of rupee one". This Ordinance elapsed subsequently.

vi) The Notification dated May 21, 1977 issued under Section 39 of the Markets Act cancelling the earlier notification dated May 2, 1977 (by which sugar was deleted from the Schedule under the Markets Act) was challenged in a series of Writ Petitions filed before the Patna High Court. Such Writ Petitions were disposed of by a common judgment dated March 30, 1992. Such decision has been reported in Delhi Cloth and General Mills Company and others Vs. Agricultural Produce Market Committee and others (AIR 1993 Patna 43). The question raised before the Patna High Court in the said Writ Petitions was as to whether or not the cancellation of the earlier notification by the subsequent notification dated May 21, 1977 had the effect of restoring the situations prevailing prior to May 2, 1977.

The High Court considered the following questions raised before it, namely,:

a) Whether or not the Notification dated May 21, 1977 cancelling the earlier Notification dated May 2, 1977 automatically restored the state of affairs which had existed prior to May 2, 1977, and if it did so, then did it mean that sugar was automatically included in the Schedule under the Markets Act and, became subjected to levy of market fee as agricultural produce" in "the specified area" under the Act?

b) Even if it is assumed that Notification dated May 21, 1977 validly cancelled the earlier Notification dated May 2, 1977 which resulted in the inclusion of sugar in the Schedule, was it necessary that procedure etc. contemplated by Sections 3 and 4 of the Act had to be applied afresh before levying market fee?

The High Court, inter alia, held that Notification dated May 21, 1977, even though cancelled the earlier Notification dated May 2, 1977, did not tantamount to an automatic revival of sugar being an item in the Schedule. For including sugar as an item in the Schedule of the Markets Act, positive action of issuing separate notification adding sugar in the Schedule was necessary. The High Court also held that even if it was assumed that the effect of notification dated May 21, 1977 was to add sugar in the Schedule of the Markets Act, such inclusion did not authorise imposition of market fee under Section 27 of the said Act because it was necessary to comply with the requirements under Section 3 and of the Markets Act before including any item in the Schedule of the Markets Act.

vii) The Bihar State Agricultural Marketing Board filed Special Leave Petition No. 9529/92 before this Court impugning the said judgment passed by the High Court. Such special leave petition was admitted but no stay order was granted by this Court.

viii) On May 23, 1992, Memo No. 3027 dated May 12, 1992 issued under Section 39 of the Markets Act adding sugar to the Schedule under the Markets Act, was published in the Bihar Extraordinary Gazette.

ix) By Notification no GSR 40 dated November 30, 1992 sub-rule (iii) of Rule 68 of the framed under the Markets Act was inserted by which every market committee was required to transfer 20% of the total receipt to the State Fund.

x) On October 13, 1992, an Ordinance, known as Bihar Agricultural produce Markets (Second Amendment) Ordinance

1992, was promulgated. The said ordinance being Ordinance No. 25/92 was repealed on February 3, 1993 and in its place the Bihar Agricultural produce Markets (Amendment) Act, 1993 was enacted. By the said Amending Act, Section 4A and 4B were inserted in the Markets Act.

xi) The market Committees issued notice to the sugar Mills in view of the amendment of the Act incorporating Sections 4A and 4B.

It will be appropriate at this stage to refer to Sections 3, 4 4A, 4B 15 33M and 39 the Markets Act:

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

(2) A notification under sub-section (1) shall state that any objection or suggestion which may be received by the state Government within a period of not less than tow months to be specified in the notification, shall be considered by the State Government.

4. Declaration of market area, -

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

(2) On and after the date of publication of the notification under sub-section (1), or such later date as may be specified therein, no municipality or other local authority, or other person, other local authority, notwithstanding anything contained in any law for the time being in force, shall, within the market area, or within a distance thereof to be notified in the Official Gazette in this behalf set up, establish, or continue, or allow to be set up, established or continued, any place for the

purchase, sale, store or processing or any agricultural produce so notified, except in accordance with the provisions of this Act, the rules and by laws.

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

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

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

4A. Sections 3 and 4 not to apply to Section 39 - (1) The provisions of Sections 3 and 4 shall not apply to the exercise of powers by the State Government under Section 39 to amend the Schedule by addition of any item of Agricultural produce not specified therein.

(2) The State shall not order the deletion of any item in exercise of its power under Section 39 without giving an opportunity for hearing to the affected parties.

4B. Validating of market fee levied and collected - Notwithstanding any judgment, decree or order of any Court to the contrary, any market fee levied and collected shall be deemed to be valid as if such levy and collection was made under the provisions of this Act as amended by this Act and notification No. 730 dated 2nd May, 1977 shall be deemed never to have been issued and no suit or other legal proceedings shall be maintained or

contained in any Court for the refund of the fee collected under the provisions of this Act and no Court shall entertain any proceedings challenging the fee merely on the ground that liability had ceased on the issuing of the notification no. 730, dated May, 1977."

15. Sale of Agricultural produce-

(1) No agricultural produce, specified in notification under sub-section (1) of Section 4 shall be bought or sold by any person at any place in the market area other than the relevant principal market other than the relevant principal market yard or sub-market yard or yards established therein except such quantity as may on this behalf be prescribed for retail sale or personal consumption.

(2) The sale and purchase of such agricultural produce in such area notwithstanding anything contained in any law be made by means of open auction or tender system except in case of such class or description of produce as may be exempted by the Board.

33-M. Every Market committee shall out of its fund contribute to the State Government Fund such percentage of its income derived from licence fees and market fees as may be prescribed by Rules from time to time by the State Government.

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

The reasonings indicated by the High Court in deciding the vires of Section 4A and 4 B of the Markets Act as contained in the impugned judgment may be broadly indicated as hereunder:

a) Notification dated May 21, 1977 cannot be treated as re-introduction of sugar in the Schedule without the requirement of Section 3 and 4 of the Markets Act which are valid and operative have been complied with. Even if Section 24 of the Bihar General Clauses Act is treated as applicable, it will have the effect of adding sugar in the Schedule; but without a proper notification under Sections 3 and 4 of the Markets Act, the regulatory provisions for fee were not applicable merely because sugar was added in the Schedule.

b) Validating/Amending Act of 1993 introducing Section 4A and 4 B into the Markets Act after Section 4; could not have the effect of making the Act applicable to sugar under Notification dated May 21, 1977 in view of the fact that Sections 3 and 4 still remained integral and vital parts of the Markets Act and compliance of Sections 3 and 4 was essential.

c) The scheme of the Markets Act is an integrated one and

mere introduction of a Commodity into the Schedule will not proprio vigore attract the provisions of the Act without following the provisions of Sections 3 and 4 of the Act.

d) The Validating/amending Act had merely the effect making Section 3 and 4 of the Act not applicable to Action taken under Section 39 of the Act. but having regard to the continuance of Sections 3 and 4 of the Act, other provisions of the Act cannot be made applicable merely because of the Re-introduction of sugar into the Schedule, To make the Act applicable to the items added by Notification dated May 21, 1977, there must have been a fresh notification under Section 3 and 4 of the Act.

e) Section 3 and 4 of the Act constitute the core of the Act for the application of the provisions of the Act, which mandates fresh notification before the Act is made applicable to items included in the Schedule, After the commencement of the Act introduction under Section 39 cannot Achieve that purpose. f) A notification under Section 3 (1) is not a mere notification introducing agricultural produce under the Schedule of the Act but the said notification is also concerned with prescribing the area within which the agricultural produce will have to be sold and purchased. Notification under Section 4 can be brought into existence only after considering the objections presented under Sections 3 and 4 of the Act, pursuant to the notification issued under Section (1) of the Act. The introduction of commodity into the Schedule of the Markets Act must be combined with notification under Section 4 (1) of the said Act. The requirements under Sections 3 and 4 of the Act must be complied with together and they cannot be severed. It is only after issuance of notification under Section 4(1) of the Act that the fee leviable under the Act becomes payable.

f) Section 27 of the Act is wholly dependent upon a notification under Section 4 (1) of the Act because levy of market fee can be made only on agricultural produce bought or sold in the market at the specified rates. As Section 4 (1) of the Markets Act still remains operative and has not been excluded, mere inclusion of a commodity under Section 39 of the Markets Act will not ipso facto attract other provisions of the Act.

g) section 4A and 4B are invalid as they constitute two different procedures, namely, the procedure for items which are added subsequent to the commencement of the Act and the procedure which has to be followed in the case of the items already included in the Schedule. There cannot be two separate procedures for the items existing prior to August 6 and those which are added subsequently, Accordingly, the provisions for non-application of Sections 3 and 4 of markets Act. by Section 4A (1) of the Act, is arbitrary, without intelligible basis and has the effect of destroying the scheme of the markets Act, Any contention that Section 3 and 4 of the Markets Act will not apply to an item which is added in the Schedule will make mockery of the entire Act. Section 4A purports to destroy the entire fabric of the Act, Therefore, Section 4A (1) of the Act has to be Struck down deep the other provisions of the Act alive.

h) Sections 4A and 4B introduced by the amending Act violate Articles 14 and 19 (1) (g) of the Constitution. The said Section 4A and 4B create two separate classes for the application of the Act, one for those who would be traders in the area concerned and the other for the market committee.

i) Section 4B is partly valid and partly invalid. The Said Section has four parts out of which first part is invalid and

cannot be given effect to. The Second part is valid and can be given effect. The other two parts of Section 4B are merely ancillary and consequential to the first and second part.

The High Court has also held that Notification dated August 31, 1992, issued under Section 4 of the Markets Act in continuation of the Memo No. 3028 issued by the State Government of Bihar under Section 3 of the Markets Act declaring its intention of regulating the purchase and processing of items mentioned in the Schedule was bad and inoperative.

Against the impugned decision of the Patna High Court. Bihar State Agricultural Marketing Board, State of Bihar and Several sugar missal have preferred appeals before this Court, It appears that each of the appellants is aggrieved by one part or the other of the impugned decision of the High court Mr, Venugopal Senior Advocate. Mr. Gopal Subramaniam, Sr Advocate, Mr. A.K. Ganguly, Sr. Advocate has argued for the Bihar State Agricultural Marketing Board and Mr. S.B. Sanyal, Sr. Advocate has made submissions for the State of Bihar at the hearing of these appals. At the arguments advanced by the learned counsel for the sugar mills are more or less on the same strain, instead of noting the arguments of each of the learned counsel appearing for the respective sugar mill separately, it is proposed to deal with the submissions made on behalf of the sugar missal jointly in order to avoid repetitions.

Mr. A.K. Sen, Learned Senior Advocate, appearing for the Bihar State Agricultural Marketing Board, has submitted that the disputes involved in the Writ Petitions and determined by the High court had their genesis in Notification dated May 2, 1977 issued under the Markets Act. That Notification deleted sugar inter alia, as and item in the Schedule of the Act being item no. XII thereof and also other items in the Schedule which were already in the Schedule at the commencement of the Act, The power to delete is conferred by Section 39 of the Act whereby the State Government has been given the power to amend or cancel any of the item specified in the Schedule to the Act, Mr. Sen has submitted that this power to amend or cancel is not controlled by Sections 3 or 4 of the markets Act as the Act form the very Beginning. Notification dated May 2, 1977 was, however, cancelled or rescinded by a fresh notification dated May 21, 1977. There was no notification under Section 39 of the Act including sugar in the Schedule nor was any notification issued under Section 3 and 4 of the Markets Act in relation to sugar. Mr. Sen has further submitted that the patna High Court in Writ Petition in the case of D.C.M. Vs. Agricultural Produce Marketing committee (Air 1993 Patna 43) accepted the contention that section 24 of the Bihar and Orissa General Clauses Act did not have the effect of having the original position, before deletion of sugar form the Schedule, restored, The High Court held that sugar having been deleted by Notification dated May 2, 1977 for the Schedule, subsequent notification of May 21, 1977 did not have the effect of re-introducing sugar as one of the items of the agricultural produce. Even if notification dated May 21, 1977 is treated as re-introducing sugar as an agricultural produce within the meaning of the Act, that by itself, would not make the Act applicable to sugar unless there was a fresh notification under Section 3 and 4 of the Markets Act. Therefore, the fees levied and claimed by the concerned Marketing Committee could to be sustained.

Mr. Sen has submitted that if the judgment of the High Court was correct, then this defect could only be cured by

fresh legislation and not by a fresh notification under Section 39 of the Markets Act. Though the State Government of Bihar and the Marketing committee had appealed against the judgment of the High Court by filing a Special Leave Petition against the same before this court, The appeal has not been heard yet, Hence, the position flowing from the Judgment of the High court had to be rectified. The State Government, therefore, exercised its power of promulgating ordinance under Article 213 of the Constitution by introducing Section 4A and 4B in the Markets Act. Such Ordinance was later on replaced by an Mending Act. such Ordinance was later on replaced by an Amending Act. Mr. Sen has also submitted that the contentions which were w accepted by the High Court in the D.C.M. s case and also in the present case are based on the hypothesis that Section 39 of the Act can have no effect without the aid of notifications under Section 3 and 4. Such a premise, according to Mr. Sen, is incorrect. Mr. Sen submitted that Section 15 of the Markets Act only prevents any municipality or local authority or any private any municipality or local authority or any private person form establishing or continuing or allowing to set up continuing a place for the purchase sale, store or processing of any such agricultural produce notified under Section 4(2). Except in accedence with the provision of this Act. Mr. Sen has submitted that Section 39 is the instrumentality by which a produce is brought into the Schedule, where such produce was not in the Schedule. It is only when a produce finds its place in the Schedule, that its control under the Market Act by notifications under Sections 3 and 4 of the Act becomes relevant and possible. Before Sections 3 and 4 of the Act can be applied, the concerned produce must be in the Schedule, as defined in Section 2(1) (a) of the Markets Act, The first step is to look to the Schedule to find out what produces can be controlled. Control under the Act is not in vacuum but is in respect of the scheduled produces, through the mechanism of Sections 3 and 4 for controlling them.

Mr. Sen has submitted that Section 15 of the Act provides one of the teeth for Section 4 read with Section 3 of the Act. It prescribes that all goods specified in the Notification under section 4(1) of the Act shall pass through the principal market yard or yards, as the case may be, and shall not be sold or purchased at any other place within the market proper and sales and purchases of such agricultural produce in such yards, shall be made by means of open auction.

Mr. Sen has contended that the effect of the amendment of Section 15(2) of the Act is that if a scheduled agricultural produce is subjected to control by notification under Section 4(1), the subsequent steps under Sections 5, 6, 16 etc. come into force, But before steps under Sections 3 and 4 are taken, the produce concerned must be in the Schedule, It may be in the Schedule originally or it may included by a subsequent notification under Section 39, which alone provides the machinery for such subsequent inclusion. According to Mr. Sen, it is an error to argue that Section 3 and 4 of the Markets Act must be used for such introduction, and not Section 39. Mr Sen has submitted that Section 15 is confined only to such produce which is included in the notification under Section 4(1) of the Act: and this is not applicable to produce which was originally in the Schedule or is brought in the Schedule by a notification under Section 39 or the Act. Mr Sen has also submitted that without such notification under Section 4(1) of the Markets Act, the sellers and buyers of a produce in

the Schedule originally or subsequently introduced by notification under Section 39 of the Act, would not suffer from the disability under Section 15(1) of the Markets Act and such produce would also not be bound by the fetters of Section 4 and 15 of the Act and the same can be sold in any place in the market area or outside and such sale and purchase would not be subject to the other provisions of the Act providing for control or levy of fees and matters connected therewith as provided under Section 27A and 27B of the Act. It is only after the notification under Section 4, that the control of the Act visits the Scheduled produce(s). The control does not come by the inclusion of a produce *proprio vigore*, in other words, Section 39 of the Act, without the aid of a notification under Section 4(1) of the Act, would not attract the restrictions and control of the Act imposed by Sections 4, 5, and 15 and the traders will be allowed to buy and sell goods anywhere in the market area or outside.

It has also been contended by Mr. Sen that Section 39 is an independent provision and is not subject to the provisions of Section 3 and 4 of the Markets Act. The Original Act did not contain Section 4(2) of the Act. It only came in 1974 by Amending Act 60 of 1980. It only provides for declaration of a market area for goods notified under Section 4(1) of the markets Act and the Restrictions under Section 15 of the Act are applicable only to such goods; for any other goods, including the goods originally in the Schedule, the Act provides no such restrictions. According to Mr. Sen. Sections 5 and 18 and the Rules imposing various restrictions and also levy of fee under Section 27 of the Markets Act apply to all goods including goods notified under Section 4(1) of the Markets Act.

It is further contended by Mr. Sen that even if it is assumed that Section 39 alone cannot add to the Schedule without the aid of Sections 3 and 4. the infirmity is cured by the amending/validation Act by introducing Section 4A and 4B. Mr. Sen has submitted that Section 4A frees Section 39 from the Fetters of Section 4 and Section 15 of the Act. Hence, even if there are fetters, exercise of the power under Section 39 will be protected by Section 4A of the Amending Act because the fetters imposed by Section 4(2) of the Act would be inapplicable in the matter of exercise of power by the State Government under Section 39 of the Markets Act. The exercise of the power under Section 39 is only for inclusion or alteration of the Schedule. Mr. Sen has also submitted that Sections 4(1) and (2) of the Markets Act are to be read together and they are not severable, Section 4B of the amending Act protects the levy and collection of fee in the past by enacting that such levy and collection are to be deemed valid and that Notification dated May, 1977 shall be deemed never to have been issued. According to Mr. Sen, the effect of Section 4B is that Notification dated May 2, 1977 will be *no-est* from the beginning, Therefore, no question of Re-introducing new goods into the Schedule arises in this case because sugar had always been in the Schedule.

Mr. Sen has further submitted that the amending/validation Act gives protection (a) to levies and collections of fee made already and (b) to keep the items existing in the Schedule prior to May 2, 1977 in the Schedule without any necessity of following the provisions of Sections 3 and 4 were not amended. It should be noted that Section 4A or the Act gives effect to amendments under Section 39 to the Schedule without complying with the

provisions of Sections 3 and 4 of the Act so that as from the commencement of the Act, the items added under Section 39 of the Act form part of the Schedule as originally enacted or modified, Mr. Sen has further contended that the intention of the State Legislature is clear. It wanted to include the goods brought into Schedule under Section 39 of the Act without the conditions of Section 3 and 4 of the Act being notified. The exercise of the power under Section 39 is freed from the condition imposed by Sections 3 and 4 of the Markets Act. Therefore, Sections 24 of the Bihar General Clauses Act will apply, as the intention of the Legislature in enacting Sections 4A and 4B of the Act is clearly to include the items deleted on May 2, 1977, notwithstanding the non-compliance of the conditions in Section 3 and 4 of the Act. Mr Sen has also submitted that the legislature itself has made the classification of agricultural produces and has specified them in the Schedule. Thereafter, it has left to the State to alter the Schedule under Section 39 of the Act. The classification for the purpose of selection scheduled produces and control are left entirely to the State government under Sections 3 and 4 of the Markets Act, so that the classification for the purpose of control is made by the State Government according to the procedure laid down under Sections 3 and 4 of the Act. The only condition is that the State Government has intend to declare its intention to control such agricultural produce for such area as may be specified in the relevant notifications. Exercise of the power under section 4 is conditioned by Section 3(2) of the Act read with Section 4 (1) of the Act. This dichotomy follows the pattern of many economic enactments like the Essential Commodities Act 1955, where certain essential commodities are specified by Section 3(a) and then the addition of other essential commodities is left to the Central Government by a notified order. The power under Section 2(a) (xi) is not conditioned by any prior right of hearing or objections but is left to the judgment of the Central Government only. The power of control under Essential Commodities Act, is also given to the Central Government under Section 3 of the Act and leaves it to be performed on the opinion of the Central Government such control was need for maintaining of increasing supplies of the concerned commodities or for securing their equitable distribution.

Mr. Sen has also submitted that the law is now well settled that a classification under any law may be made by the law itself or the law may leave it to some other authority to devise the classification for the purpose of achieving the objects of the Act. When such a classification is left to an authority other than the Legislature, the Law may provide conditions for the exercise of such classification or leave it again to the judgment of the authority concerned. In support of this contention, Mr Sen has referred to the decision of this Court in Ram Krishan Dalmia Vs. Shri Justice S.R. Tendukar (1959 SCR 279). Mr. Sen has submitted that various actions of the authorities, other than the Legislature, exercised under such delegated power like fixing of price of mustard oil or other essential commodities have been upheld on the ground that the delegates knew the need and the reasons for the exercise of such powers. In this connection, Mr. Sen has referred to the decision of this Court in Prao Ice and Oil Mills Vs. Union of India (1978 (3) SCR 293).

Mr. Sen has submitted that the Markets Act adopts different procedures for control and regulation and the setting up and running of regulated markets which have been

found to be the principal objects of the Act. But machinery of control imposed under the Act rests on several provisions. The first step is to select the item of control by specifying the goods in the Schedule. The power of altering the Schedule is given to the State government under Section 39 of the Markets Act, like the power of the Central Government to specify essential commodities under Section 2(a) of the Essential Commodities Act other than those specified by the Legislature, It has been contended by Mr. Sen that this is a case where the first step of Classification is performed by the Legislature itself leaving it to the State to add or alter the field of control by deleting or adding to or amending the Schedule under Section 39 of the Markets Act. There is no condition for hearing Act, for the purpose of such a function in part material with the Essential Commodities Act. Then, when the area of control is circumscribed by the items in the Schedule, the Actual control part of it including selection of scheduled goods to be controlled, the market area where the control will operate and where the controlled produce will have to be sold left to the judgment of the State government, Subject to statutory conditions imposed by Sections 3, 3(1) and 4(1) of the Markets Act. Mr. Sen has submitted that once the notifications under Sections 3 and 4 of the Act have been made specifying the goods to be controlled and the areas where the control will operate, other provisions of control contained in Section 5 onwards including the levy of fee under Section 27 of the Act and the provisions under Section 39, 42, 48, 52, 53 and the Rules framed under Act, spring into operation, The Selection of the Goods for control i.e. the broad field of the Act is done by the Legislature itself with a further power given to the state government to alter the boundaries and the contents of the field. For defining the field of control, no procedure for hearing the objections has been prescribed by the statute nor it is feasible to do so. It must be left to the judgment of the Legislature and the State Government concerned. But for the purpose of bringing the control into operation and for opening the gate for the stream of control to flow, a procedure is prescribed in sections 3 and 4 of the Markets Act.

Mr. Sen has contended that it has not been alleged in the Writ petitions not has it been founding the judgment under appeal that by following the procedure of Sections 3 and 4 of the Markets Act Agricultural produce has been included in the Schedule. In Fact, even since control of sugar was imposed by fixing the market areas concerned, the Act has been operating for controlling sales of sugar and the purchases have been levied with fee and regulated by other provisions of control. Mr. Sen has further submitted that it is not argued not is it possible to argue that notification under Section 39 had to take the aid of Section 3 and 4 of the Markets Act. The deletion of sugar by the first Notification had the effect of shrinking the field of control of the original Schedule, It should better be appreciated that it was not a deletion under Section 4(1) of the act and therefore it was sought to be done without following the procedure prescribed in Sections 3 and 4 of the Act.

Mr. Sen has contended that there was no challenge from the Writ Petitioners against the exclusion of sugar from the Schedule by the Notification of May 2, 1977 made under Section 39 of the markets Act of the Ground that such Exclusion was made without taking recourse to the procedure prescribed in Sections 3 and 4 of the Markets Act. The

reason is obvious. Section 3 would apply in case of inclusion or exclusion of the produce or markets which have been brought under control already under Section 4 (1) of the Act. Section 4 (3) does not contemplate inclusion or exclusion of the Schedule under Section 39 of the Act, but makes Section 3 applicable only to inclusion and exclusion of the produces or the areas of the market concerned which have been notified for control in a specified market by State Government. Mr. Sen has submitted that on a parity of reasoning there cannot be any complaint against the notification of May 21, 1977 under Section 39 of the Act or under Section 24 of the Bihar General Clauses Act or under Section 24 of the Bihar General Clauses Act rescinding the earlier notification. The step for control having been taken by the delegated authority and control having been imposed already on sugar, any exclusion of the control of sugar would have to follow the procedure of Section 3 of the Act. The not having been done, the State Government was entitled to cancel the Notification of May, 1977.

Mr. Sen has contended that the High Court was wrong in holding that such notification could nullify the control imposed earlier on sugar as a scheduled commodity and it needed re-introduction of control of sugar by following the procedure of a commodity under Section 39 of the Markets Act are functionally different from imposing control of produces already in the Schedule under Sections 3 and 4 of the Markets Act. The Schedule fixes the contents of the field from which the items covered therein are intended to be selected for control. But notification under Section 4 (1) of the Act fixes the area of the control and the commodity to be controlled within that area. The latter can only be altered by following the procedure under Sections 3 and 4 of the Act.

With regard to challenge under Articles 14 of the Constitution, Mr. Sen has submitted that the High Court has held that the amending Act has created two different procedures one for the items which were introduced or re-introduced by Section 39 of the markets Act without the fetters of Sections 3 and 4 of the markets Act read with Section 15 of the Markets Act and the other for the Articles which are introduced or re-introduced under Sections 3 and 4 of the markets Act which gives a right of hearing and marking objections against inclusion of an item not in the schedule. Mr. Sen has submitted that this reasoning with respect is not correct. According to Mr. Sen, the amendment only cancels or rescinds the Notification of May 2, 1977 and preserves the status quo as on that date including sugar in the Schedule as it was before. If the deleting notification is made or not, then there is no question of any introduction by following the procedure of Section 3 and 4 of the Markets Act. Mr. Sen has also submitted that it should be borne in mind that Section 39 of the markets Act is not subordinate to Sections 3 and 4 of the Act and it can exist independently, Only for the purpose of bringing in the restriction under Section 15 of the Act, aid from Sections 3 and 4 of the markets Act is necessary. Once an item is included in the Schedule under Section 39 of the Markets Act, it will be subject to all the provisions of the Act, excepting Section 15, which is confined to items dealt with under Section 3 and 4 of the Markets Act. As from the date of the amending Act there will be no difference of procedure for the exercise of power under Sections 3 and 4 and for the exercise of power under Section 39 of the Act, following of the provisions of Sections 3 and 4 of the markets Act is not necessary. Mr. Sen has submitted that the Legislature is

competent to say that come of the provisions would not be subject to some other provisions, New Sections 4A and 4B are now parts of the Act and these new provisions are to be construed harmoniously with Sections 3 and 4 read with Section 15 of the Act. Mr. Sen has submitted that it must be presumed that the exercise of the powers under Sections 39, as under Sections 3 and 4, will be made reasonably and not arbitrarily and indiscriminately, In exercising the powers under section 3 of the markets Act, all that is necessary is a declaration of intention include a particular article in a particular market and then followed by hearing. In the case of Section 39, the power is only freed from the duty to hear objections. Mr. Sen has submitted that in almost all fiscal legislations like the Sales Tax Act, the Excise Act, the Customs Act, the right or hearing is not a necessary condition for the regulation and levy under the said enactment. A simple notification is enough to include an item even by a delegated power which has been considered to be legislative in character, So long as the main provision delegating the power does not suffer from any bias, the delegated authority can validly exercise the power. Mr. Sen has submitted that the Legislature may very well be of the view that for including certain items in Sections 3 and 4 or the Act benefit of hearing is necessary.

Mr Sen has also submitted that the challenge under Article 19 of the constitution is very weak as it is founded on the ground that Section 3 and 4 still continue to operate and that Sections 4A and 4B were not proper validating provisions as the Legislature had no power to enact the same with retrospective effect. Mr. Sen has submitted that it is only where the previous law is subjected to certain infirmities, that a validation enactment comes to protect it. It is true that the Legislature would not be competent to validate the provisions which are not within its legislative competence; but this question cannot arise here as the Legislature was fully competent to legislate on the subject. The Act is for the public benefit and for the protection of agricultural producers from middleman and brokers, so also for the regulation of quality and weight and for providing facilities in the markets and the market areas concerned with the aid of the fees collected. Mr, Sen has, therefore, submitted that challenge under Article 19(1) (g) to the Constitution is without any basis and must fail.

Mr. Sen has therefore submitted that the impugned decision of the High Court should be set aside and the appeals preferred by the Bihar Agricultural State Marketing Board should be allowed and the appeals preferred by the sugar mills should be dismissed by upholding the validity of the Notification dated may 21, 1977, so too vires of Sections 4A, 4B and Section 33M.

The arguments advanced by the respective counsel appearing for various sugar mills may summarised as follows:

- (I) The title to the Markets Act itself delineates its scope, which is to provide for better regulation of buying and selling of Agricultural produce and the establishment of markets for agricultural produce in the State and for matters connected therewith. In the Statement of Objects and Reasons of the markets Act, it has been indicated that the Act is aimed to constitute regulated markets so as to secure

to the cultivator better prices, fair weightment and freedom from illegal deductions, a fair deal for the agriculturists provide good incentive for the agriculturists to adopt improved agricultural programme etc. The main objects of the Markets Act are to create market area and markets with a view to ensuring constitution of market committees fully representatives of growers, traders, local authorities and Government for supervising the working of regulated markets and regulation of market charges and prohibition of realisation charges etc.

(II)(a) When the State Government decides to exercise its control over the purchase, sale, storage or processing of any agricultural produce in a specified area. it can do so only by issuing a notification declaring its intention to that effect and by inviting objections or suggestions within a period of not less than two months, The State Government is required to consider such objections or suggestions.

(b) Any inclusion of an item in the Schedule to the Markets Act under Section 39 does not bring about any control or regulation of sale, purchase, storage or processing of such produce. In order to regulate and bring the produce under control, it is necessary that intention to regulate a produce is to be notified. When is finally decided after hearing objections to the Notification under Section 4(1) is to be issued declaring the area specified in the notification issued under Section 3 or any portion thereof to be market area for the purpose of the Markets Act in respect of any of the agricultural produce. Sub-Section (2) of Section 4 provides that after the date of publication of notification under subsection (1) of Section 4 or such later date as may be specified therein, no municipality, local authority or other person shall within the area notified in the official gazette set up, establish or continue any place for the purchase of sale, purchase, storage or processing of any agricultural produce so notified, except in accordance with the provisions of markets Act, the Rules and by law, Sub-section (3) of Section 4 provides that subject

to the provisions of Section 3, the State Government may at any time, by notification, exclude from a market area or any area or any agricultural produce specified therein or include in any market area or any area or agricultural produce.

(c) It is thus clear that the scheme of the Act is that after it is determined legislatively as to what are the agricultural produce within the meaning of the Act and which are provided in the Schedule to the Act, the second stage of contemplated exercise of control of regulation can be undertaken by following the procedure laid down under Section 3 and 4 read together. It is quite apparent that unduly declaration under Section 4 is notified by the State Government, the question of any regulation and control of sale, purchase, storage of processing of any agricultural produce mentioned in the Schedule to the Act does not arise at all.

(III) The Markets Act presents and integrated scheme and section 39 of the Act cannot be read in isolation of other provisions of the Act, it is a settled rule of construction that the provisions of the Act should be read as a whole so as to determine the scope and effect of each of them. The provisions of the Act should be harmoniously construed so as to allow each of the provisions to have full effect no particular provision should be so construed as would render other provisions ineffective or redundant. Moreover, the provisions are to be so construed as would subserve the basic scheme and object of the legislation.

(IV) The Amending/ Validation Act introducing Section 4A and Section 4B to revive control of any agricultural produce, even if it is included in the Schedule under Section of the Act, until and unless the provision of Section 3 and 4 of the Act read with Section 15 are complied with Section 4A and Section 4B are invalid. Sub-section (1) of Section 4A, in so far as it dispenses with the requirement of complying with the provisions of Sections 3 and 4 before market fee can be validly levied on an agricultural produce, is bad and void for being repugnant to the scheme of the Act, It is also bad

and void for truncation valuable right given to citizens and others under Section 3 and 4. Sub-section (1) of Section 4A also obliterates the concept of market area which is the sole basis of operating the Act and for imposing the levy. As a result of sub-section (1) of Section 4A, the basis of the Act gets transmuted from an Act levying a fee to an Act imposing tax. Sub-section (2) of Section 4A is also bad because it renders invalid the notifications for deletion of items issued by the State Government, which have been acted upon by the citizens and all concerned. The introduction of Sub-section (2) of Section 4A retrospectively with effect from 6.6.1960 would lead to invalidation notification by which items have been deleted and enable the market committee to impose fee and to collect the fee in respect of items which have been deleted, the same is bad inasmuch as it does the certainty with which citizens had acted upon issuance of notification under Section 39 of the Act deleting items from the Schedule.

Section 4A (2) is also bad inasmuch as the Legislature has provided an opportunity for hearing at the stage of deletion of the items from the Schedule and not at the stage of addition of the items. Since the process of addition and deletion are both legislative Acts, unless a rational basis exists to differentiate the circumstance when an item is being deleted from the Schedule, no-affording of opportunity to the members of general public when an item is being added to the Schedule, is per se discriminatory and as such void. Sub-Section (1) and (2) of Section 4A cannot co-exist with 3 and 4 of the statute. The continuance of Sections 3 and 4 after the Amending Act is entirely futile and these sections have been reduced to a dead letter, such cannot be the scheme of the Act, particularly, when Sections 3 and 4 have always been adverted to by this Hon'ble Court while analysing the scheme of the provision of the Act both in relation to the declaration of a market area and also the declaration of a principal market/sub market yard and while adjudging the validity of imposition of fee.

Section 4A by obliterating the right to object conferred under section 3 introduces an unnecessary hardship and exposes the entire scheme of the Act to a charge of unreasonableness. The substantial nature of the objections of the appellant as depicted in the objections filed would indicate that they had a right at least to set forth the grievances for consideration by the State Government.

Section 4B of the Act is consequential provision, Section 4B is a validating provision proceeding on the basis of curing the defects pointed out by the Division bench of the High Court in the D.C.M. case through the medium of 4 A and consequently validating all collections as if the same was authorised by the Amending Act and also removing the impediments of any judgment by a court to the contrary. It is, therefore, submitted that Section 4B containing the words: "as if such levy and collection was made under the provisions of this Act as amended by this Act....

(emphasis supplied)

indicate that 4B cannot have any existence independent of its own. The effect of the judgment of the Division Bench in striking down Section 4A entirely and upholding the fiction contained in Section 4B would lead to an anomalous result that without curing the defects, a judgment can be overruled by the legislature by a simple process of amendment. It is well settled that a mere attempt to overrule the decision of the courts by amending the law is not sufficient and would itself be an encroachment on the judicial power of the State. It is only upon the defects pointed out by the judgment being cured in proper manner that validation enactments can be upheld.

The legal fiction in Section 4B must stand the test of reasonableness. The fiction occurring in 4 is consequential to the removal of defects pointed out but the Division bench in the judgment dated 30.3.92 and cannot be divorced from the same Section 4B is inseverable for the purpose of either interpreting the provisions or for the purpose of considering its validity.

The Notification of 31.8.92 is pad

and illegal because the objections raised by the appellants have not been considered. On the basis of the pleadings submitted by the parties, the High Court ought to have answered the questions relating to the validity of the notification dated 31.8.92 in the affirmative. It is also contended the no satisfactory material has been placed by the Marketing Board before the Court to suggest that to objections were considered in serious manner as is expected of statutory authority under Section 3 of the Act.

(V) It is well settled that the provisions of an Act have to be read as a whole in order to give effect to a purposive interpretation of the Act, viewed from this cardinal principal of construction, it evident that the purpose of the Act to regulate activities in relation to specified agricultural produce a market area is being defeated by the Amending Act. Viewed from this principle of statutory interpretation, Sections 4A and 4B of the Amending Act are bed, as being contrary to the Scheme of the Act, In this connection reference has been made to the decision of this Court in Commissioner Commercial Taxes vs. R.S. Jhaver (1968 (1) SCR 148).

(VI) Legislation relating to imposition of a restriction under the provisions of the various Marketing Regulation Acts have always been viewed in an integrated manner by this court, In support of such contention, reference has been made to the decision in MSVS Aunachal Naddar Vs. State of Madras and others (1959 (suppl) SCR 92). Considering the scheme of the Madras Commercial Crops Act, 1953, which is in pari materia with the provisions of the markets Act, it was observed by this Court in Naddars case that "under Section 3, the State Government issues a Notification declaring their intention to exercise control over the purchase and sale or such commercial crop in a particular area and calls for objections and suggestions to the made within prescribed time. After the objections are received, the State government considers them and declares the area to be specified in the Notification or any portion thereof to be a notified area for

the purpose of the Act in respect of commercial crop or crops specified in the notification."

(VII) In this connection reference has also been made to the decision of this court in Lakhan Pal Vs. State of Bihar (1968 (3) SCR 534). In Lakhan pal's case, this Court had noted that power under Section 4(1) should be exercised reasonably. It is contended that the intention or the judgment is that the reasonableness of the exercise of the power under section 4(1) is amenable to judicial review, By dispensing with Sections 3 and 4, the Markets Act has become plainly vulnerable.

(VIII) Referring to Kewal Krishan Puri's case (1980 (1) SCC 418), it is contended that for a fee to be valid, levy must be impose on the agricultural produce bought or sold by licencees in notified market area and must also be earmarked for rendering services to the licencees in the notifies market area and good and substantial portion of it must be shown to be expended for that purpose. If the requirement of regulatory control as envisaged in Sections. 3 and 4 are sought to be dispensed with by the aid of Sections 4A and 4B, the imposition of levy of market fee loses its character as fee and it essentially partakes the character of tax, Such imposition of tax suffers from legislative incompetence.

(IX) A valid law must cure the defects pointed out in the judgment of court and unless it does so effectively, the validation statute would be liable to be struck down. mere amendment to overrule or annual a decision of courts is not permissible inasmuch as the as the same amounts to encroachment on the judicial power of the state. In this connection, reliance has been made on the decision of this court in Prithvi cotton Mills Vs. Broach Borough Municipality & Ors. (1969 (2) SCC 283 at 286-287 para 4), Municipal Corporation of the City of Ahmedabad Vs. New Shrock Spinning and Weaving Co Ltd. (1970 (2) SCC at paces 285-287 paras 6,7, & 8), Madan Mohan Pathak Vs. Union Of India and Ors (1978 (2) SCC 50 at pages 65.67), Cauveri Water Disputes Tribunal's case (Special Reference NO. 1 1991) (1992 Suppl. SCC 6 paragraph 142).

(X) A validating law must also be

reasonable. The validating law must satisfy the requirement of the Constitution after taking into account the accrued and acquired rights of the parties today. In this connection, reference has been made to the decision in State of Gujarat Vs. Ramanlal Keshav Lal (page 52 at pages 61-63).

(XI) Whilst it is true that Sections 3 and 4 do not influence the exercise of power under Section 39 of the Markets Act and are not therefore, condition precedent, yet once an item is added to the Schedule, it should be operative in a market area through the process of Sections 3 and 4. Section 39 contemplates a positive act of addition or alteration. While amendment to the Schedule may be effected by deletion of an item in the Schedule, yet addition can be effected only by positive Act of insertion. Rescission of a notification deleting the items will not lead to or tantamount to addition of the item in the schedule.

The Notifications of 2.5.1977 and 21.5.1977 are referable to Section 39. The Notification dated 21.5.1977 expressly rescinds notification issued under Section 39 on 2.5.31977. Hence, this notification is referable to Section 39 and not Section 4(3). For exercise of power under Section 4(3), the procedure under Section 3 is to be followed.

On the basis of aforesaid submissions, it has been contended by the learned counsel appearing for various sugar mills that sugar having been deleted from the Schedule by the Notification of 2.5.1977, its inclusion could have been made only by taking integrated actions as contemplated under Sections 3 and 4 of the Markets Act; and any attempts to include sugar in the schedule for imposition of levy either by amending/validating Act or by purporting to rescind the Notification dated 2.5.1977 by Notification dated 21.5.1977 is illegal, arbitrary, unreasonable and repugnant to the scheme of the Act. The impugned decision of the High Court therefore, should be modified by allowing the writ petitions by declaring Sections 4A, 4B and 33M of the Markets Act as ultra vires and void and also declaring that at the present no imposition of levy on sugar under the Markets Act is permissible.

Mr. S.B. Sanyal, the learned Senior Advocate appearing for the State of Bihar, has adopted the arguments advanced by Mr. A.K. Sen in so far as the validity of Sections 4A and 4B of the Markets Act and validity of imposition of levy on sugar are concerned. Mr. sanyal has submitted that by the impugned judgment, the High Court has struck down Section 33M requiring contribution to the State fund certain percentage of income derived from licence fees as may be prescribed. Mr Sanyal has submitted that Rule 68 of

the Bihar Agricultural Produce Market Rules, 1975 was consequently amended and sub-rule (iii) of Rule 68 provides that the Market Committee will pay, as contribution to the state Government, 10 to 20% of its total income out of the market fee on a graded basis. The principal attack on the validity of Section 33M before the High court was the ground that no fee can be raised for general purposes of the State because in that case such realisation will amount to tax and in that event it will alter the entire scheme of the Act. Mr. Sanyal has submitted that Section 33M was introduced in the Markets Act with the object to defray the cost, grant, loan etc. which the State Government had provided and is providing to the Marketing Board and different Market Committees from time to time.

Mr. Sanyal has submitted that substantial finance may be necessary in future for further expanding the activities of Marketing Board and for advancing the object of the Markets Act. He has submitted that at the hearing of the Writ Petitions before the Patna High court, the State of Bihar specifically submitted that the amount which should be collected under Section 33M would be spent exclusively for rendering services to the agricultural markets constituted under the act and for the purposes of the Markets Act.

Mr. Sanyal has further submitted that in view of the financial crunch which the State Government was facing, it was not possible for the State to perform and discharge the responsibilities and duties cast on the State Government under the various provisions of the Markets act, so also to translate into action the improvement Scheme which the Government proposes to introduce for advancing the object of the Act, In order to protect the interests of the agriculturists which is the prominent object of the Markets Act, the State Government proposes to introduce measures for the raising the agricultural produce of the growers and to secure them fair return of their produce in order to increase their holding capacity so that they are not required to sell their entire stock in the harvest season when the price is very low. The produce of the agriculturists brought in the market areas or yards is to be stored in the Government godowns and pledged to meet the immediate need and to enable them to sell their produce at a later point of time when the standard price will prevail in the market. The State implementation of such scheme and the Government order has been issued to that effect. Mr. Sanyal has submitted that although it is for the Market committee to establish market in the market area and to maintain market yard and sub market yard as per the directions of the State Government, but for implementing such objects, the Market Committee is authorised to obtain loan from the State Government as envisaged under Section 28 of the Markets Act. The marketing Board which exercise the power of superintendence over the Market committees can also obtain loan from the State government for Marketing Development Fund as envisaged under Section 33C (3) of the Markets Act. Mr. Sanyal has submitted that the State Government is also guarantor to repay the loan in case of default by the Board in making payment to the financial institutions. As a matter of fact, the state Government stands as a guarantor for the grant of loan for 14 million dollars by the World bank to carry out the objects of the Markets Act. Mr. Sanyal has also submitted that crores of rupees have been funded by the State Government for acquisition of lands for different market areas. Such fact is revealed in the letter No. 1066 dated February 26, 1993

written by the Secretary, Bihar State marketing Board to Under Secretary, Department of Agriculture, Government of Bihar. as on account of financial crunch, the State Government felt difficulty in releasing more funds for carrying out the object of the Act, it felt the necessity that out of the realisation made under the Act, a certain percentage should be handed over to the State Government so that such an amount is ploughed back as and when necessary. Mr. Sanyal has submitted that the State Government fully undertakes that the money which will be made available to it under Section 33M will not be spent for the general expenditure of the State Government and such amount will be exclusively spent for the purposes as envisaged in the Act. In such view of the matter, it cannot be reasonably contended that the realisation to be made under Section 33M loses the essential characteristic of fee, namely, quid pro quo consistent with the scheme of the Markets Act.

Mr. Sanyal has submitted that it has been decided by this Court in Jagannath Ramamirig Dass Vs. State of Orissa (1954 SCR 1046) that annual contribution taken from the religious institutions for meeting the expenses of the Commissioner of Hindu Religious Endowments of due administration of the affairs of religious institutions, do not lose the character of fees so long it is not merged in general revenue of the State for general public purpose. Mr. Sanyal has submitted that similar view has also been expressed in the later decision of this Court in Chief Commissioner, Delhi and another Vs. Delhi Cloth and General Mills Co. Ltd. and Ors. (1978 (3) Scr 657) and in municipal Corporation of Delhi and Ors. Vs. Mohd, Yasin etc. (1983 (2) SCR 999). Mr. Sanyal has submitted that the High Court has wrongly understood the import of Section 33M and aims and objects for introducing the same. These have only indicated that in view of the financial situation of the State, it needed fund by way of contribution of certain percentage out of market fees and licence fees, but it was nowhere stated in the aims and objects that such fund was needed by way of general revenue of the State for General public purpose. Mr. Sanyal has submitted that even if the objects for introducing Section 33M may not be happily worded, the State Government has made its position very clear that entire amount to be made available under Section 33M to the State Government of Bihar will be ploughed pack for advancing the objects under the Markets Act and no part of suction collection will be utilised for general public purpose, Mr. Sanyal has, therefore, submitted that in the aforesaid facts, there is no need to strike down the Section 33M and the decision of the High Court in that regard must be set aside.

After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned counsel for the parties, it appears to us that unsell agricultural produce is included in the Schedule to the Markets Act, the provisions of the Act have no application to such produce. An agricultural produce may find its place in the Schedule to the Markets Act as originally included by the Legislature, or it may subsequently be added to the Schedule under Section 39 of the Act. Section 39 is the only provision in the Act which authorises the State government to add any item to the Schedule of the Act or delete any item therefrom. Section 39 being an independent provision, it does not require sustenance from other sections. It operates on its own strength.

The power of altering the Schedule by addition or

deletion so as to determine the area of control and the goods to be controlled other than those specified in the Schedule has been delegated by the Legislature to the State Government in the same manner as the power has been delegated to the Central Government under Section 2(a) of the Essential Commodities Act to specify essential commodities other than those specified by the Legislature itself.

For drawing up the field of control by specifying agricultural produce in the Schedule so that control in respect of the same under other provisions of the Act is made, no hearing has been prescribed by the Statute. In our view, such hearing is not contemplated because it may not always be feasible or even desirable to give hearing for determining which produce is to be included in the Schedule. The wisdom in selecting the field of control by including the produce in the Schedule was exercised initially by the Legislature and thereafter such wisdom has been left to the discretion of the delegated authority namely the State government. It may be noted here that such hearing in the matter of selecting the field of control by adding items also not contemplated in the Essential Commodities Act.

Mr. Sen, In our view, has rightly contended that when the field of control is circumscribed by the items in the Schedule, the actual control part of it including the goods to be controlled, the market area where the control will operate and where the controlled products will have to be sold are left to the judgment of the State Government subject to the statutory conditions imposed by Section 3(1) and Section 4(1) of the Markets Act. Once the notification under Sections 3 and 4 are issued specifying the goods to be controlled and the areas where the control will operate, the other provisions of control contained in Section 5 onwards including the levy of fee under Section 27 of Markets Act spring into action.

It is nobody's case not it has been found as a fact in the impugned judgment that sugar was not in the Schedule and the same was not brought under control by following the procedure of Sections 3 and 4 of the Act As a matter of Fact, ever since control on sugar was imposed by fixing the market areas, the Markets Act had been operating for controlling sale of sugar and purchase has been levied with fee.

In exercise pose under Section 39 of the Markets Act, a notification was issued on May 2, 1977 deleting sugar from the Schedule, admittedly, the said notification under Section 39 was issued without following the procedure of Sections 3 and 4 of the Markets Act. As result of the said notification sugar was deleted from the Schedule and such deletion had the effect of shrinking the field of control of the original Schedule.

It may be noted here that the invalidity of the deletion of sugar on the basis of the said notification dated 2.5.1977 is not alleged by the sugar mills. As a matter of fact, they accept that by the said notification sugar stood deleted from the Schedule. But when such deletion is sought to be negated by issuing notification dated May 21, 1977 rescinding the earlier notification dated May 2, 1977, challenge as to the validity of the later notification was made by filing writ petitions before the High Court. In the judgment in D.C.M.'s case (supra) such notification dated May 21, 1977 rescinding earlier notification has been held invalid by the High Court on the ground that once control has been effected in respect of a scheduled good by following provision under Section 3 and 4,

reintroduction of an item in the Schedule is not permissible without following the provisions of the Section 3 and 4. In our view, such decision can not be sustained for the reasons indicated hereafter, inclusion or deletion of an item in selecting the field or control is to be made in exercise of power under Section 39 of the markets Act and State Government is clothed with such power which can be exercise without any aid of the provisions of Sections 3 and 4 of the Act. It should also be noted that since deletion of sugar from the Schedule was made in exercise of power under Section 39, and such deletion was not a deletion under Section 4(1) of the Act, the procedure prescribed in Sections 3 and 4 of the Act, was not required to be followed. Section 4(3) does not contemplate inclusion or exclusion of produce under Section 39 of the Act but is applicable only to the inclusion or exclusion of any area from the area of market or any produce specified therein as have been notified for control in a specified market already by notification issued under Section 3 and 4 of the Act.

Since the decision in DCM's case that by the notification of May 21, 1977 rescinding the earlier notification May 2, 1977 was invalid and the said subsequent notification had not the effect of introducing sugar in the schedule for want of compliance of Sections 3 and 4 was binding on the State government, although appeal before this Court against the judgment was pending, the State Government intended to remove the hurdles or fetters in deleting or including items under Section 39 without following the provisions of Section 3 and 4 by introducing Section 4A and 4B by the validating/amending Act of 1993,

Sub-section (1) of Section 4A makes Sections 3 and 4 of the Act non-applicable in the matter of exercise of the power by the State Government under Section 39 of the Act to amend the Schedule by addition of the item of agricultural produce not specified therein. Sub-section (2) of Section 4A provides that the State shall not order the deletion of any of the item without giving an opportunity for hearing to the affected parties, It is apparent that the legislature has given a chance of hearing to the parties to be effected if deletion of an item already included in the Schedule is to be effected. But for addition of an item of agricultural produce in the Schedule in the exercise of power under section 39, no hearing has been contemplated.

In our view, subsection (2) of Section 4A has for the first time circumscribed the power of deletion of a scheduled item in exercise of power under Section 39 of the Act without affording any hearing to the party aggrieved. It has already been indicated that Section 39 is the only provision in the Markets Act which has delegated the authority to the State Government to modify the Schedule either by adding or by deleting any agricultural produce, Before the introduction of section 4A by the amending Act, even for deletion in exercise of power under Section 39, no hearing was necessary.

The Legislature is quite competent to make provision for hearing only in case of deletion of a scheduled item without making such provision for inclusion of an item in the Schedule. Whether an item deserves to be included in the Schedule so that control under the Act may be brought in respect of such item is a matter of decision of the State Government according to its perception to the felt need for such inclusion. But when the State Government has felt the need of inclusion in the schedule but later on intends to change its mind by deleting the item from the schedule. The

Legislature in its wisdom has thought it fit that before deletion, a second thought is desirable by noting the objection that might be given by party aggrieved. In our view, both the sub sections of Section 4A are within the legislative competence and are also informed by reasons. In the aforesaid facts, there is no occasion to hold that Section 4A is ultra vires. In our view, High Court has laboured under an erroneous view that power under Section 39 can not be exercise without the aid of Sections 3 and 4 of the Act and in view of such misconception about the power and authority under Section 39, the impugned decision has been made by holding Section 4A as ultra vires.

Even if it is held that the decision in DCM's case, though erroneous, was binding inter-parte, the requirement of following the procedures under Sections 3 and 4 of the Act in the matter of inclusion or deletion of an agricultural produce as held in DCM's case by the High Court, has been expressly removed by introducing Section 4A. In our view, the amending/validation Act does not intend to overrule or annul any decision of the Court, but the amending Act has brought in a change in the requirement of following the procedure under Sections 3 and 4 of the Act while amending the Schedule under section 39 of the Act. Hence, the basis of the decision in DCM's case has undergone a legislative change, therefor, Section 4 does not suffer from encroachment of judicial power of the State.

Section 4A does not offend Article 14 of the Constitution. In view of Section 4A of the Act, any exercise of power under Section 39 of the Act is to be uniformly exercised in accordance with Section 4A of the Markets Act. In our view, no objection as to the validity of Section 4A can be raised on the ground that different procedures for inclusion and deletion of an item for the purpose of exercising power under Section 39 and power under Sections 3 and 4 of the Act have been provided for in the Act. Exercise of power under section 39 is altogether a different exercise from the exercise of power under section 39 in the matter of inclusion and deletion of an agricultural produce overlaps or comes in conflict with the exercise of power under Sections 3 and 4, the Legislature by incorporating Section 4A has given overriding poser to section 39, subject to the limitation under Section 4A(2). Viewed fro this perspective, Sections 3 and 4 stand modified on account of Section 39 read with Section 4A of the markets Act.

First part of Section 4B contemplates validation of Market fee levied and collected by treating such levy and collection under the Act as amended. Second part of Section 4B legislatively annuls the notification dated May 2, 1977. The other parts relate to consequential actions following from the first two parts. Levy of Market fee was held invalid for item like sugar which was excluded from the Schedule by notification dated May, 1977 on the ground that once deleted from the Schedule, its reintroduction can take effect only after complying with Sections 3 and 4 of the Act. It should be noted that in view of Section 4A, which has been inserted in the Market Act by specifically indicating in Section 2 of Amending Act that the said Section "shall always be deemed to have been inserted", deletion of an item and subsequent inclusion of the same under Section 39 is to be made in accordance with Section 39 read with Section 4A. Sub-section (2) on Section 4a makes it imperative that deletion can be made after hearing objection. Hence, even if notification dated May 21, 1977 purporting to rescuing the notification dated May 2, 1977, by which sugar was deleted form the Schedule, is held

invalid for the reason indicated by the High Court, such deletion stands invalidated under sub-section (2) of Section 4A. Hence, declaration of annulment of notification dated May 2, 1977 flows from Section 4A (2). The result is that sugar must be deemed to be always in the Schedule in respect of which controls have been operative. Both the parts of Section 4B therefore, If deletion is non-est, annulment of notification dated may 2, 1977 is a matter of course, Similarly, levy and realisation of market fee on the items which were included in the Schedule, but exclusion of which was of no consequence, cannot be held invalid. In sense, first tow parts of Section 4B are declaration of the consequence of invalidation of deletion notification. We, therefore, find no difficulty in upholding the fires of both Sections 4A and 4B of the Markets Act.

Section 33M cannot also be held ultra vires inspite of the fact that the object for inclusion of Section 33M in the Act is not happily worded. It has been categorically stated by the State Government that the collection to be made by the State government under Section 33M of the Markets Act are not to be utilised for general purposes but entire collection are to be ploughed back for achieving the purposes under the Act. In that view of the matter. it cannot be reasonably contended that the imposition has lost the character of fee and it partakes the character of tax.

In the result, (2) Section 4A and 4B are held valid by declaring that Section 4A and 4B are intra vires and (b) Section 33M is also valid. Further, the imposition of market fee and collection of such levy in respect of sugar are legal and valid.

The appeals and SLP are accordingly disposed of without any order as to costs.

SLP (C) NOS.

C.A.NOS.

10150_60/94, 10554_58/92
10709_10/94, 10767-68/94
11186, 11308_11/95
11657, 11661_62/95
11770_74, 11807/94
1200_07/95

8352_62/96, 7776_80/96
8395_96/96, 8537, 8548/96
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8623, 8626_27/96
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8612, 8613_14, 8609, 8615,
8625, 8696, 8557
8561_63, 8566, 8603_04/96
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8348, 8351, 8397/96
8549_51, 8557_58/96, 8496_97/96
8560, 8564_65, 8538_47/96
8503, 8506, 8511_12/96, 8507_10/96
8500_02, 8459_91/96
8535_36, 8629/96
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7918_19, 8493, 8492/96
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8597_98, 8607, 8628, 8647/96
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8610_11, 8636/96
8618, 8638, 8608/96

13045_48/94, 13275_76/95
13644_52/94, 13799_13800/94
14441, 15491_97
15851_52, 15974_78/94
15980_81, 16097/94
16549_53, 16557_58/94
16702_04, 16845_54/94
16878_81, 16884_87/94
16934_36, 17258_90/94
17297_98/94, 17640/95
17990_91, 18064, 18189/94
18203_06, 18208_09/94
18298_99, 18301_04/94
18404, 18954, 19016_28/94
19221_22, 19787, 19791/94
20353_54, 20362_63/94
20371_72/94, 20787/95
21367, 21402_03/94
21752, 21872/94, 723721/95
4574_76, 4581, 4583_84/95
4586_87, 4591_92, 4594/95
4596, 4819_24, 493/95

5191, 5205, 5278/95

5679_79, 6178/95
 6451, 7066_67/95
 7216, 7611/95, 7945_52/94
 8139_56, 8359_60/94
 8638_46, 8985_9004/94
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8594_95, 8599_8600, 8600, 8640/96
 8602, 8576_77/96
 8591, 8637, 8320_27/96
 8328_45, 8346_47/96
 8578_86, 8398_8417/96
 8418/8448 of 1996

WITH

W.P.(C) Nos.106/95, 118/95, 139/95, 14_20/95, 194_95/95,
 267_68/95, 273/95, 309/95, 31_33/95, 334/94, 350/95,
 379/94, 408/94 449/95, 459_60/94, 465-66/95, 469/95, 478/95,
 523_26/94, 543-44/94, 554/94, 558/95, 563/94, 572/95, 605-
 605/95, 626_27/94, 688/95, 709_710/94, 718/95, 723/94, 748-
 49/94, 797-98/94,
 804/94, 91/95 AND 93/95.
 Vikas Sales Corporation and
 Anr. etc etc.

V.

Commissioner of Commercial Taxes
 & Anr. etc. etc.

W I T H

CIVIL APPEAL NOS. OF 1996

[ARISING OUT OF S.L.P.(C) NOS. 10150-60/94, 10554-58/92,
 10709-10/94, 10767-68/94, 11186/95, 11308-11/95, 11657/95,
 11661-62/95, 11770-74/94, 11807/94, 1200-07/95, 11308-11/95,
 11657/95, 11661-62/95, 11770-74/94, 11807/94, 1200-07/95,
 13045-48/94, 13275-76/95, 13644-52/94, 13799-800/94,
 14441/94, 15491-97/94, 15851-52/94, 15974-78/94, 15980-
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 16845-54/94, 16878-81/94, 16884-87/94, 16934-36/94, 17258-
 90/94, 17297-98/94, 17640/95, 17990-91/94, 18064/94,
 18189/94, 18203-06/94, 18208-09/94, 18298-99/94, 18301-
 04/94, 18404/94, 18954/94, 19016-28/94, 19221-22/94,
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 20787/94, 21367/94, 21402-03/94, 21752/94, 21372/94,
 25721/95, 3128-29/95, 4500/95, 4554-56/95, 4574-76/95,
 4581/95, 4583-84/95, 4586-87/95, 4591-92/95, 4594/95,
 4596/95, 4819-24/95, 493/95, 5191/95, 5205/95, 5278/95,
 5676-79/95, 6178/95, 6451/95, 7066-67/95, 7216/95, 7611/95,
 7945-52/94, 8139-56/94, 8359-60/94, 8638-46/94, 8985-9004/94
 AND 9789-819/94

W I T H

W.P.(C) NOS.106/95, 118/95, 139/95, 14-20/95, 194-95/95,
 267-68/95, 279/95, 309/95, 31-33/95, 334/94, 360/95, 379/94,
 408/94, 449/95, 459-60/94, 465-66/95, 469/95, 478/95, 523-
 26/94, 543-44/94, 554/94, 558/95, 563/94, 572/95, 605-
 606/95, 626-27/94, 688/95, 709-710/94, 718/95, 723/94, 748-
 49/94, 797-98/94, 804/94, 91/95 AND 93/95.

VIKAS SALES CORPORATION AND
 ANR.ETC.ETC.

V.

COMMISSIONER OF COMMERCIAL TAXES
 AND ANR. ETC.ETC.

J U D G M E N T

B.P.JEEVAN REDDY.J.

Leave granted in Special Leave Petitions.

This batch of appeals and writ petitions raise the question - whether the transfer of an Import Licence called R.E.P. Licence/Exim Scrip by the holder thereof to another person constitutes a sale of goods within the meaning of and for the purposes of the Sales Tax enactments of Tamil Nadu, Karnataka and Kerala. If it does, it is exigible to sales tax. Otherwise not. The Karnataka and Madras High Courts have taken the view that R.E.P. Licences/Exim Scrips constitute goods and, therefore on their transfer sales tax is leviable. Their judgment appears to be influenced mainly

by the decision of this Court in H.Anraj etc. v Government of Tamil Nadu etc. [1985 Suppl.(3) S.C.R. 342].

2. With a view to conserve precious foreign exchange and to channelise the nation's economy on desired lines, the Central Legislature enacted the Imports and Exports (Control) Act in 1947. Section 3 empowers the Central Government to make provisions by order published in the official gazette for prohibiting restricting or otherwise controlling the import into and export of the goods from the country. The expression "licence" is defined in clause (i) of Section 2 to mean, a licence granted, including a customs clearance permit issued, under any Control order. Pursuant to Section 3 and Section 4(a) of the said Acts, the Central Government issued the imports (Control) Order, 1955. Clause (3) of the Order provides that "save as otherwise provided in this Order, no person shall import any goods of the description specified in Schedule I except under and in accordance with a licence or a customs clearance permit granted by the Central Government or by any Officer specified in Schedule II". The Order contains elaborate provisions governing the grant and cancellation of licences and conditions subject to which the licences have to be operated.

3. The Central Government has been issuing, from time to time, what is called the Import and Export Policy, published in the form of a brochure. The import Policy in vogue during the years concerned herein provided for issuance of what is called "replenishment licence" (for short "R.E.P. Licences"). The objective behind the licences was to provide to the registered exporters the facility of importing the essential inputs required for the manufacture of the products exported. The essential idea was to encourage exports and for that purpose import licences called R.E.P. Licences were issued equal to the prescribed percentage of the value of exports. These licences were made freely transferable. It was provided that the transfer of such licences did not require any endorsement or permission from the licensing authority. It was clarified that such would be "governed by the ordinary law". It only required a letter from the transferor recording and evidencing the transfer. On that basis, the transferee became the due and lawful holder of the licence and could either import the goods permitted thereunder or sell it to another in turn.

4. With effect from July 3, 1991, the name of the licence was changed to Exim Scrip (Export-Import Licence). The provisions governing the Exim Scrip were broadly the same as those governing the R.E.P. Licence with certain minor variations, which are not relevant for our purposes.

5. Several registered exporters who obtained R.E.P. Licences/Exim Scrips sold them to others for profit. In fact, these licences/Exim Scrips were being traded freely in the market and on stock exchanges. The sales tax authorities of certain States proceeded to subject such sales to sales tax under their respective enactments. The assessees immediately protested contending that these licences/Exim Scrips do not constitute "goods" within the meaning of the relevant sales tax enactments and, therefore, not exigible to tax. The matter came up for consideration in the first instance before a learned Single Judge of the Karnataka High Court in Bharat Fritz Werner Ltd.v.Commissioner of Commercial Taxes [(1992) 86 S.T.C. 170]. It was a writ petition challenging the validity of a circular issued by the Commissioner of Commercial Taxes, Karnataka, stating that whenever an Import Licence is transferred, it attracts tax under Section 5(1) of the Karnataka Sales Tax Act, 1957

as unclassified goods at the rate of seven percent and directing the assessing authorities and other concerned authorities to levy tax accordingly. The learned Judge considered the definition of "goods" in Section 2(m) of the Karnataka Act and held following Anraj that having regard to the nature and character of the said licences and their free transferability, they constitute goods, the sale whereof is subject to sales tax. The learned Judge rejected the argument that the said licences are in the nature of actionable claims. He held: "the import licence not merely enables a person the right of indulging in a business of importing goods but it also excludes competition. Therefore, it cannot be said that it is only a beneficial interest in respect of a movable property not in possession of the person but is itself a valuable right which, according to the petitioners themselves, is freely transferable. The import licence therefore must be treated as merchandise for the purposes of the Act and clearly falls within the definition of 'goods'". The learned Judge further held that the right under this licence is, in fact, more concrete and substantial than the right under a lottery ticket considered in Anraj. On appeal, a Division Bench of the Karnataka High Court affirmed the judgment of the learned Single Judge. The Division Bench too relied upon the ratio of Anraj and dismissed the appeal in the following words:

"In the instant case, the transfer of R.E.P. Licences confer upon the transferee the immediate right to clear goods covered by the licences at the Customs barrier. This is not an inchoate or incomplete right. It cannot be held to materialise in future because its exercise is dependent upon the transferee buying goods covered by the licence and bringing them to Indian shores. Nor can R.E.P. licences be held to be actionable claims because the Customs authorities might not clear the goods and the transferee would have to commence an action against them in a Court of Law. In our view, the transfer of an R.E.P. licence confers upon the transferee a right which is choate and perfected and exercisable immediately he presents to the Customs barrier goods of the nature covered thereby.

It must, therefore, follow that R.E.P. licences are goods within the meaning of the said Act and the premium or price received by the transferor thereof is liable to sales tax thereunder."

7. A Division Bench of the Madras High Court has also taken the same view in P.S.Apparels v. Deputy Commercial Tax Officer, T. Nagar disposed of on April 4, 1994. Under the said Judgment a large number of writ petitions were disposed of.

8. Number of appeals have been preferred by the assesseees against the decisions of Karnataka and Madras High Courts, while a number of other assesseees have approached directly by way of petitions under Article 32 of the Constitution of India, raising identical questions.

9. The main contention of the learned counsel for appellants/petitioners, S/Sri K.K.Venugopal, Joseph Vellapally, Vidyanathan and K.V.Mohan, is that these licences/scripts are not goods; they are not property; they represent merely a permission to import goods, which permission can be revoked at any time by the licensing authority; they are really in the nature of shares and securities which have been expressly excluded from the definition of "goods" in the relevant enactments. The expression "goods" has been understood by this Court in *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd* (1959 S.C.R.379) in the sense it is defined in the Sale of Goods Act and the said definition cannot and does not comprehend the licences of the nature concerned herein. The meanings assigned to the expression "licence" and "goods" in various law dictionaries have been brought to our notice, besides several decisions, Indian and English by the learned counsel. On the basis of the said material, it is argued that property is a bundle of rights but every strand in that bundle does not by itself constitute property. On the other hands Sri A.K.Ganguly and Sri Chandrasekharan, learned Additional Solicitor General, supported the reasoning and conclusion arrived at by Karnataka and Madras High Courts and commended it for our acceptance.

11. Entry 54 in List-II of the Seventh Schedule to the Constitution of India empowers the State Legislatures to make laws with respect to "taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92-A of List-I". Entry 92-A of List-I speaks of "taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce". The Karnataka, Tamil Nadu and Kerala Sales Tax Acts are referable to Entry 54, while Central Sales Tax Act, 1956 is referable to Entry 92-A. These entries empower the State Legislatures and the Parliament respectively to levy sales tax on sales or purchase of goods with the difference that if it is an intra-State sale, it is the State Legislature which is competent to levy the tax, whereas in the case of inter-State sale it is the Parliament alone that can levy tax. Entry 54 in List-II, which is the one we are immediately concerned with in these matters, is a legislative head, a head of legislation. Being a legislative head it must be construed liberally and not narrowly. There appears no reason why Entry 54 should not be given its full and due meaning and content. By giving full effect to Entry 54 in List-II, the field and content of Entry 92-A in List-I is in no way affected or curtailed. So far as the meaning of the expression "good" is concerned, these two entries cannot be called competing entries. There is no overlapping between them. The meaning given to the said expression in Entry 54 in List-II can equally be attributed to the said expression in Entry 92A in List-I. This is a consideration which must certainly weigh with the Court in approaching the question at issue herein.

12. Clause (12) in Article 366 of the Constitution defines the expression "goods" in the following words: "'goods' includes all materials, commodities and articles". Clause (29A) in Article 366, as amended by the forty sixth Amendment Act, defines the expression 'tax on the sale or purchase of goods' in the following words:

"(29A). "Tax on the sale or purchase of goods" includes-
(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods

for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food any other article for human consumption intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration;

and such transfer delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

The definition in clause (29A) was inserted by the forty sixth Amendment Act with a view to give an expansive meaning to the words "tax on the sale or purchase of goods". Clauses (c) and (d) in this definition are relevant to the present controversy. Clause (d) provides that even where a right to use any goods is transferable for cash, deferred payment or other valuable consideration, it will be a sale or purchase of goods for the purpose of the Constitution.

13. Clause (7) in Section 2 of the Sale of Goods Act, 1930 defines the expression "goods" thus: "'goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale" [Emphasis added]. Since the said definition defines the "goods" to mean "every kind of movable property other than actionable claims and money", it would be appropriate to notice the definition of "property" in Clause (11). It reads: "'property' means the central property in goods, and not merely a special property". It is noteworthy that both these definitions seek to spread the net as wide as possible. While the definition of goods includes every kind of movable property within its ambit, the definition of property says that it includes not merely special property but general property in goods as well.

The General Clauses Act, 1897 defines "movable property" to mean "property of every description except immovable property". The expression "immovable property" is defined to "include land, benefits to arise out of land and

things attached to the earth or permanently fastened to anything attached to the earth". The definitions in Karnataka, Tamil Nadu and Kerala General Clauses Acts are identically worded. In the absence of definition of the expressions in the Sales Tax enactments, the definitions in the respective General Clauses Acts become applicable. None of these Acts, it may be mentioned defines the expression "property".

14. The Central Sales Tax Act, 1956 defines the expression "goods" in Clause (d) of Section 2 in the following words:

"'Goods' includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stocks, shares and securities."

What is relevant to note is that this definition is not only inclusive in nature, but takes in all kinds of movable property. It excludes from its ambit certain items, which but for such exclusion, may well have fallen within the ambit of the said definition.

15. The Tamil Nadu Sales Tax Act, 1959 defines the expression "goods" in Clause (j) of Section 2 in the following terms:

"'goods' means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes all materials, commodities, and articles including the goods (as goods or in some other form) involved in the execution of a works contract or those goods to be used in the fitting out, improvement or repair of movable property and all growing crops, grass or things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

This definition too includes all kinds of movable property within the definition of goods while excluding certain specified items, viz., newspapers, actionable claims, stocks, shares and securities. The Act does not define the expression "movable property" which means that definition in the General clause Act has to be adopted for the purposes of the Tamil Nadu General Sales Tax Act, 1957 is no different. It reads:

"goods' means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities), and includes live stock, all materials, commodities, and articles including goods, as goods or in some other form involved in the execution of a works contract or, those goods to be used in the fitting out improvement or repair of movable property and all growing crops, grass or things attached to, or forming part of, the land which are agreed to be severed before sale or under the contract or sale."

This Act too does not define the expression "movable property".

17. The definition of "goods" in the Kerala General Sales Tax Act may now be set out:

"'goods' means all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities) and includes live-stocks, all materials, commodities and articles (including those to be used in the constructions fitting out, improvement or repair of immovable property or used in the fitting out improvement or repair of movable property) and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale."

18. Inasmuch as all the aforesaid definitions of the expression "goods" say that it includes all kinds of movable property, it becomes necessary to notice the meaning of the expression "movable property". Inasmuch as the Sales Tax enactments do not define the said expressions, we have to adopt the definition in the respective State's General Clauses Act. But these definitions in the General Clauses Act too are not very helpful. All that they say is that movable property means property of every kind except immovable property. The counsel have accordingly brought to our notice the several meanings of property and movable property in various legal dictionaries.

19. In Black's Law Dictionary (6th Edition, 1990) the expression "property" has been given the following meanings:-

"Property: That which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. *Fulton Light, Heat & Power Co. v. State*, 65 Misc.Rep.263 121 N.Y.S. 536. The term is said to extend to every species of valuable right and interest. More specifically, ownership; the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. the exclusive right of possessing, enjoying, and disposing of a thing. The highest right of man can have to anything; being used to refer to that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy.

The word is also commonly used

to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments, and includes every invasion of one's property rights by actionable wrong. *Labberton v. General Cas.Co. of America*, 53 Wash.2d 180,332 P.2d.250,252,254.

Property embraces everything which is or may be the subject of ownership, whether a legal ownership, or whether beneficial, or a private ownership. *Davis v. Davis*. Tex.Civ.App.,495 S.W.2d 607, 611. Term includes not only ownership and possession but also the right of use and enjoyment of lawful purposes. *Hoffmann v. Kinealy*, Mo.389 S.W.2d.745,752.

Property, within constitutional protection, denotes group of rights inhering in citizen's relation to physical thing, as right to possess, use and dispose of it. *Cereghino v. State By and through State Highway Commission*, 230 Or .,439 370 P.2d 694,697.

Goodwill is property, *Howell v. Bowden*,Tex.Civ.App.,368 S.W.2d 842,848; as is an insurance policy and rights incident thereto, including a right to the proceeds, *Harris v. Harris*, 83 N.M. 441,493 P.2d 407,408."

The Dictionary further says "property is either: real or, immovable; or, personal or movable". It then proceeds to give the meaning of the expression "absolute property", "common property", "intangible property" "movable property", "personal property", "private property" and "public property" among others. The above definition shows the wide meaning attached to the expression. It is said to extend to every species of valuable right and interest. It denotes every thing which is the subject of ownerships corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal. It includes "everything that has an extendable value". It extends to every species of valuable right and interest.

To the same effect is the definition in the Dictionary of Commercial Law by A.H.Hudson (published by Butterworths, 1983. it reads:

Property. In commercial law this may carry its ordinary meaning of the subject matter of ownerships, e.g. in bankruptcy referring to the property of the debtor divisible

amongst creditors. But elsewhere as in sale of goods it may be used as a synonym for ownership and lesser rights in goods. The Sale of Goods Act, 1979, s.2(1) makes transfer of property central to sale. Section 61(1) provides that 'property' means the general property in goods, and not merely a special property. 'General Property' is tantamount to ownership; bailees who have possession and not ownership and others with limited interests are said to have a 'special property' as their interest."

20. Jowitt's Dictionary of English Law (Sweet & Maxwell Limited, 1977) Volume-I also sets out the meaning of the expression "property" as well as the meaning of the expression "general property" and "special property".

We may set them out:

"Property (Norm.Fr.proprete; Lat. proprietas; proprius, one's own), the highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy.

In its largest sense property signifies things and rights considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured. Property includes not only ownership, estates, and interests in corporeal things, but also rights such as trade marks, copyrights, patents, and rights in personam capable of transfer or transmission, such as debts.

Property is of two kinds, real property (q.v.) and personal property (q.v.).

Property in reality is acquired by entry, conveyance, or devise; and in personality, by many ways, but most usually by gift, bequest, or sale. Under the Law of Property Act, 1925, s.205, "property" includes any thing in action and any interest in real or personal property. There must be a definite interest; a mere expectancy as distinguished from a conditional interest is not a subject of property.

'Property' also signifies a beneficial right in or to a thing. Sometimes the term is used as equivalent to ownership; as where we speak of the right of property as opposed to the right of possession (q.v.), or where we speak of the property in the goods

of a deceased person being vested in his executor. The term was chiefly used in this sense with reference 'so chattels (Finch, Law 176).

Property in this sense is divided into general and special or qualified.

General property is that which every absolute owner has (Co.Litt.145b.). See OWNERSHIP.

Special property has two meanings first, it may mean that the subject matter is incapable of being in the absolute ownership of any person. Thus a man may have a property in deer in a park, hares or rabbits in a warrens fish in a ponds etc.; but it is only a special or qualified property for if at any time they regain their natural liberty his property instantly ceases unless they have animus revertendi (2 B1.Comm.391). See ANIMALS FERAЕ NATURAE...."

This definition also shows that the expression signifies "things and rights considered as having a money value". Even incorporeal rights like trade marks, copyrights, patents and rights in personam capable of transfer or transmission, such as debts, are also included in its ambit. The meaning given to "general property" and "special property" are self-explanatory and need no emphasis at our hands. It is worth recalling that movable property means "property of every description except immovable property"-- the definition in all the General Clauses; Acts. 21. The above material uniformly emphasises the expansive manner in which the expression "property" is understood. Learned counsel for the petitioners brought to our notice the meanings of the term "property" set out in Chapter-13, "The Law of Property", in Salmond's Jurisprudence (12th Edition, 1966). in this chapter, several meanings attributed to "property" are discussed in extenso, to all of which it may not be necessary to refer. Suffice to say that property is defined to include material things and immaterial things (Jura in re propria) and leases servitudes and securities etc. (Jura in re aliena). The material things are said to comprise land and chattels while immaterial things include patents, copyrights and trade marks, which along with leases, servitudes and securities are described as incorporeal property. The expression "movable property" is stated to include (Page 421) corporeal as well as incorporeal property. Debts, contracts and other choses-in-action are said to be chattels, no less than furniture or stock-in-trade. Similarly, patents, copyrights and other rights in rem which are not rights over land are also included within the meaning of movable property. We are unable to see anything in the said Chapter-13, which militates against the meanings ascribed to the said expression in the Judicial dictionaries referred to above. indeed, they are consistent with each other.

22. Learned counsel for the petitioners have brought to our notice the several meanings of the expression "licence" in various law dictionaries. But as those very dictionaries make it clear, the expression has several meanings - and one has to choose the appropriate one depending upon the

context. we do not think it necessary to refer to the material cited by the learned counsel for the reason that the characters nature and content of the licences in question should be ascertained with reference to the law governing them and not with reference to the general meaning of the expression "licence". We have already referred to the provisions of the "Export and Import Policy" governing these licences. We may now refer to a few more paragraphs from the 'Import and Export Policy' 1990-93, relevant to the R.E.P. Licences/Exim Scrips.

23. Para 184(1), which deals with "Extent of import Replenishment", says, "the extent of replenishment permissible against export products (other than Gen and Jewellery) enumerated in Column 2 of Appendix 17 Part 1 of this book shall be that set out in Column 3."

Para 185(1), which deals with "Items permissible for Import", says, "REP Licences issued against export of products listed in Column 2 of Appendix 17 Part 1 and as per para 184(4) of this book, will be valid for import of those relevant items of raw materials, components, consumables and packing materials as are listed in Appendices 3 and 5 Part-A and related to the product exported."

Para 192 deals with "Flexibility in the utilisation of REP Licences". It says that the said licence "are also valid for import of any other items of raw materials components tools, consumables and packing materials listed in Appendices 3 and 5 Part A" besides some other goods.

Para 199 deals with "Transferability of REP licences". It reads:

"199(1). The REP licence will be issued in the name of the registered exporter only and will not be subject to Actual User Conditions". A licence holder may transfer the licence to another person. The licence holder or such transferee may import the goods permitted therein.

(2) The transfer of a REP licence will not require any endorsement or permission from the licensing authority, i.e.. It will be governed by the ordinary law. Accordingly, clearance of the goods covered by a REP licence issued under this policy will be allowed by the Customs authorities on production by the transferee of only the document of transfer of the licence concerned in his name. Whenever a REP licence is transferred the transferor should give a formal letter to the transferee, giving full particulars regarding number, date and address of the transferee. and complete description of the items of import for which the licence is transferred."

As mentioned hereinbefore, the relevant features of Exim Scrip are identical.

24. The above provisions do establish that R.E.P. licences have their own value. They are bought and sold as such. The original licensee or the purchaser is not bound to import the goods permissible thereunder. He can simply sell it to

another and that another to yet another person. In other words, these licences/Exim Scrips have an inherent value of their own and are traded as such. They are treated and dealt with in the commercial world as merchandises as goods. A REP Licence/Exim Scrip is neither a chose-in-action nor an actionable claim. It is also not in the nature of a title deed. It has a value of its own. It is by itself a property - and it is for this reason that it is freely bought and sold in the market, For all purposes and intents, it is goods. Unrelated to the goods which can be imported on its basis, it commands a value and is traded as such. This is because, it enables its holder to import goods which he cannot do otherwise. [With effect from March 1, 1992, of course, the very policy and system under which these licences/scrips were being issued has been discontinued.]

25. Since Karnataka and Madras High Courts have placed strong reliance upon the decision of this Court in Anraj, it would be appropriate to refer to the relevant facts and the ratio of the said decision. The question in that case was whether lottery tickets are "goods" within the meaning of and as defined in the Tamil Nadu General Sales Tax Act and Bengal Finance (Sales Tax) Act, 1941. The contention of the State was that they were goods and, therefore, attract the sales tax on their sale. According to assessees, the lottery tickets were in the nature of actionable claims but not goods. They questioned the legislative competence of the State Legislatures to levy sales tax on their sale. They contended that the expression 'sale of goods' has to be construed in the sense in which it is used in the Sale of Goods Act, as has been held by this Court in Gannon Dunkerly. They submitted that the definition of "goods" in Sale of Goods Act excludes from its purview actionable claims and that the essence of the lottery being merely a chance for a prize for a price, it does not constitute goods, but a mere actionable claim. It was argued that the lottery ticket is a mere slip of paper or a memorandum evidencing the right of the holder thereof to claim or receive a prize if successful in the draw.

25-A. The arguments of the assessees were rejected by this Court. The Court referred to the definition of "goods" and "sale" in both the aforesaid enactments, the definition of "goods" in Article 366(12) and the definition of "tax on the sale or purchase of goods" in Article 366(29A). It referred to the meaning of the expression "lottery ticket" in law dictionaries and decided cases; it referred to the definition of "movable property" in the General Clause-Act, 1897 and the definition of the expression "actionable claims" in Section 3 of the Transfer of Property Act and observed [Tulzaurkar, J., speaking for the Bench comprising himself and Sabyasachi Mukharji, J.]:

"If incorporeal right like copyright or an intangible thing like electric energy can be regarded as goods exigible to sales there is no reason why the entitlement to a right to participate in a draw which is beneficial interest in movable property of incorporeal or intangible character should not be regarded as 'Goods' for the purpose of levying sales tax. As stated above, lottery tickets which comprise such entitlement do constitute a stock-in-trade of

every dealer and therefore is merchandise which can be bought and sold in the market. Lottery tickets comprising such entitlement, therefore, would fall within in the definition of 'Goods' given in the Tamil Nadu Act and the Bengal Act.

In the light of the aforesaid discussion my conclusion are that lottery tickets to the extent that they comprise the entitlement to participate in the draw are 'goods' properly so called, squarely falling within the definition of that expression as given in Act, 1941, that extent they are not actionable claims and that in every sale thereof a transfer of property in the goods is involved."

With respect to the nature and content of the lottery tickets, the learned judge observed that it confers upon the holder thereof "the right to participate (in the draw) and the right to claim a prize if successful..... in other words, lottery tickets not as physical articles but as slips of paper or memoranda evidencing the right to participate in the draw must in a sense be regarded as the dealer's merchandise and, therefore, goods, capable of being bought or sold in the market. They can also change from that to hand as goods."

We are of the opinion the ratio of the said decision fully supports the contention of the States herein. As rightly pointed out by the Karnataka High Court, the content of R.E.P. Licence/Exim Scrip is far more substantial and real than that of a lottery ticket. If lottery tickets are goods, there is no reason why these licences/scrips are not goods.

We see no substance in the argument based upon the decision in Gannon Dunkerley. On the basis of this decision, it is contended that the expression "goods" and "sale of goods" must be understood in the sense they are used in the Sale of Goods Act. We need not quarrel with this proposition. We have not only referred hereinbefore the definition of "goods" and 'property' in the Sale of Goods Act but have also pointed out that in material particulars it is similar to the definition of "goods" in Tamil Nadu, Karnataka and Kerala Sales Tax Acts. All of them uniformly say "goods" mean "every kind of movable property" (Sale of Goods Act) and "all kinds of movable property" (Tamil Nadu, Karnataka and Kerala Acts). As a matter of fact, this submission was made but not pursued by any of the counsel for the petitioners.

26. We are also of the opinion that these licences/scrips cannot be treated as actionable claims.

"Actionable claims" is defined in Section 3 of the Transfer of Property Act in the following words:

"'Actionable claim' means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording

grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."

When these licences/scripts are being bought and sold freely in the market as goods and when they have a value of their own unrelated to the goods which can be imported thereunder, it is idle to contend that they are in the nature of actionable claims. Indeed, in Anraj, the main contention of the petitioners was that a lottery ticket was in the nature of an actionable claim. The said argument was rejected after an elaborate discussion of law on the subject. We agree with the said decision and on that basis hold that the R.E.P. Licences/Exim Scripts are not in the nature of actionable claims.

Learned counsel for the petitioners submitted that the licence is something less than property, because the licencing authority can always cancel it, in which event, it becomes a mere scrap of paper. That feature, in our opinion has no relevance on the question at issue. Cancellation can be effected by the appropriate authority in accordance with the procedure prescribed by law and on proof of permissible grounds. We are unable to see how the said factor detracts from the inherent value of these licence. For that matter, many a grant is subject to such a condition. That circumstance is in no way affects the content of the grant. The further contention that the licence/scrip merely gives a right to import certain goods, that in case the licence is lost, one can always obtain a copy from the authority and, therefore, the licence has no value of its own is equally unacceptable. We have already pointed out how the commercial world treats these licences and trades in them. They represent merchandise for all practical purposes.

27. Learned counsel for petitioners have brought to our notice certain decisions, to which a brief reference would be in order:

The decision on which strong reliance is placed by Sri K.K.Venugopal is in State of Orissa & Ors. v. Titaghur Paper Mills Company Limited & Anr. (1985 (Suppl.) S.C.C. 280). It was a case arising under the Orissa Sales Tax Act. Under Section 3-B of the Orissa Act, the State Government was empowered to declare from time to time by notification any goods or class of goods to be liable to tax on turn-over of purchases. Notifications were issued under this provision from time to time declaring that standing trees and bamboos agreed to be severed shall be liable to tax on turn-over of purchases at the rate prescribed. The contention of the assessee was that the said levy was not a tax on sale or purchase of goods within the meaning of Entry 54 in List-II and, therefore, beyond the legislative competence of the State Legislature. Construing the relevant notifications and contracts, (called Bamboo contracts and Timber contracts) this Court held that the Bamboo contracts were in the nature of a grant of interest in immovable property and; therefore, beyond the purview of the Act. So far as Timber contracts are concerned, the Court held that inasmuch as the property in the trees, which were the subject-matter of the contracts, passed to the forest contractor only in the felled trees, i.e., in timber, after all the conditions of the contract had been complied with and after such timber was examined and checked and removed from contract area, they too were not governed by the Notifications concerned therein. On the basis of this decision, it was contended by Sri Venugopal that taxable event, if at all, will arise only at the time of transfer of the actual goods imported under

and by virtue of the said licences/scrips, but not at the time of transfer of documents. We are unable to agree. We are unable to see how the above holding helps the petitioners herein, more particularly, in view of our finding that these licences/scrips have value of their own, are freely transferable and are openly traded in the market and on stock exchanges.

29. Sri Vaidyanathan relied upon a decision of the Patna High Court in *State of Bihar v. Rameshwar Jute Mills* (A.I.R. 1953 Patna 236) where the sale of loom hours was held not to be a sale of goods. It was held by the Court that the expression "goods" in Section 2(d) of the Bihar Sales Tax Act cannot be given a wider connotation which is given to that term in the sale of Goods Act or for that matter the wider connotation given to "movable property" in the General Clauses Act. It was held that having regard to the definition in that Act, the expression "goods" refers only to tangible goods or tangible movable property and not to any kind of intangible right like room hours, actionable claims, stocks, shares or securities. We are afraid, we cannot agree with the said reasoning which appears to be contrary to the one affirmed by this Court in *Anraj*.

29. Reliance was then placed upon the dissenting opinion of Mudholkar, J. in *Joint Chief Controller of Imports and Exports v. Aminchand Mutha* (1966 (1) S.C.R. 262) to contend that transfer of a right to quota is not sale of goods. The observations relied upon are to the effect that the Import Export policy issued by the Government of India "would not confer a legal right upon an exporter for the division of the quota rights of a dissolved firm." Firstly, the majority opinion (Gajendragadkar, CJ, Wanchoo, Shah and Sikri, JJ.) is to the contrary. Secondly, quota rights considered therein were not freely transferable like the licences/scrips concerned herein. The last mentioned comment holds good for the other decision relied upon *S.Chandra Sekharan & Ors. v. Government of Tamil Nadu & Ors.* (1974 (2) S.C.C. 196). This decision deals with the transferability of a licence/authorisation in respect of a ration shop.

30. Sri K.K.Venugopal placed strong reliance upon the decision/authorisation of the Court of Appeal in *Frank Warr & Co. v. London County Council* (1904 (1) K.B. 713). In particular, the learned counsel relied upon the observations of Romer L.J. at Pages 720 to 722. It was a case where a contract was entered into between lessees of a theater and the plaintiffs. Under this contract, the plaintiffs were given the exclusive right for a particular period to supply refreshments in the theater. For that purpose, the plaintiffs were entitled to use the refreshment rooms, bars and wine cellars in the theater and were also given the exclusive right to advertise and to let spaces for advertisement in certain parts of the theater. It was held by the court of Appeal that the said contract did not convey to the plaintiffs an interest in the land which could form the subject-matter of compensation under the Lands Clauses Consolidation Act, 1845. In that connection, Romer L.J. held that the contract created only a licence in favour of the plaintiffs, but did not create any estate or interest in land in their favour. It was also held that the right given to the plaintiffs to use refreshment rooms and bars etc. was to enable the plaintiffs to supply refreshments at appropriate times and did not involve absolute parting of possession of those parts of the theater by the lessees to the plaintiffs. Referring to the earlier decision in *Thomas v. Sorrell* [(1674) Vaugh. 351], the learned Judge held, "a dispensation or licence properly passeth no interest, nor

alters or transfers property in anything, but only makes an action lawful which without it had been unlawful." It is evident, the decision dealt with the question whether the interest created in the plaintiffs under the aforesaid contract was a lease or a licence. It was held that it was only the latter. With respect, we are unable to see how the said observations are of any assistance to the appellants/petitioners herein.

31. Sri Ganguly, learned counsel for the State of Tamil Nadu, relied upon the dissenting opinion of S.R.Das, J. in *Chiranjitlal Chowdary v. Union of India* (1950 S.C.R. 869) [at Pages 920 to 922] where the learned Judge dealt with the meaning of the expression "property" in Article 199(1)(f) and Article 31 of the Constitution. Having regard to the context in which the said question had arisen, we do not think it necessary to refer to the observation relied upon since the material referred to by us on the meaning of the expression "movable property" and the decision in *Anraj* is more to the point.

32. In the written submission filed by Sri K.V.Mohan, a new contention, not urged at the bar, is raised, viz., that R.E.P. Licences/Exim Scrips are incentives granted by the Union of India as concessions from customs duty and that this is a matter which comes within the exclusive competence of the Union Legislature under Entry 41 in List I of the Seventh Schedule to the Constitution of India and that, therefore, the State Legislature has no power to levy sales tax upon their sale/purchase. We are unable to see any substance in this submission either. Applying the rule of pith and substance, it must be held that the enactments in question are referable to Entry 54 in List II and not to Entry 41 in List I. By no stretch of imagination can they be related to Entry 41 in List I. The State Legislatures are not seeking to make a law with respect to customs duties. They are seeking only to levy tax upon the sale of goods. The test to be applied in this behalf has been authoritatively stated by the Constitution Bench of this Court in *A.S.Krishna v. State of Madras* (1957 S.C.R. 399).

33. Another contention raised in the written submissions of Sri K.V.Mohan is that even if the said licence/scrips are treated as goods, the tax must be levied at the first point of sale, viz., upon the authority issuing the licence. We cannot agree. The grant of licence by the licencing authority to the registered exporter or the purchaser sells it to another person for consideration.

34. The last submission urged by Sri Vaidyanathan is that these licences/scrips constitute securities within the meaning of Clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956, and therefore, stand excluded from the definition of "goods" contained in Tamil Nadu, Kerala and Karnataka Sales Tax Acts as well as Central Sales Tax Act. The contention is misconceived. It is true that the definition of "goods" in the said Sales Tax enactments does exclude securities, but the question is whether these licences/scrips are securities. They are not. Before the definition of the expression "securities" in Clause (h) of Section 2 of the Securities Contracts (Regulation) Act was amended by Act 15 of 1992, the definition reads thus :

"(h) 'securities' include --

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body

corporate;
(ii) Government securities ;
(iii) rights or interests in
securities."

By the said amendment Act, sub-clause (ia) was added in the said definition, which reads :

"(ia) such other instruments as
may be declared by the Central
Government to be securities;"

Firstly, it is not brought to our notice that any declaration has been made by the Central Government to the effect that these licences/scripts are securities. Secondly, any such declaration can only be for the period subsequent to the coming into force of the said Amendment Act, i.e., subsequent to January 30, 1992. All the cases before us pertain to the period earlier to the said date. In this view of the matter, it is not necessary to pursue this argument further.

For the above reasons, all the appeals and writ petitions fail and are dismissed herewith. No costs.