Mohammad Hussain Gulam Mohammadand ... vs The State Of Bombay And Another on 2 May, 1961

Equivalent citations: 1962 AIR 97, 1962 SCR (2) 659, AIR 1962 SUPREME COURT 97

Author: K.N. Wanchoo

Bench: K.N. Wanchoo, P.B. Gajendragadkar, A.K. Sarkar, K.C. Das Gupta, N. Rajagopala Ayyangar

PETITIONER:
MOHAMMAD HUSSAIN GULAM MOHAMMADAND ANOTHER

Vs.

RESPONDENT:
THE STATE OF BOMBAY AND ANOTHER

DATE OF JUDGMENT:
02/05/1961

BENCH:
WANCHOO, K.N.
BENCH:
WANCHOO, K.N.
GAJENDRAGADKAR, P.B.
SARKAR, A.K.
GUPTA, K.C. DAS
AYYANGAR, N. RAJAGOPALA

CITATION:
1962 AIR 97 1962 SCR (2) 659
CITATOR INFO :
R 1962 SC1517 (1)
R 1966 SC 385 (2,3,8,11)
RF 1971 SC1017 (8)
D 1974 SC1489 (6)
R 1980 SC 350 (10)
E 1980 SC1008 (22)
RF 1983 SC1246 (15)
R 1990 SC 560 (13)

ACT:
Agricultural Produce Markets-Enactment for regulation of purchase and sale of such produce Constitutional validity-Validity of rules framed under the Act-Bombay Agricultural Produce Markets Act, 1939 (Bom. 22 of 1939), ss. 4, 4A, 5,

5A, 5AA, 11, 29, rr. 53, 64, 65, 66, 67-Constitution of India, Arts. 19(1)(g), 19(6).

HEADNOTE:

The Bombay Agricultural Produce Markets Act, 1939, was enacted by the Bombay Legislature to provide for the better regulation of buying and selling of agricultural produce in the State of Bombay and the establishment of markets for such produce. Under the provisions of the Act power was given to the commissioner by notification to declare certain areas as market areas as a result of which such areas could not thereafter be used for the purchase or sale of any agricultural produce specified in the notification, except under a licence. Markets were to be established and market committees constituted with power to grant licences for operation in the market. By s. 11 a market committee may, subject to the provisions of the Rules and subject to such maxima as may be prescribed, levy fees on the agricultural produce bought and sold by licencees in the market area. Section 29 enabled the State Government by notification in tile official Gazette to add to, amend or cancel any of the items of agricultural produce specified in the Schedule to the Act. The petitioners challenged the validity of the Act and the rules framed thereunder, and in particular ss. 4, 4A, 5, 5A, and 5AA which provided for the declaration of a market area and the establishment of a market, as unconstitutional on the ground that they placed unreasonable restrictions on their right to carry oil trade in agricultural produce and thus infringed their fundamental right guaranteed under Art. 19(1)(g) of the Constitution of India. They also attacked the validity of ss. 11 and 29 and rr. 53, 64, 65, 66 and 67.

Held: (1) that ss. 4, 4A, 5, 5A and 5AA of the Act are constitutional and intra vires and do not impose unreasonable restrictions on the right to carry on trade in the agricultural produce regulated under the Act.

M. C. V. S. Arunachala Nadar v. The State of Madras, [1959] Supp. 1 S.C.R. 92, followed.

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(2) that the fee provided by s. 11 though calculated on the amount of produce bought and sold, is not in the nature of sales tax as it is only a levy charged for services rendered by the market committee in connection with the enforcement of the various provisions of the Act. Accordingly, s. 11 is valid.

(3) that r. 53 in so far as it enables the market committee to fix any rates as it liked of the fees to be collected on agricultural produce bought and sold in the market area, is not valid, because under s. 11 unless the State Government fixes the maxima by rule it is not open to the committee to fix any fees at all.

(4) that under S. 29, the power given to the State Government to add to, or amend, or cancel any of the items of the agricultural produce specified in the Schedule in accordance with the local conditions prevailing in different parts of the State is only in pursuance of the legislative policy which is apparent on the face of the Act, and, therefore, the section is intra vires.
The Edwards Mills Co. Ltd., Beaway v. State of Ajmer and Another, [1955] 1 S.C.R. 735, applied.
(5) that r. 64 is merely a method of enforcing the regulatory provisions with respect to market yards and sub-market yards and is valid.
(6) that rr. 65, 66 and 67, in so far as they authorise the market committee to grant a licence for doing business in any market area, go beyond the power conferred on the market committee by S. 5A, and are ultra vires.

JUDGMENT:

ORIGINAL JURISDICTION: Petition No. 129 of 1959. Petition under Art. 32 of the Constitution of India for the enforcement of fundamental rights.

R. Ganapathy Iyer, J. B. Dadachanji, S. N. Andley, Rameshwar Nath and P. L. Vohra, for the petitioners. N. S. Bindra and R. H. Dhebar, for the respondents. S. T. Desai, Trikamlal Patel and I. N. Shroff, for the Interveners.

1961. May 2. The Judgment of the Court was delivered by WANCHOO, J.-This petition raises a question as to the constitutionality of the Bombay Agricultural Produce Markets Act, No. XXII of 1939 (hereinafter referred to as the Act) and the Rules framed thereunder. The petitioners are businessmen of Ahmedabad. Their case is that by a notification under the Act the whole area within a radius of 12 miles of Ahmedabad city was declared to be a market area under s. 4 of the Act for the purposes of the Act in respect of certain agricultural produce from June 1, 1948. At the same time a market yard and a market proper were established for dealing in the commodities mentioned above; and simultaneously a market committee was established under s. 5 of the Act for the Ahmedabad market area by the name of "The Agricultural Produce Market Committee, Ahmedabad." By later notifications certain other agricultural produce was declared to be regulated under the provisions of the Act in this market area. ID 1959 a locality known as the "Kalupur market" in the Telia Mill compound near the railway station Ahmedabad was declared to be a sub-market yard for the purposes of the Act. The petitioners apparently were carrying on business in the Kalupur market and therefore after the declaration of that area as sub-market yard, the market committee required the petitioners to take out licences under the Act without which they were not to be allowed to carry on business. The petitioners contend that the various provisions of the Act and the Rules and bye-laws framed thereunder place un- reasonable restrictions on their right to carry on trade in agricultural produce and thus infringe their fundamental right guaranteed under Art. 19 (1)(g) of the Constitution. In particular, the heavy fees payable to the market committee for taking out licences in order to trade in various markets impose a heavy burden on trade in the regulated commodities

resulting in an unreasonable restriction on the right of the petitioners to carry on their trade. Further the declaration of the market area and the establishment of market yard and sub-market yards has resulted in compelling producers of agricultural commodities to carry their produce for long distances, thus imposing an unreasonable restriction on their right to carry on trade. The petitioners thus assail the main provisions of the Act and some of the provisions of the Rules and the bye-laws framed by the market committee, which we shall specify at their proper place later. The petitioners also contend that the State of Bombay has never required the market committee to establish a market as required by s. 5AA of the Act and no market has in law been established by the market committee and therefore the market committee has no power to issue licences and to exercise other powers conferred under the Act on market committees. They therefore pray that the Act and the Rules and the bye- laws framed thereunder may be declared unconstitutional, ultra vires and void. In the alternative a direction should be issued to the respondents, in particular the market committee, not to enforce the provisions of the Act, the Rules and the bye-laws against the petitioners so long as a market has not been established as required under the law. The petition has been opposed on behalf of the respondents, and their contention is that the Act, the Rules and the bye- laws provide reasonable restrictions on the fundamental right to carry on trade under Art. 19(1)(g). It is further contended that a market has been established as required by law, and therefore the market committee in particular has the right to enforce all the provisions of the Act, the Rules and the bye-laws and to insist upon the petitioners taking out licences as provided therein.

Before we consider the attack made on the constitutionality of the Act, the Rules arid the bye-laws framed thereunder, we should like to refer to the main provisions of the Act and the scheme of regulation provided in it. The Act deals with the regulation of purchase and sale of agricultural produce in the State of Bombay and establishment of markets for such produce. Section 2 of the Act is the definition section. Section 3 provides for the constitution of markets and market committees and gives power to the Commissioner by notification to declare his intention of regulating the purchase and sale of such agricultural produce and in such area as may be specified in the notification; and objections and suggestions are invited within a month of the publication of the notification. Thereafter the Commissioner after considering the objections and suggestions, if any, and after holding such inquiry as may be necessary, declares the area under s. 4(1) to be a market area for the, purposes of the Act. The consequence of the establishment of the market area is given in s. 4(2) which lays down that after the market area is declared, no place in the said area shall, subject to the provisions of s. 5A, be used for the, purchase or sale of any agricultural produce specified in the notification. After the declaration of the market area, the State Government is given the power under s. 5 to establish a market committee for every market area. Thereafter under s. 5AA it becomes the duty of the market committee to enforce the provisions of the Act, and also to establish a market therein, on being required to do so by the State Government, providing for such facilities as the State Government may from time to time direct, in connection with the purchase and sale of the agricultural produce with which the market committee is concerned. The Act however envisages that there may be a time lag between the declaration of a market area and the establishment of a market; therefore the proviso to s. 4(2) lays down that pending the establishment of a market in a market area the Commissioner may grant a licence to any person to use any place in the said area for the purpose of purchase and sale of any such agricultural produce, and it is the duty of the market committee under s. 5AA also to enforce the conditions of a licence granted under s.

4(2). Further under s. 5A, where a market has been established, the market committee is given the power to issue licences in accordance with the Rules to traders, commission agents, brokers, weighmen, measurers, surveyors, ware housemen and other persons to operate in the market; provided that no such licence shall be necessary in the case of a person to whom a licence has been granted under the proviso to s. 4(2). The effect therefore of these provisions of the Act read with the definition section is this. A market area is first declared under s. 4(1). In the market area, a market may be established. The Rules make it clear that the market may consist of what are called market proper and principal market yard and sub-market yards, if any. Under s. 4A for each market area there shall be one principal market yard and one or more sub-market yards as may be necessary and the Commissioner is given the power by notification to declare any enclosure, building or locality in any market area to be the principal market yard for that area and other enclosures, buildings or localities to be one or more sub-market yards for the area. As we have already said, the Act envisages that there may be a time lag between the declaration of a market area and the establishment of a market, and that is why there is a provision for licences under the proviso to s. 4(2) pending the establishment of a market in a market area. The establishment of a market, however, takes place only when the State Government requires the market committee under s. 5AA to establish a market in the market area. There does not seem to be any provision in the Act or the Rules as to how the market committee shall proceed, on being required to do so by the State Government, to establish a market; but reading the provisions of s. 4A and s. 5AA together it appears that after the State Government has required the market committee to establish a market, it has to approach the Commissioner with its recommendation to declare localities as the principal market yard and the sub-market yards, if any, and the Commissioner makes a notification in regard thereto, and thereafter the market is established. Till however such action is taken by the committee and the Commissioner notifies a principal market yard and sub-market yards, if any, no market can in law be established; and other provisions of the Act which come into force after the establishment of a market cannot be enforced and the trade is till then regulated in the manner provided in the proviso to s. 4(2).

After the market is established, the market committee gets the power to issue licences under s. 5A. Other provisions of the Act provide for the constitution of market committees and the establishment of a market committee fund and the ancillary powers of market committees with which however we are not directly concerned in the present case. It is enough to refer to s. 11 only in this connection, which provides that the market committee may subject to(the provisions of Rules and subject to such maxima as may be prescribed levy fees on the agricultural produce bought and sold by licencees in the market area. This section, it will be noticed, applies to the purchase and sale of agricultural produce in the market area and the power under it can be exercised by the committee as soon as the market area is declared, though no market might have been established under s. 5AA. Till such time as the market is established the fees prescribed under s. 11 would be levied on the licencees under the proviso to s. 4(2). Then come sections creating offences for contravention of the various provisions of the Act, which it is unnecessary to consider. Section 26 gives power to the State Government to frame rules for the purposes of carrying out the provisions of the Act. Section 27 gives power to the market committee to frame bylaws with the previous sanction of the Director or any other officer specially empowered in this behalf by the State Government and subject to any rules framed by the State Government under s. 26. Finally, s. 29 provides that the State Government

may by notification in the official gazette add to, amend or cancel any of the items of agricultural produce specified in the Schedule to the Act.

These are the main provisions of the Act and the scheme which results in the declaration of a market area and the establishment of a market therein. The first contention on behalf of the petitioners is that ss. 4, 4A, 5, 5A and 5AA which provide for the declaration of a market area and the establishment of a market are unconstitutional as they are unreasonable restrictions on the right to carry on trade in agricultural produce. We are of opinion that there is no force in this contention. This Court had occasion to consider a similar Act, namely, the Madras Commercial Crops Markets Act, No. XX of 1933, in M. C. V. S. Arunachala Nadar etc. v. The State of Madras and others (1) and the regulation with respect to marketing (1) [1959] Supp 1 S.C.R. 92.

of commercial crops provided in that Act was upheld. The main provisions of the Madras Act with respect to the declaration of a market area (called notified area in that Act) and the establishment of markets are practically the same as under the Act. It is therefore idle for the petitioners to contend that the main provisions contained in ss. 4, 4A, 5, 5A and 5AA of the Act are unconstitutional. Learned counsel for the petitioners, however, urges that there is a difference between the Madras Act and; the Act inasmuch as the Madras Act dealt with commercial crops whereas the Act makes it possible to bring every crop under its sweep. It is conceded that though it may be con- stitutional to regulate the sale and purchase of commercial crops, regulation of all crops made possible under the Act would mean an unreasonable restriction on the fundamental right enshrined in Art. 19(1)(g). We are of opinion that there is no force in this contention. The Madras Act which dealt with commercial crops specified certain crops as commercial crops in the definition section and added that the words "commercial crop" used in that Act would include any other crop or product, notified by the State Government in the Fort St. George Gazette as a commercial crop for the purposes of that Act. In view of this inclusive definition of "commercial crop" in the Madras Act, it was open to the State Government under that Act to include any crop within the meaning of the words "commercial crop" which was regulated by that Act. The Act had a schedule when it originally passed in which certain crops were included. The State Government was however given the power to add to, or amend or cancel any of the items mentioned in the Schedule by s. 29. It is true therefore that under the Act it is open to the State Government to bring any crop other than those specified originally in the Schedule within its regulatory provisions; but the fact that it is possible to bring any crop within the regulatory provisions of the Act by amendment of the Schedule would not necessarily make the Act an unreasonable restriction on the exercise of the fundamental right guaranteed under Art.

19(1)(g). As we have already pointed out, the definition of the words "commercial crop" in the Madras Act was also wide enough to bring any crop which the State Government considered fit to be included as a commercial crop for the purposes of that Act. There is thus in our opinion no difference in the ambit of the Madras Act and of the Act. Besides we see no reason why a crop which can be dealt with on a commercial scale should not be brought under the regulatory provisions of the Act. Section 4(2A) makes it clear that the Act does not apply to the purchase or sale of specified agricultural produce, if the producer of such produce is himself its seller and the purchaser is a person who purchases such produce for his own private use or if such agricultural produce is sold to such person by way of a retail sale. Thus it is clear from this exception that the provisions of the Act

do not apply to retail sale and are confined to what may be called wholesale trade in the crops regulated thereunder. This would suggest that the Act also deals with commercial crops in the same way as the Madras Act, for the notion of wholesale trade implies that the crop dealt with therein is a commercial crop. There is thus no distinction so far as the main provisions are concerned between the Act and the Madras Act, and for the reasons that have been elaborately considered in Arunachala Nadar's case (1) we are of opinion that ss. 4, 4A, 5,5A and 5AA of the Act are constitutional and intra vires and do not impose un- reasonable restrictions on the right to carry on trade in the agricultural produce regulated under the Act. The next attack is on s. 29 of the Act, which provides that the State Government may by notification in the official gazette, add to, amend or cancel any of the items of agricultural produce specified in the Schedule. It is submitted that this gives a completely unregulated power to the State Government to include any crop within the Schedule without any guidance or control whatsoever. We are of opinion that this contention must also fail. It is true that s. 29 itself does not provide for any criterion for determining which crop shall be put into the Schedule or which shall (1) [1959] Supp. 1 S.C.R. 92.

be taken out therefrom but the guidance is in our opinion writ large in the various provisions of the Act itself. As we have already pointed out, the scheme of the Act is to leave out of account retail sale altogether; it deals with what may be called wholesale trade and this in our opinion provides ample guidance to the State Government when it comes to decide whether a particular agricultural produce should be added to, or taken out of, the Schedule. The State Government will have to consider in each case whether the volume of trade in the-produce is of such a nature as to give rise to wholesale trade. If it comes to this conclusion it may add that produce to the Schedule. On the other hand if it comes to the conclusion that the production of a particular produce included in the Schedule has fallen and can be no longer a subject-matter of wholesale trade, it may take out that produce from the Schedule. We may in this connection refer to The Edward Mills Co. Ltd., Beawar v. The State of Ajmer and another (1). In that case, s. 27 of the Minimum Wages Act, 1948, which gave power to the appropriate Government to add to either part of the schedule any employment in respect of which it is of opinion that minimum wages shall be fixed by giving notification in a particular manner was held to be constitutional. It was observed in that case that the legislative policy was apparent on the face of the enactment (impugned there); it was to carry out effectively the purposes of the enactment that power had been given to the appropriate Government to decide with reference to local conditions whether it was desirable that minimum wages should be fixed in regard to a particular trade or industry which was not included in the list. The same considerations in our opinion apply to s. 29 of the Act and the power is given to the State Government to add to, or amend, or cancel any of the items of the agricultural produce specified in the Schedule in accordance with the local conditions prevailing in different parts of the State in pursuance of the legislative policy which is apparent on the face of the Act. Therefore, in enacting s. 29, (1) [1955] 1 S.C.R. 735.

the legislature had, not stripped itself of its essential powers or assigned to the administrative authority, anything but an accessory or subordinate power which was deemed necessary to carry out the purpose and policy of the Act. We therefore reject the contention that s. 29 of the Act gives uncontrolled power to the State Government and is therefore unconstitutional.

The next attack is on s. 11 of the Act and the rules framed in that connection. Section II gives power to the market committee subject to the provisions of the rules and subject to such maxima as may be prescribed to levy fees on the agricultural produce bought and sold by licencees in the market area. It is said that the fee provided by s. 11 is in the nature of sales tax. Now there is no doubt that the market committee which is authorised to levy this fee renders services to the licencees, particularly when the market is established. Under the circumstances it cannot be held that the fee charged for services rendered by the market committee in connection with the enforcement of the various provisions of the Act and the provisions for various facilities in the various markets established by it, is in the nature of sales tax. It is true that the fee is calculated on the amount of produce bought and sold but that in our opinion is only a method of realising fees for the facilities provided by the committee. The attack on s. 11 must therefore fail. Besides this however, it is also contended that rr. 53 and 54 which provide for levying of fees under s. II are ultra vires, as they do not conform to s. 11 of the Act. It will be noticed that s. 11 provides for levy of fees to be fixed by the market committee, subject to such maxima as may be prescribed by the Rules and this fee is to be charged on the agricultural produce bought and sold. There are thus two restrictions on the power of the market committee under s. 11; the first is that the fee fixed must be within the maxima prescribed by the Rules and naturally till such maxima are fixed it would not be possible for the market committee to levy fees, and the second restriction is that fees have to be charged not on the produce brought into but only on such produce as is actually sold. Rule 53 provides that the market committee shall levy and collect fees on agricultural produce bought and sold in the market area at such rates as may be specified in the bye-laws. The Rules nowhere prescribe the maxima within which the bylaws will prescribe fees. The first attack therefore on the Rules is that it will not be open to the market committee to prescribe any fee under s. 11 till the State Government prescribes the maxima by the Rules, which it has not done so far. Further there is an attack on r. 54 which lays down that the fees on agricultural produce shall be payable as soon as it is brought into the principal market yard or sub-market yard or market proper or market area as may be specified in the bye- laws. The argument is that this rule allows fees to be charged on the produce brought into the market irrespective of whether it is actually bought and sold, and this is against s. 11. As we read s. 11, there is no doubt that the State Government is expected to specify the maxima within which the market committee shall fix fees and until such maximum is specified by the State Government in the Rules it would not be possible for the market committee to fix any fees under s. 11. Further, there is no doubt that s. 11 provides that fees shall be charged only on the amount of produce bought and sold and not on all the produce that may have been brought into the market but may have to be taken back as it is not sold. The reply of the respondents so far as r. 54 is concerned is that the rule only prescribes a convenient method of levying fees and that various bye-laws provide for refund in case there is no sale of the produce brought into the market. The petitioners in their application have not specifically said that there is no provision for refund and in the circumstances all that we need say is that r. 54 will be valid if proper provision for refund is made in the bye-laws with respect to the produce brought into the market on which fees have been charged but which has been taken back because it is not sold, for then it would only be a method of levying the fee permitted under s. 11. In the connected petition Yograj Shankersingh Parihar and another v. The State of Bombay and another (57 of 1957) which was heard along with this petition there was an attack on r. 53; but the attack was confined to the fee being analogous to a sales tax and there was no ground taken that the fee could not be levied under r. 53 because the maxima had not been specified in the Rules.

However, it is not in dispute in this case that maximum has not been specified in any rule and r. 53 itself leaves it open to the market committee to prescribe such rates as may be specified in the bye-laws. We have already said that it would not be possible for the market committee to prescribe any fees under s. 11 through byelaws till the State Government prescribes the maximum under s. 11. As no such maximum has been prescribed in the Rules, the contention that fees which are being charged under the bye- laws for the purposes of s. 11 are ultra vires of that section, must prevail.

It has been urged on behalf of the respondents that the true construction of s. 11 is that if maxima are prescribed by the Rules, fees will be fixed by the market committee within the maxima; but if no maxima are fixed under the Rules, it will still be open to the market committee to prescribe any fees it thinks proper under its power under s. 11. We are not prepared to accept this interpretation of s. 11, for it amounts to adding the words "if any" after the word "maxima" therein. Besides, the legislature was conferring power of taxation (using the word in its widest sense) by s. 11 on the market committee. While doing so, the legislature apparently intended that the committee shall not have unlimited power to fix any fees it liked. It restricted that power within the maxima to be prescribed by the State Government in the Rules. Thus the power given to the committee was meant to be subject to the control of the State Government which would be in a position to view the situation as a whole and decide the maxima. At the same time, some flexibility was provided by leaving it to the committee to fix fees within the maxima. We may in this connection refer to various municipal Acts for example where also the power of taxation is subject to the control of the different form. Section 11 also prescribes similar control by the State Government over this taxing power of the committee and this is obviously in the interest of the community as a whole. The State Government cannot practically abdicate that power as it seems to have done under r. 53 by leaving it to the committee to fix any rates it likes. We are therefore of opinion that unless the State Government fixes the maxima by rule it is not open to the committee to fix any fees at all and the construction urged on behalf of the respondents is not correct. The next attack is on r. 64 which provides that no person shall (a) enter a principal market yard or sub-market yard in contravention of a direction given by a servant or a member of the market committee, or (b) disobey any of the directions of the market committee in regard to the places where carts laden with agricultural produce may stand or loads of agricultural produce may be exposed or in regard to the road by which or in regard to the times at which they may proceed. Any person contravening or disobeying any of the directions referred to in sub-r. (1) shall, on conviction be punishable with fine. It is urged that this rule is ultra vires as it imposes an unreasonable restriction on the right to carry on trade. We are of opinion that there is no force in this contention because this rule is merely a method of enforcing the regulatory provisions with respect to market yards and sub-market yards.

The next attack is on r. 65 which provides that "no person shall do business as a trader or a general commission agent in agricultural produce in any market area except under a licence granted by the market committee under this rule." The contention is that this rule goes beyond the provisions of s. 5A which lays down that "where a market is established under s. 5AA, the market committee may issue licences in accordance with the Rules to traders, commission agents..... So far as the grant of licence to traders before the establishment of a market is concerned, the provision is to be found in the proviso to s.4(2) and the power to grant licences before the establishment of a market for trading in any market, area, is given to the Commissioner and not to the market committee. The

power of the market committee to grant licences under s. 5A arises only after a market is established and is confined to operation in the market. Rule 65 therefore in our opinion when it authorises the market committee to grant a licence for doing business in any market area goes beyond the power conferred on the market committee by s. 5A and entrenches on the power of the Commissioner under the proviso to s. 4(2). It must therefore be struck down as ultra vires of the provisions in s. 5A read with the proviso to s. 4(2). Rule 66 which is incidental would fall along with r. 65.

The next attack is on r. 67. It gives power to the market committee to grant licences for doing business in the market area and prohibits doing of business without such licences. This rule is open to the same objection as r. 65, for the power of the market committee to grant licences is with respect to operation in the market and not in the market area, the latter power being in the Commissioner under the proviso to s. 4(2) till the market is established. It seems to us that rr. 65 and 67 as they are framed show a confusion in the mind of the rule making authority. It would have been enough if the Rules had been confined to grant of licences for operation in the market, for under the law as soon as the market area is declared and a market is established, s. 4(2) comes into force and no place in the said area can be used for the purchase and sale of any agricultural produce except as provided by s. 5A. It seems to us therefore that the intention probably was to confine the issue of licences under rr. 65 and 67 to markets which the market committee has the power to do where a market is established under s. 5A; but the two rule.-, as drafted refer to the market area and not to the market and must therefore be held to be beyond the power granted to the market committee under s. 5A.

The last point that is urged is that no market has been established in law as required under s. 5AA of the Act. We have already said while dealing with the scheme of the Act that the scheme envisages that there may be a time lag between the declaration of a market area under s. 4 and the establishment of a market. under s. 5AA. We have also pointed out that a market can only be established by a market committee constituted under s. 5, if it is required so to do by the State Government under s. 5AA. Therefore, the requirement by the State Government is a condition precedent to the establishment of a market under s. 5AA. No procedure has however been prescribed either under the Act or under the Rules as to what the market committee has to do after it has been required to establish a market. We presume, in view of the provisions of s. 4A which gives power to the Commissioner to establish a market yard or sub- market yards, that the market committee after it receives a direction from the State Government to establish a market will have to approach the Commissioner with its recommendation and ask him to notify the establishment of a principal market yard and sub-market yards, if any. The contention of the petitioners is that no direction was issued by the State Government under s. 5AA to the market committee for the establishment of a market and that in any case the committee took no steps after the receipt of any such direction for the establishment of a principal market yard and sub-market yards, if any. It appears that the market area was declared for the first time in Ahmedabad from June 1, 1948, by notification dated April 15, 1948. This was followed by another notification by which the State Government established a market and a market proper under the Act as it stood before the amendment of 1954 by which the power to establish a principal market yard and sub- market yards has now been given to the Commissioner. It seems however that no direction was issued as required by s. 5 of the Act as it stood before the amendment (now s. 5AA) requiring the market committee to

establish a market. This matter had come to the notice of the Bombay High Court in Bapubhai Ratanchand Shah v. The State of Bombay (1). Chagla, C. J., then pointed out as follows at p. 887:-

> "Now, a very curious situation was disclosed to us by Mr. Joshi. No market has been established under s. 5 of the Act and therefore s. 5A has not come into operation. The result is this that the Market Committee cannot issue licences under s. 5A to traders, commission agents, etc., to operate in the market. In the absence of a market being established under s. 5 and the absence of licences being issued under s. 5A, licences can only be issued by the State Government under the proviso to s. 4A(2). But the rules show that licences have been issued by the Market Committee and not by the State Govern- ment. It is difficult to understand how either the Government or the Market Committee came to the conclusion that the Market Committee was authorised to issue licences without s. 5 and s. 5A being brought into force. Mr. Joshi suggests that the Market Committee acts as a delegate of the State Government and the authority to issue licences has been delegated by the State Government. It is rather difficult to accept this contention."

Having said this, the learned Chief Justice went on to observe that as there was no such challenge in the petition itself, therefore whether the challenge could be sustained or not, it was not open to the petitioners before him to make that challenge. That observation was made with respect to another market area but the same, we understand, applies to the present case. It appears that after that observation of the Bombay High Court, the State Government on August 11, 1955, issued a notification (No. PMA 7055) dated August 1, 1955, directing the Agricultural Produce Market Committee Ahmedabad to establish a market in the market area for which the said committee had been established. But there is nothing in the affidavit of the respondents to show that after this direction was issued on August 11, 1955, the market committee took any steps to establish a market by making recommendations to the Commissioner to establish a principal (1) I.L.R. [1955] Bom, 870.

market yard or sub-market yards under s. 4A of the Act. As a matter of fact, the principal market yard was already there from before this direction given in 1955 and has continued. Even in the case of the sub-market yard established at Kalupur in 1959 there is nothing in the notification issued by the Commissioner on January 16, 1959, to show that he was doing so in pursuance of the desire of the market committee and on its recommendation. We should have thought that if the market committee had requested the Commissioner to establish a sub-market yard and recommended Kalupur as the place for it, the notification should have shown that the Commissioner was acting at the desire of the market committee and on its recommendation. In any case, even if the notification did not show this, it was the duty of the respondents, when this question was specifically raised in para. 25 of the petition, to state when the State Government directed the market committee to establish the market and what steps the market committee took in that behalf after such direction. But in para. 24 of the counter-affidavit filed on behalf of the respondents all that is stated is that "with reference to paragraph 25 of the petition, I crave leave to refer to s. 5-A of the Act for ascertaining its contents, true meaning and legal effect. I deny all the allegations, contentions and submissions contained in paragraph 25 of the petition as are contrary to or inconsistent with what is

stated herein as if they were specifically set out herein and traversed." We must say that this is a most curious way of meeting the allegations made on behalf of the petitioners that no direction as required by s. 5AA of the Act has been ever given to the market committee to establish a market and no steps were ever taken by the market committee in pursuance of such a direction to establish a market. The notification No. PMA 7055 which was produced before us during the course of arguments seems in the circumstances to have been an empty formality which was observed in view of the observations of the Bombay High Court in Bapubhai Ratanchand Shah's case (1). It seems to us that the curious situation which (1) I.L.R. [1955] Bom. 870.

the Bombay High Court noticed as far back as March, 1955 still continues with respect to the market in this(case and no proper steps have been taken in law even after the formal direction made by notification No. PMA 7055 in August, 1955 to establish a market. It is true that in fact the State Government before the amendment of 1954 and the Commissioner after that amendment have established a principal market and a sub-market yard for this market area; but there is nothing to show in the case of the principal market yard that it was established at the instance of the market committee on a direction given by the State Government as required by s. 5 of the Act as it was before the amendment of 1954 or that the sub-market yard at Kalupur which was established in 1959 was so established at the instance of the market committee. In the circumstances the curious situation that was noticed with respect to another market area by Chagla, C. J., is there with respect to the Ahmedabad market area and the Ahmedabad market, with the result that the market committee cannot issue licences under s. 5A of the Act and exercise such other powers as may be exercisable on the establishment of a market under the law. In the result therefore the petition must be allowed and the market committee forbidden to enforce any of the provisions of the Act, the rules and the bye-laws with respect to the market until a market is properly established under s. 5AA. No other point has been urged before us.

In conclusion we hold that the challenge made by the petitioners to the constitutionality of the main provisions of the Act and of the provisions in r. 64 fails; but the challenge in respect of (i) the provisions in r. 53 on the ground that they are ultra vires s. 11, there being no maximum fee prescribed by the State Government, and (ii) the provisions in rr. 65, 66 and 67 on the ground that they are ultra vires the provisions in s. 5(a) read with the proviso in s. 4(2) succeeds. As however we have held that the market in this case has not been properly established, the market committee cannot enforce any of the provisions of the Act or the rules or the bye-laws framed by it and cannot issue licences till the market is properly established in law. We therefore allow the petition partly and direct the respondents not to enforce any of the provisions of the Act, the rules and the bye-laws against the petitioners with respect to the market till a market is properly established in law for this area under s. 5AA and not to levy any fees under s. 11 till the maximum is prescribed under the Rules. In the circumstances we order parties to bear their own costs.

Petition allowed in part.