

Shari Malaprabha Coop. Sugar Factor vs Union Of India on 13 October, 1993

Equivalent citations: 1994 AIR 1311, 1994 SCC (1) 648

Author: S. Mohan

Bench: S. Mohan

PETITIONER:
SHARI MALAPRABHA COOP. SUGAR FACTOR

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT 13/10/1993

BENCH:
MOHAN, S. (J)
BENCH:
MOHAN, S. (J)
VENKATACHALLIAH, M.N. (CJ)
THOMMEN, T.K. (J)

CITATION:
1994 AIR 1311 1994 SCC (1) 648
JT 1993 (6) 561 1993 SCALE (3) 927

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by MOHAN, J.- All these cases can be dealt with under a common judgment since what is under attack is the fixation of price of levy sugar under orders issued under Section 3(3-C) of the Essential Commodities Act, 1955 (hereinafter referred to as 'the Act').

2. To highlight the points in issue we will refer to the facts of the case relating to the State of Karnataka.

C.A. Nos. 122-23 of 1981 and C.A. Nos. 1253-57 of 1977:

3. In these appeals two sugar orders are 1975-76 and 1977-78.

4. In exercise of the powers conferred under Section 3 of the Act, the Central Government on June 15, 1972 promulgated the Levy Sugar Supply (Control) Order of 1972 (hereinafter referred to as 'the Levy Order'). That provides for compulsory supply or sale of sugar from a producer or a recognised dealer of a specified quantity to a person or Organisation or to such State Governments as it may direct from time to time. Under the said Levy Order, the Central Government issues release orders to the producers or manufacturers against which the manufacturers supply sugar. The Central Government is required to pay the price. Such a price is determined in accordance with Section 3(3-C) of the Act. Altogether 5 orders were issued. For the year 1975-76 the following three orders were issued:

1. GSR571(E)/Ess.Com/Sugar,datedNovember29,1975

2. GSR 67(E)/Ess. Com/Sugar, dated February 9, 1976

3. GSR 67(E)t/Ess. Com/Sugar, dated August 3, 1976.

5. For the year 1977-78 the following two orders were issued:

1. GSR 76(E)/Ess. Com/Sugar, dated December 22, 1977 + Ed.: GSR 749(E)

6. The attack against all these notifications by the manufacturers of sugar 6. The attack against all these notifications by the manufacturers of sugar in the writ petitions before the Karnataka High Court was that in price fixation the Central Government had not taken into consideration the relevant criteria laid down under Section 3(3-C) of the Act.

7. The Central Government opposed the stand and urged that the relevant considerations were borne in mind.

8. The learned Single Judge struck down all the determinations on the ground of non-application of mind. Aggrieved by this, the matter was taken up in appeal. For the year 1975-76 the Division Bench was of the view that though the orders dated November 29, 1975 and July II, 1975 could not be upheld insofar as the order dated February 9, 1976 varied the price by 99 paise more. That evidenced application of mind and hence could not be struck down. Concerning 1977-78 the order dated November 29, 1975 had to be struck down because it was based on an obsolete data of more than 16 months. During that period, there has been great escalation which ought to have been taken note of. With reference to the notification dated March 1, 1978 the Division Bench was of the view that the Government had taken into account free sale realisation of the previous year at the rate of Rs 319 per quintal. During that period, free sale prices had gone down to distress levels. Therefore, the price fixation was not in order. Accordingly, the matter was remitted to the Government to consider afresh and fix proper prices on relevant criteria.

9. On certificate, both the Government and the manufacturers have come up in appeal. Various writ petitions questioning the correctness of these notifications have also been transferred to this Court.

10. Similarly, in other High Courts the price fixation was questioned. The High Courts have rendered their decisions. Insofar as the sugar producers are concerned they have come up in appeal. Equally, the Central Government, to the extent it is aggrieved, has preferred appeals.

11. The arguments of Mr F.S. Nariman, learned counsel, appearing for some of the sugar producers are as under:

12. Section 3(3-C) of the Act was specifically enacted to provide for the manner of fixation of price of sugar in cases where sugar was produced for distribution by Government. According to the learned counsel the price fixation must be done on the principles laid down by the Tariff Commission and Sugar Enquiry Commission mainly on the following bases:

1. Fair price of cane fixed by Government;
2. cess or tax payable thereon;
3. manufacturing cost; and
4. a reasonable return on capital employed.

13. In support of this submission reliance is placed on Panipat Cooperative Sugar Mills v. Union of India. 1 (1973) 1 SCC 129: (1973) 2 SCR 860

14. This interpretation is in line with the earlier ruling of Diwan Sugar & General Mills (P) Ltd. v. Union of India². No doubt, that case dealt with Clause 5 of the Sugar Control Order of 1955. The words used thereunder were "with due regard to". The factors mentioned in Clause 5 of the said Sugar Control Order are substantially the same as under

Section 3(3-C) of the Act. The latter ruling construed the words "having regard to" as factors mentioned in Section 3(3-C) as essential in price determination.

15. The further submission of the learned counsel is when Section 3(3- C) of the Act says 'determination' it cannot be a purported determination. It signifies an effective expression of opinion which ends a controversy or dispute by some authority to whom it is submitted under a valid law for disposal. Thus, it is submitted that the observations in Shri Sitaram Sugar Co. Ltd. v. Union of India³ are not a fetter, they are not words of limitation but of general guidance to make an estimate requires fresh consideration.

16. It is further urged that in the instant cases, it cannot be said there is a valid determination because the levy price for one year cannot be the levy price for the subsequent years as indeed the minimum cane price for one year is not the same for the subsequent years. Similarly, the

notification of uniform increase of Rs 18.03 for each zone for 1977-78 is not correct as it is without reference to the parameters which are known and calculated for each zone. What had been done was merely to take a weighted all- India average. This is contrary to the Government's stand of zonal determination. Though this Court has taken the view that the determination under Section 3(3-C) is a legislative function, yet a review of subordinate legislation is permissible on the following grounds:

1. It is unreasonable.

2. It is uncertain or repugnant to the general law or some other statute. Support for this is sought from the case *Mixnam's Properties Ltd. v. Chartsey Urban District Council*⁴.

17. This Court, it is urged, has also taken the view in *Indian Express Newspapers (Bombay) Pvt. Ltd. v. Union of India*⁵ that a subordinate legislation can be questioned on any ground on which the plenary legislation could be questioned. According to the ruling, it could be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable but in the sense it is manifestly arbitrary. Viewed in this light, while fixing the price under Section 3(3-C) regard must be had to Clause 5A. That provides for an additional minimum price which is statutorily required to be paid by the manufacturer of sugar to the sugar-cane grower. Therefore, the grower's share (additional price payable to growers out of the excess realisation) has necessarily to be included as an element under factor A or Section 3(3-C). Thus, the minimum price under Section 3(3-C) and the 2 1959 Supp 2 SCR 183 : AIR 1959 SC 626 3 (1990) 3 SCC 223 : (1990) 1 SCR 909 4 (1963) 2 All ER 787: 61 LGR 489 5 (1985) 1 SCC 641 : 1985 SCC (Tax) 121 : (1985) 2 SCR 287 additional minimum price under Clause 5-A are essential components of manufacturing cost of sugar under factor B. Then again, mopping up of the entire excess realisation by the sale of free sugar is incorrect in view of Clause 5-A. That would result in total denial of any return resulting in not even recovering the actual cost of production.

18. Prior to October 1, 1974 mopping up might have been permissible. But after October 1, 1974, the mopping up for arriving at a price under Section 3(3-C) is contrary to law i.e. the law enacted in Clause 5-A which contemplates excess free market sales realisation for the benefit of growers to the extent of 50 per cent. The entire theory of "mopping up" of 100 per cent of extra sale realisation will be contrary to law, namely, Clause 5-A. This will also be against the recommendations of Bhargava Commission.

19. Mr B.R.L. lyengar, learned counsel appearing for the sugar manufacturers of the State of Karnataka states that till the departure in the notification dated July II, 1975, the itemisation and the factors of the format for arriving at the levy price were those repeatedly laid down by the Tariff Commission. The incidence of additional cane price over and above the statutorily notified minimum price and the estimated average realisation on the sale of levy free sugar was at Rs 317.65 for internal consumption and for exports. The result of inclusion of these items which were not of the standard formula till then adopted by the Tariff Commission, whether so intended or not, bring about as far as the Southern and other zones are concerned, the reduction of the price from Rs 171.52 to Rs 139.72. It is this drastic reduction which is complained of in these cases.

20. As can be seen from the report of Bhargava Commission, the object was to reward efficient factories which pay a fair price to the cane growers but not to give such a benefit to an inefficient sugar factory. In the case of Panipat Sugar Mills' which has not been correctly understood, the Court was only ascertaining that the factories in Haryana got a reasonable return on the capital employed and for that purpose, took into account excess realisation from the sale of levy free sugar.

21. Mr C.S. Vaidyanathan, learned counsel appearing for the sugar mills of Tamil Nadu submits that Section 3(2)(f) of the Act deals with a situation of acquisition of immovable property on payment of compensation. This is in contrast to Section 3(2)(c) of the Act wherein a power is conferred on the Government to control the prices of essential commodities.

22. When Section 3(3-C) came up to be introduced containing guidelines for determination of the price of sugar compulsorily acquired under Section 3(2)(f) of the Act the Parliament could not have laid down as a guideline that the Government should take into account as a factor in such price determination, the additional realisation of non-levy sugar so as to depress the price of levy sugar even less than the actual cost. While determining the price of levy sugar the Central Government is bound to take into account the four factors mentioned in clauses (a) to (d) of Section 3(3-C) of the Act. The Government is bound to fully compensate the manufacturers of sugar at least under clauses (a) to (c) as they represent the basic cost. Even assuming the Government can ignore the return on the capital in other construction under Section 3(3-C) would be violative of Articles 14, 19(1)(f), 19(1)(g) and 31(2) of the Constitution of India. The only question that arose for consideration in Sitaram Mills case³ related to zonewise price fixation. The price determination in accordance with factors (a) to (d) of Section 3(3-C) did not call for consideration in that case. It is also not correct to state that judicial review of price determination is altogether excluded in view of Sitaram case³.

23. The Central Government acts on the advice of expert bodies like Tariff Commission and Bureau of Industrial Costs and Prices while determining the prices. The specific- case of the Government is that the recommendations of these bodies have been accepted. If that be so, the additional realisation should not enter into competition of the price under Section 3(3-C) of the Act. The additional realisation will have to be shared by the sugar-cane grower and the sugar producer. Whatever might have been the position of Section 3(3-C) as construed by this Court in Panipat case¹ the same has been deliberately departed from by the Government by introducing Clause 5-A. As a result, the additional realisation on free sale sugar cannot be taken into account as a neutralising factor under clause (d) partially or fully. The contention that Clause 5-A has no relevance for determination of price under Section 3(3-C) is untenable.

24. Mr Raja Ram Agarwal, learned counsel appearing for the sugar factories of East Uttar Pradesh, in addition to filing the necessary data in detail showing the break-up of levy prices, urges that according to the Bhargava Commission Inquiry Report which acceptance is borne out by introduction of Clause 5-A, the balance of 50 per cent from excess realisation was left with the industry for certain specific purposes and not for depressing the levy sugar price. Therefore, if the free sale realisation is excluded the loss would be even more. The fixation of levy price for East Zone of Uttar Pradesh is totally arbitrary and requires to be reconsidered.

25. Mr S.S. Khanduja, learned counsel adopts the arguments of Mr Raja Ram Agarwal and prays for redetermination.

26. Mr Shanti Bhushan, learned counsel for the sugar factories of West Uttar Pradesh submits that in the decision of Sitaram case³ it has been laid down that the price fixation under Section 3(3-C) is a legislative power. The very same decision states that it could be challenged on the following grounds:

- (i) If the fixation of levy price is arbitrary.
- (ii) If it is fixed on extraneous grounds.
- (iii) If it is not done in good faith.
- (iv) If ultra vires of the power granted and not on consideration of relevant material facts.
- (v) If it is manifestly unjust oppressive or outrageous or directed to an unauthorised end.
- (vi) If it does not tend in some degree to accomplish the objects of delegation.
- (vii) If it is made on irrelevant grounds.
- (viii) Without regard to relevant considerations.

With reference to these grounds he submits that no data has been disclosed by the Government to this Court. For four years, 1975-76, 1976-77, 1977-78 and 1978-79 the Government had fixed levy sugar prices without regard to any of the factors mentioned in clauses (a) to (d) of Section 3(3-C).

In every sugar year the recovery in a zone varies from year to year to a very great extent. Therefore, the minimum cane price notified in clause (a) must be by applying the actual recovery figure. However, for these four years instead of calculating the minimum cane price on the basis of actual recovery for the zone in the previous year what has been taken into consideration is an identical recovery, namely, 9.65 per cent. Therefore, clause (a) is violated.

27. Then again, the cost of conversion mentioned under clause (b) depends on the duration of the sugar season and the recovery from sugarcane. These factors are bound to vary. For all these four years, the Government has assumed an identical duration of 139 days in West U.P. Zone. Hence, there is disregard of clause (b).

28. If price determination is to be done with reference to clauses (a), (b), (c) and (d) these factors are always different in different years. It is not possible for the levy sugar price to be the same for any

zone for two successive years. For the year 1975-76 the notification dated August 3, 1976 fixed the price at Rs 163.79. By notification dated November 19, 1976 for the year 1976-77 the levy sugar price was fixed at Rs 163.79. Again, notification dated December 22, 1977 fixed the levy sugar price at Rs 163.79 for 1977-78. These notifications per se are not in conformity with the factors mentioned in clauses

(a) to (d) of Section 3(3-C). Then again, where the Government is required to revise the price with reference to each zone a uniform increase of Rs 18.03 per quintal over the price fixed under the notification dated November 22, 1979 for all the zones, is not contemplated at all.

29. The realisation from free sale sugar to depress the levy sugar price is illegal. That is against the report of the Tariff Commission and also disregards Clause 5-A which is based on Bhargava Commission Report accepted by the Government. The respondent has recommended that the excess realisation from sale should be shared by the factories on 50:50 basis with the cane growers and necessary steps were being taken from the ensuing sugar season. The loss sustained by sugar factory on its export quota is not taken into consideration. This is also bad in law.

30. Even assuming that the extra realisation from free sugar could be used for decreasing the amount of return which may be provided under clause (d) the sugar factories would at least be entitled to a price determination in accordance with the factors mentioned under clauses (a), (b) and (c) of Section 3(3-C). That is not so in the present case. For the years 1978-79 and 1979-80 the sugar factories paid to the sugar growers only the statutory minimum cane price. It was that statutory minimum cane price that has been taken into consideration. At the same time, the extra realisation from free sugar went into calculation. This resulted in depressing the levy price and mopping up of the extra free sugar realisation for calculating the levy price. This is opposed to Clause 5-A.

31. Taking into consideration the extra realisation by the sale of free sugar it is not in accordance with the view expressed by the Court in Panipat Sugar Mills case 1.

32. If the price fixation does not result in a reasonable return not even providing for the cost of cane and the cost of conversion, the price fixation is liable to be struck down where the Government is obliged to fix the price on the L Factor. It has to be so fixed in respect of the entire levy sugar production. Therefore, even for a provisional price fixed during the beginning of the season, at the end of the season it has to be revised.

33. Mr B. Sen, learned counsel after referring to (a) Panipat Sugar Mills v. Union of India'; (b) Anakapalle Cooperative Agrl. & Industrial Society Ltd. v. Union of India⁶ and (c) Shri Sitaram Sugar Co. Ltd. v. Union of India³ points out that the price fixation is vitiated as it has been based on considerations which are not germane. Firstly, price fixation has been done on the basis of estimates in relation to factors contained in clauses (a) to

(d) of Section 3(3-C). Thereafter some additions and deductions have been made from the figure arrived at on the basis of estimates. The addition is on the actual cane price payable while the deduction is based on the estimate realisation from sale of free sugar. The realisation from sale of

free sugar is not germane except for purpose of clause (d). The factors mentioned in clauses (a), (b) and

(c) are those based on weighted average cost involved in relation to each item.

34. The fixation of price based on estimates on the beginning of the season and not updating has caused the industry to suffer loss. For example, for the year 1979-80 the levy price fixed at the beginning of the season was Rs 250.45 while L Factor worked out to Rs 294.07.

35. Mr H.J. Javeri, learned counsel appearing for the cooperative society situated in Saurashtra region submits that Panipat¹ and Anakapalle² rulings upheld price determination by Government of India since such determination was based on the recommendations of the Tariff Commission fixing the prices for different zones by adopting the method of working out the weighted averages. Such a method of price fixation would not now be relevant particularly when a better method of pricing of sugar by an expert body such as Bureau of Industrial Costs and Pricing is available.

36. Though in Sitaram case³ the Court refused to reopen the earlier decisions it was on the ground that no material was brought to the notice of the Court to establish that the Central Government had not applied its mind to the price fixation. However, that decision does lay down that the price 6 (1973) 3 SCC 435 : (1973) 2 SCR 882 fixation could be challenged on the ground of unreasonableness or arbitrariness. Insofar as the entire State of Gujarat was placed in a zone along with Maharashtra and Goa without regard to the relevant conditions of yield recovery and availability of sugar-cane as they materially differ, the price fixation must be held to be arbitrary. Even in Gujarat there are two zones. The units in Saurashtra are to be placed in low recovery zones while those in South Gujarat are to be grouped in high recovery zones. Further, the capital cost of establishment of these units also materially differ. The High Court of Gujarat failed to appreciate this important aspect of the matter. In actualities, the cane growers were paid a higher price than the statutory minimum price. This is because the appellant-society had to pay harvesting and transport charges. This important factor ought to have been taken note of by the Government.

37. Mr P.V. Kapur, learned counsel appearing for the sugar mills of Haryana would urge that in respect of the year 1977-78 the Central Government issued an order dated December 22, 1977. By that order it had mechanically and without application of mind repeated the price fixed earlier for the season 1976-77 in utter disregard of cost escalation. The higher sugar price and purchase tax on cane which was increased by the State Government from Rs 13 to Rs 13.50 and from Rs 1.25 to Rs 1.50 per quintal respectively and higher labour cost and other relevant factors like expected recovery and duration which had to be taken into account.

38. Mr Altaf Ahmed, learned Additional Solicitor General on behalf of the Union of India after drawing our attention to the various provisions of the Essential Commodities Act, 1955 submits that sub-section (3-C) of Section 3 is a link in a statutory chain consisting of sub-section (2)(f), sub-section (1) of Section 3 and the preamble of the Act. The object of the Act is to aim at equitable distribution of sugar at fair prices. Clause 5-A of the Sugar-cane Control Order would form a part of that scheme by virtue of clause

(d) of sub-section (3-C). The effect of the argument that Section 3(3C) is not consumer-oriented but producer-oriented, designed with the object of protecting the producer's profit and does not permit price control would amount to tearing it out of statutory context.

39. 'Reasonable return' may be a term of art. It is for this reason the return recommended by the Tariff Commission is totally protected against the impact of Clause 5-A. The High Court of Madras has confused the underlying purpose of sub-section (3-C) with the concept of providing compensation for compulsory acquisition of property underlying Article 31(2) of the Constitution. Essential Commodities Act is not made under Entry 42 of List III of Seventh Schedule but under Entry 33 of List III. In any event, Article 31 stands deleted by virtue of Constitution (Forty-fourth Amendment) Act, 1978. Therefore, to hold that sub-section (3-C) is only for partial control of sugar is incorrect. This finding overlooks that sub-section (3-C) refers to sub-section (2)(f) under which an order can be made both for partial or complete control.

40. The finding that Section 3(3-C) did not enable the Government to effect price control of sugar but will merely enable it to fix levy price of sugar is incorrect. The judgment of the Karnataka High Court rendered by a learned Single Judge holding that Clause 5-A supersedes Section 3(3-C) is apposite to the ruling of this Court in Panipat case'. He would commend for our acceptance the view taken by the Allahabad High Court.

41. In opposing the stand of Mr Nariman, learned counsel, it is urged that Clause 5-A of Sugar-cane Control Order provides for payment of additional cane price. Such payment would arise only in case of surplus from sales of both levy and free sugar after adjustment of the unit cost of production. This surplus may or may not arise. Therefore, it is, by no means, a mandatory payment like minimum bonus. The L Factor refers to the sale value of the entire production and not merely the sale of free sugar.

42. It is not correct to state that bonus creditor interest on borrowed capital and debentures were not taken into account in the determination of levy sugar price for 1974-75 and 1975-76. In fact, the cost schedules recommended by the Tariff Commission in its Report of 1973 did mention these factors which are accepted by the Government with suitable adjustment.

43. It is not a fact that a reasonable return was not provided by the Government. The price of levy sugar fixed for a zone is intended to ensure to the manufacturers a reasonable return on their overall production and investment provided the units are run economically and effectively. It is not contemplated that the price should protect the imprudent extravagant or mismanaged factories. In other words, the Government does not act as an insurer.

44. In cases arising in East U.P. the conclusion drawn by the appellants is that all-India average is taken into account. In the affidavit of the Government the impact of raising free sale percentage from 13 to 35 on sugar industry, as a whole, has been indicated. This does not relate to East Uttar Pradesh alone.

45. The levy is fixed with reference to a zone, as a whole. Therefore, the impact of such a fixation on individual factory is irrelevant. In Sitaram case³ this Court has upheld fixation of levy sugar prices on zonal basis.

46. The sugar factory pays price for the cane more than the minimum price. This is higher than the minimum and additional cane price provided under Clause 5-A. If, therefore, no further payments are liable to be made by the manufacturers of sugar the entire surplus would be available to the sugar mills besides the minimum return which is included in L Factor.

47. As regards cases arising from Maharashtra it is incorrect to state that the factors mentioned in clauses (a) to (d) of Section 3(3-C) were not home in mind. In view of the decision of this Court in Sitaram³ not only those factors but other factors, which have a bearing, were also taken into consideration. When the appellants talk of reasonable return it should be noted that reasonable return refers to the entire production of sugar, That would be sufficient compliance with law as laid down in Panipat case'. Under Clause 5-A of the Sugar-cane Control Order sugar producer is required to pay to the sugar-cane growers in addition to the minimum sugarcane price fixed under Clause 3(a), an additional price if found due in accordance with Second Schedule to that order. This surplus is calculated in terms of Bhargava Commission formula. The obligation to pay the cane growers arises only if the statutory minimum cane price plus the surplus exceeds the actual cane price already paid to the grower. Therefore, only to the extent of excess the payment is required to be made.

48. For sugar year 1978-79 the minimum notified prices of sugar-cane have been considerably increased. Therefore, the appellants cannot have any valid complaint. The general trend of argument that the actual cane prices were not taken in Maharashtra for fixation of price for 1978-79 and 1979-80 is untenable. The Government has not discriminated against Maharashtra. Minimum cane prices had been adopted in all zones for price determination in these two years. Free sale prices were adopted where estimates based on data given by the sugar factories may not correspond with the actuals. Claim of actuals of industry has not been backed by proper calculations. The figures were found to be not supported by documents.

49. Opposing the stand of Tamil Nadu sugar mills owners it is submitted that the additional sugar-cane price under Clause 5-A has necessarily to be included as an element under Section 3(3-C) is based on an incorrect notion. What is termed as an additional cane price under Clause 5-A is actually the sugar-cane grower's share of surplus. It cannot be deemed as a sort of a dividend. It can hardly be considered as an item of cost of production. Since the payment of additional sugar-cane price would arise only in case profits are available for sharing between the factories and sugar-cane growers and since the exact quantum of additional cane price would become known only after the end of the sugar season, it cannot be taken into account as an element of cost of production at the time of determination of levy sugar price. The additional sugar-cane price is not susceptible of quantification at the beginning of the sugar year.

50. The objectives of these two provisions, namely, Clause 5-A of the Sugar-cane Control Order and Section 3(3-C) are different. Even if there is a conflict between the two, Clause 5-A is subordinate

legislation. That cannot supersede Section 3(3-C). The factors mentioned in clauses

(a) to (d) of Section 3(3-C) are not mandatory in nature since the language used is "having regard to". Only when the factories obliged to pay additional price, this formula under Clause 5-A could be worked out. Since the sugar factories were expected to pay only the minimum notified price the same was considered in working out the return. Additional cane price was never reckoned for consideration as it was payable only in the case of surplus for sharing between the sugar mills and the sugar-cane growers.

51. Here, actual cane prices were considered for determining the fair cost of production. The sugar factories were entitled to surplus. In such a case, the grower has been paid not only the statutory minimum price but also additional cane price. Provisions of Clause 5-A come into operation only after levy price is fixed which is part of Factor R., Therefore, reckoning of extra free sales realisation in levy price determination cannot be said to be contrary to Clause 5-A. The same is the position with reference to Karnataka also. Thus it is prayed that the appeals filed by the Union of India may be allowed and those of the manufacturer may be dismissed.

52. In reply to these contentions Mr P.H. Parekh, learned counsel would urge that the Government should have fixed the prices with reference to the actuals of the previous year which had not been done. If that had been done the levy prices would have been higher even under the methodology under challenge. The assumed free market prices taken for calculation when actuals were available would make the whole exercise ex facie arbitrary. The importance of this glaring and patent error would be apparent from the fact that roughly every rupee of free sale realisation which is assumed as higher would lead to a reduced levy price to the extent of 50 paise per quintal.

53. The Union of India has not substantiated why there is mechanical repetition of the levy prices fixed for earlier season.

54. Even with regard to Clause 5-A the contention of the Government of India cannot be accepted. In the Second Schedule of Sugar-cane Control Order which contains Factor 2 in the denominator representing the fraction $\frac{1}{2}$ (50 per cent) of the excess realisation on sale of sugar. Even according to the Government of India the growers are entitled not only to the statutory minimum price but also additional price. The growers must have 50 per cent of the profit.

55. The Tariff Commission has specifically stated that some of the items of manufacturing costs were left out of the conversion cost schedule since they could be adequately met from the additional realisation from sale of free sugar. That being so, this factor ought to have been taken into consideration. Then again, Bhargava Commission has recommended 50 per cent to the industry for meeting its commitment for bonus, gratuity and interest on borrowed capital and the requirements for rehabilitation, modernisation and expansion. These have not been considered at all.

56. In order to appreciate these points we will first refer to the relevant provisions of the Essential Commodities Act.

57. The object and the intendment of the Essential Commodities Act is to secure equitable distribution and availability of fair prices of essential commodities. In order to fulfil that object Section 3 authorises the Central Government to pass orders which may provide for regulating or prohibiting the production, supply and distribution of an essential commodity and trade and commerce therein.

58. Section 3 sub-section (2) clause (f) provides-

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

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

(b) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him, to the Central Government or a State Government or to an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the order."

(Explanations omitted)

59. The order under Section 3(2)(f) is quasi-judicial in character. It is a specific order directed to a particular individual in order to enable the Central Government to purchase a certain quantity of commodity from the person holding it. It is an order of compulsory sale. When a compulsory sale is required to be made the question would naturally arise; what is the price to be paid for that commodity?

60. Section 3(3-C) provides for the ascertainment of such a price. This has been so held in *Union of India v. Cynamide India Ltd.*⁷

61. This is how with reference to sugar it has been declared as an essential commodity the price fixation under Section 3(3-C) comes into play. The said section provides:

In calculating the amount to be paid for the commodity required to be sold, regard is to be had to the following:

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

(b) the manufacturing cost of sugar;

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

(d) the securing of a reasonable return on the capital employed in the business of manufacturing sugar.

62. It is further prescribed that different prices may be determined, from time to time, for different years for different factories or for different kinds of sugar.

63. With reference to price fixation following principles emerge from three important decisions:

(1) Panipat Sugar Mills v. Union of India'. (2) Anakapalle Cooperative Society v. Union of India⁶.

(3) Shri Sitaram Sugar Company Ltd. v. Union of India³.

64. The principles are:

(a) The amount payable for levy sugar shall be calculated with reference to price of sugar as the Central Government may determine having regard to four factors set out in clauses (a), (b), (c) and (d) of Section 3(3-C).

7 (1987) 2 SCC 720

65. In Panipat case' it was observed thus: (SCC p. 139, para 22 : SCR p. 870) "Sub-section (3-C), with which we are presently concerned, was inserted in Section 3 by Section 3 of Act 36 of 1967. The sub-

section lays down two conditions which must exist before it applies. The first is that there must be an order made with reference to sub-section (2), clause (f), and the second is that there is no notification under sub-

section (3-A) or if any such notification has been issued it is no longer in force owing to efflux of time. Next, the words 'notwithstanding anything contained in sub- section (3)' suggest that the amount payable to the person required to sell his stock of sugar would be with reference to the price fixed under the sub-section and not the agreed price or the market price in the absence of any controlled price under sub-section (3-A). The subsection then lays down two things; firstly, that where a producer is required by an order with reference to sub-section (2)(f) to sell any kind of sugar, there shall be paid to that producer an amount therefor, that is for such stock of sugar as is required to be sold, and secondly, that such amount shall be calculated with reference to such price of sugar as the Central Government may, by order, determine, having regard to the four factors set out in clauses (a), (b), (c) and (d).

Unlike the preceding three sub-sections under which the amount payable is either the agreed price, or the controlled price, or where neither of these prices is applicable at the market or average market price, the amount in respect of sugar required to be sold is to be calculated at the price determined by the Central Government. The last words of the sub-section empower the Central Government to determine price either from time to time or for different areas, which means that it may determine

zonal or regional prices, or for different factories, i.e., unit-wise, or for different kinds of grades of sugar."

It was further observed thus: (SCC p. 140, para 23 : SCR p. 87 1) "... The words 'such price of sugar', relate to the price which the Central Government has to determine having regard to clauses (a),

(b), (c) and (d)."

66. The same is reiterated in Sitaram case³: (SCC p. 241, para 25 : SCR pp. 931-32) "The price of sugar must be determined by the Central Government having regard to the factors mentioned in clauses (a) to (d) of subsection (3-C). This is done with reference to the industry as a whole and not with reference to any individual seller. In contradistinction to the 'price of sugar', the 'amount' is calculated with reference to the particular seller. The Central Government is authorised to determine different prices for different areas or for different factories or for different kinds of sugar."

(b) A fair price has to be determined. For this purpose, the realisation from sale of free sugar can be taken into consideration in fixing the rate of return.

67. In the case of Panipat' it was observed thus: (SCC pp.

140-41, para 25: SCR p. 872) "The fair price, therefore, has to be determined on the minimum price of cane fixed by Government, the manufacturing cost on the basis of zonal cost-schedules, the tax or duty applicable in the zones and must be so structured as to leave in the ultimate result to the industry a reasonable return on the capital employed by it in the business of manufacturing sugar."

(c) The Government cannot fix an arbitrary price nor can a price be fixed on extraneous considerations. If such a price does not secure a reasonable return on the capital employed, such a fixation is liable to be challenged both on the ground of its being inconsistent with the guidelines built in this subsection and also as violative of Articles 19(1)(f), 19(1)(g) and 31 of the Constitution. In the case of Panipat' it was held thus: (SCC p. 143, para

30) "We are, therefore, satisfied both on the language of the sub-section, the background in which it was enacted and the mischief the legislature sought to remedy through its working that the true construction is that a fair price has to be determined in respect of the entire produce, ensuring to the industry a reasonable return on the capital employed in the business of manufacturing sugar."

68. In Sitaram case³ it was observed thus:

(SCC p. 25 1, para 45 : SCR p.

943) "Price fixation is in the nature of a legislative action even when it is based on objective criteria founded on relevant material. No rule of natural justice is applicable to any such order. It is nevertheless imperative that the action of the authority should

be inspired by reason.⁸ The Government cannot fix any arbitrary price. It cannot fix prices on extraneous considerations.⁹"

(d) It could be held that there is sufficient compliance with Section 3(3- C) if the Government had applied its mind to the factors mentioned in clauses (a) to (d) of the said sub-section. What is essential is, the Government must apply its mind which is relevant to the determination of prices with due regard to the norms laid down in the said sub-section.

69. In Sitaram case³ it was further held thus: (SCC p. 245, para 30: SCR p. 936) " The reasonableness of the order made by the Government in exercise of its power under sub-section (3-C) will, of course, be tested by 8 Saraswati Industrial Syndicate Ltd. v. Union of India, (1974) 2 SCC 630 : (1975) 1 SCR 956, 961, 962 9 State of U.P.v.Renu sagar Power Co.,(1988) 4 SCC 59 asking the question whether or not the matters mentioned in clauses (a) to (d) have been generally considered by the Government in making its estimate of the price, but the Court will not strictly scrutinise the extent to which those matters or any other matters have been taken into account. There is sufficient compliance with the sub-section, if the Government has addressed its mind to the factors mentioned in clauses (a) to (d), amongst other factors which the Government may reasonably consider to be relevant and has come to a conclusion, which any reasonable person, placed in the position of the Government, would have come to."

(e) Price fixation is in the nature of a legislative action, even though it may be based on an objective criteria. It is nevertheless imperative that the action of the authority should be inspired by reason. The individual orders calculating the amounts payable to individual producers are in the nature of administrative orders founded on the mechanics of price fixation.

70. In Sitaram case³ it was held: (SCC p. 25 1, para 44:

SCR p. 943) "The individual orders, calculating the 'amounts' payable to the individual producers, being administrative orders founded on the mechanics of price fixation, they must be left to the better-instructed judgment of the executive, and in regard to them the principle of audi alteram partem is not applicable. All that is required is reasonableness and fairplay which are in essence emanations from the doctrine of natural justice as explained by this Court in A.K. Kraipak v. Union of India

10. "

(f) The price fixation on a zonal basis taking into account the average zonal cost is valid.

71. In Anakapalle Coop. Society⁶ it was held thus: (SCC p. 450, para 27) "Once it is recognised that prices could be fixed according to the zones the cost schedules that have been worked out by the Commission have necessarily to be different for each zone. The various items which go into cost

differ from zone to zone. It is not possible to take out only a few items and find discrimination, disregarding all the other items or components of costs on the basis of which price determination has to be made. We are unable to hold that while classifying zones or geographical-cum-agro-economic consideration, any discrimination was made or that the price fixation according to each zone taking into account all the relevant factors would give rise to such discrimination as would attract Article 14 of the Constitution."

72. To the similar effect are the observations in Sitaram case³: (SCC p. 235, para 11 : SCR pp. 924 and 925) "[T]here is ample justification in continuing and sustaining the zonal system for the purpose of price fixation. Price has to be fixed for each zone and necessarily it varies from zone to zone. There is no 10 (1969) 2 SCC 262: (1970) 1 SCR 457 discrimination in the classification of zones on a geographical-cum-agroeconomic consideration and any such classification is perfectly consistent with the principle of equality."

73. This Court in Sitaram case³ observed thus: (SCC p. 251, para 46) "Any arbitrary action, whether in the nature of a legislative or administrative or quasi-judicial exercise of power, is liable to attract the prohibition of Article 14 of the Constitution."

74. It is in the light of these principles we propose to examine the correctness of price fixation by the various orders which are impugned in these cases.

75. The main thrust of the argument on behalf of the appellants is that price fixation has proceeded on notional basis without regard to the actualities. More than above this, clause (d) of sub-section (3-C) ensures a reasonable return on the capital employed in the business of manufacturing sugar. Therefore, clause (d) cannot be invoked to limit or restrict the return or to mop off the profits which the sugar producer may get by sale of free sugar by fixing a low price for the levy sugar. If really, the price fixation is for the sale of sugar in Section 3(2)(f) the fair price must be fixed. Further, the impugned orders are in conflict with Sugar-cane Control Order, particularly Clause 5-A.

76. In opposition to this, the Government would urge that there is a valid determination of the price and not a mere purported determination. The Government did have regard to clauses (a) to (d) of Section 3(3-C) and fixed the price for levy sugar taking into account the actual cane price paid and the excess realisation from free market sales which are relevant criteria.

77. It cannot be gainsaid that for fixing the price under Section 3(3-C) the Government must have regard to the four factors mentioned under Section 3(3-C) of the Act. Those factors are:

- (1) Minimum price of sugar-cane;
- (2) manufacturing costs;
- (3) taxes and duties; and (4) reasonable return on the capital employed.

78. In Sitaram case³ this Court has categorically laid down that the price fixation is a legislative function. If that be so, what is permissible for the Court to examine is whether regard has been had to these four factors and any other relevant factor. For the 1974-75 season the price determination was fixed under the following orders:

1. Price Determination Order No. GSR 670(E)/Ess. Com/Sugar, dated November 28, 1974.
2. Price Determination Order No. GSR 403(E)/Ess. Com/Sugar, dated July 11, 1975.

79. The fixation of levy sugar price involves an elaborate exercise such as forecasting the cane availability, sugar production, duration, recovery etc. Pending finalisation of all this, the prices notified for 1973-74 were repeated in the first of these two notifications (dated November 28, 1974) as an interim measure. It had to be so done because the Government had to release 1974-75 sugar season production. Without such a price fixation sugar could not have been released. This would have resulted in disruption of sugar through public distribution system.

80. In January 1975 the Government increased the free sale quota from 30 to 35 per cent. However, a decision was taken not to review the price immediately as the increase in free sale quota could have given some relief to the industry by way of higher realisation. By July 1975 the final working results of the season were available for almost all the zones. The free sale prices were high compared to levy sugar prices. Therefore, the Government was required to determine prices in a suitable manner. The Government having regard to Section 3(3-C) had taken into consideration the following aspects:

(i) Consideration of minimum price of cane as fixed by Government:

In fixing that minimum price the Government took into account the statutory minimum price (SMP) fixed under Section 3(1) of the Sugarcane (Control) Order, 1966 dated July 16, 1966. In addition to this factor, the difference of actual cane price that would be paid by sugar producers over and above the statutory minimum cane price was also taken into account. So much so, the Government took a higher figure than what they were required to do. Thus, compensating the sugar factories for higher cane price the levy price was determined and notified.

(ii) Manufacturing cost of sugar:

The conversion cost of sugar for all the zones adopting as the basis the Schedules in this regard recommended by Tariff Commission in their 1973 Report, was duly adjusted for further escalations.

(iii) Duties and taxes thereon:

The Government adjusted the difference between the cost of production including reasonable return of the, entire sugar and the total realisations from the sale of levy sugar and fixed levy sugar prices, thereby ensuring a reasonable return to the producer on the entire production. Various Annexures show the break-up of levy sugar price notified in respect of the zones of Uttar Pradesh, North Bihar, Maharashtra, Goa, Karnataka, Andhra Pradesh, Tamil Nadu.

81. Since these aspects have been borne in mind we are unable to hold that the notional figures had been adopted.

82. For 1975-76 season there are three notifications:

1. Levy Sugar Price notified, vide the Government of India Gazette Notification No. GSR 571(E)/Ess. Com/Sugar, dated November 29, 1975.
2. Levy Sugar Price notified, vide the Government of India Gazette Notification No. GSR 67(E)/ Ess. Com/Sugar, dated February 9, 1976.
3. Levy Sugar Price notified, vide the Government of India Gazette Notification No. GSR 748(E)/Ess. Com/Sugar, dated August 3, 1976.

83. Pending the finalisation of the levy sugar prices for 1975-76 sugar season, for which a detailed exercise involving estimates of the availability of cane, sugar production, duration of the crushing season, recovery, percentage etc. had to be undertaken by the Government, the prices applicable for 1974-75 season w.e.f. July 12, 1975 were renotified for 1975-76 sugar season, as an interim measure. This was done in view of the overriding need to release sugar stocks out of 1975-76 production for meeting requirements of the public distribution system.

84. The renotification of the prices for 1975-76 season w.e.f. November 29, 1975 at the same level as those in previous season w.e.f. November 29, 1975 cannot be faulted on grounds of arbitrary exercise of power by the Government for the following reasons:

- (a) The issuance of the price notification dated November 29, 1975 was intended to be an interim measure and was a conscious decision to meet the exigencies of the situation. But, for the timely fixation of the prices, the country would have faced a serious disruption of the public distribution system in respect of the supplies of an essential commodity viz., sugar.
- (b) An across-the-board upward or downward revision of the prices pending a detailed examination of the cost estimates relating to price determination, was hardly likely to have achieved the real purpose of determination of the levy price.
- (c) The levy sugar price notified on November 29, 1975 was intended to be an interim measure to be followed soon by the determination of the price after a more detailed

examination of available information and data. The Government had accordingly decided to set for themselves an urgent time frame for completion of the price determination exercise.

85. After an intensive examination of the data on the crucial determinants of the ex-factory price of levy sugar, the Government notified the levy sugar prices for 1975-76 season on February 9, 1976.

86. Thereafter the Government adopted the same methodology of taking into consideration the factors as were made applicable to 1974-75 season. Levy Sugar Price for 1976- 77 Sugar Season:

87. The report of the Bhargava Inquiry Commission was submitted to the Government on November 8, 1976. In its report the Commission made several recommendations which made a complete departure from the earlier methodology followed by the Tariff Commission for decades. The recommendations included grouping of sugar producing units on similarities of performance characteristic instead of on a geographical basis. In view of Bhargava Inquiry Commission's emphasis on treatment of all its recommendations in the report including the above mentioned recommendations as one single package, it was not found possible to accept and give effect to any one single recommendation. Because of the impracticability of implementation of Bhargava Inquiry Commission's main recommendations, the Government had no other alternative but to repeat 1975-76 prices for 1976-77 sugar season. 1977-78 Season:

88. For the abovesaid season there are two orders:

(1) Price Determination Order No. GSR 767(E)/Ess. Com/Sugar, dated December 22, 1977.

(2) Price Determination Order No. GSR 355(E)/Ess. Com/Sugar, dated March 1, 1978.

At the beginning of season the Government repeated the prices for 1976-77 season on December 22, 1977 which was an interim measure only. Many factors such as estimates of quantity of sugar-cane crushable by sugar factories, anticipated recovery and duration, estimates of sugar production had to be called for from the factories for assessing likely working conditions that would prevail in 1977-78 season to enable determination of the levy sugar prices. This was likely to take quite some time. Since the old price had been continuing for long time, with the available records the Government estimated all India average ex-factory price and this was found to be Rs 18.03 more than the average all India levy sugar prices, as was announced on January 22, 1977. This increase was uniformly added to prices of all the zones earlier notified on December 22, 1977 and the new prices that were thus arrived at, were notified on March 1, 1978. Final levy sugar price was to be determined after crushing was over. But, by then, decision was taken to decontrol the sugar, which became effective from August 16, 1978 and levy sugar price was no longer needed. 1978-79 Season:

Price Determination Order No. GSR 699(E)/Ess. Com/Sugar, dated December 17, 1979.

89. All controls on production, distribution, movement and prices of sugar were removed on August 16, 1978 and the Government reintroduced the policy of partial control w.e.f. December 17, 1979. Bulk of the production of 1978-79 season was sold when there was no control on sugar i.e. the sugar mills were free to sell the sugar at the best price available in the market. With the introduction of partial control, only 65 per cent of the small quantities that remained unsold on December 17, 1979 were declared as 'levy sugar'. The Government had information that the sugar factories had paid only the minimum cane price notified during the 1978-79 season. The levy sugar prices were determined as per the provision of Section 3(3-C) of the Act viz., taking into account the factors (a) to (d) mentioned therein. The final levy sugar prices were determined after adjusting the excess of free sale realisation over the cost of production assessed, so as to ensure that the industry got a reasonable return on the entire production of sugar.

90. In the case of Eastern Uttar Pradesh the following requires to be mentioned.

91. The Government worked out the levy price assuming recovery and duration but the actual working results were lower than the assumptions made by the Government. This was because the Government assumed a certain degree of efficiency. In East U.P. Zone, it appears that the factories have not been efficient. Certainly, the Government cannot be expected to reward inefficiency for a higher price. This zone is a high cost zone. The machinery in the factories is old with poor working. The Government wanted to provide a reasonable return of Rs 12.80, the said zone could not earn. On the contrary, it could earn a return of only Rs 7.70. Therefore, to contend that the Government had fixed the price without regard to the reasonable return is not correct.

92. In the State of Maharashtra initially an ex-field advance is fixed uniformly for all cooperative sugar factories. At the end of the season, the actual working results are assessed and the entire profits are passed on to the cane growers as additional cane prices. Thus, the farmers get profits in the form of additional cane prices and this fluctuates widely from factory to factory. In view of this it can be categorically stated that actual cane prices are not available in Maharashtra, particularly for cooperative (sic) as it is of a profit sharing nature (excess over the initial ex-field advance).

93. Therefore, it is not correct on the part of the appellants to contend that notional prices were taken into consideration without regard to the actualities. Even otherwise, as stated above, if regard has been had to this factor that would be sufficient in law. We may add that this Court cannot determine the price by redoing that exercise.

94. With this, we move to the next contention. Mr Nariman, learned counsel urges that whatever might have been the position when Panipat case was decided, namely before October 1, 1974, after that date regard must be had to Clause 5-A of the Sugar-cane Control Order, 1966. After incorporation of the said clause the Government could not, in law, proceed to determine the levy price by mopping up 100 per cent of the excess realisation on Sale of free sugar. In the notifications issued for the sugar years 1974-75 to 1979-80 the Government had admitted mopping up 100 per cent excess realisation on sale of free sugar. This clearly overlooks the fact that the producer had become statutorily entitled to 50 per cent of such excess realisation from October 1, 1974.

95. The changed methodology adopted from July 11, 1975 was directly contrary to the recommendation of the Sugar Industry Inquiry Commission, namely, Bhargava Commission. The ruling in Panipat case¹ will not militate against this contention because that was prior to October 1, 1974. Again, Sitaram case² cannot affect this submission since there is no mention or reference to the impact of Clause 5-A.

96. The recommendations of the Bhargava Commission regarding sharing of excess realisation from sale of free sugar between factories and the growers on 50:50 basis was adopted by the Government, as stated in Parliament on August 26, 1974. This was also given effect to, as is clear from the addition of Clause 5-A of Sugar-cane Control Order on September 25, 1974. Under the aforesaid clause, excess realisations from sale of free sugar were to be shared on 50:50 basis between the producers and the growers. Further, Bhargava Commission, in its report, has specifically stated that it will be unreasonable to deny the industry a share in its excess realisation. Having regard to Schedule 11 under Clause 5-A the L Factor is the unit cost based on minimum cane price and which expressly includes the element of return.

97. Even assuming that the change in the methodology after July 11, 1975 was permissible and could be justified, it had to be such as would take into account the change in law by reason of the introduction of Clause 5-A in the Sugar-cane (Control) Order, 1966 issued under the Essential Commodities Act, 1955 and the statutory provision that the industry was entitled to retain 50 per cent of the excess realisation on sale of free sugar, 'which will give them a reasonable margin for meeting their requirements' viz., industry's commitments under bonus, gratuity, interest on borrowed capital and debentures, dividend on preference shares, income tax and requirements for rehabilitation, modernisation and expansion. Taking this into account, even if the changed methodology was permissible, only 50 per cent of the excess realisation on sale of free sugar can be mopped up.

98. The Government, in opposition to this, would state as under:

"Clause 5-A of the Sugar-cane (Control) Order, 1966 provides for payment of additional cane price only in case of surplus, arising, if any, from sales of both levy and free sugar after adjustment of the unit cost of production ('L' Factor in the formula specified in the Second Schedule of the order). The surplus may or may not arise in the case of all sugar factories or during all seasons. It is by no means a mandatory payment like minimum bonus. It is also wrong to suppose that only surplus from realisations of free sale sugar are to be taken into account under Clause 5-A. The 'A' Factor figuring in the formula refers to the sales value of the entire production and not merely that of the free sale quantities of production.

The recommendations of the Bhargava Commission was made specifically with a view to ensure that a part of the surplus is passed on to the cane growers. The sugar factories would in any case retain the entire surplus for a statutory provision like Clause 5-A. The determination of surplus is done after taking into account the sales value of entire sugar production and not confined to free sale production as per the formula in the Second Schedule to the Sugar-cane (Control) Order. It is not

correct to say that bonus, gratuity, interest on borrowed capital and debentures were not taken into account in the determination of levy sugar price for 1974-75. The cost schedules recommended by the Tariff Commission Report, 1973 included, among others, bonus, gratuity, interest on borrowed capital and debentures and dividend on preference shares and depreciation. The determination of the levy sugar prices by the Government was based on the cost schedules recommended by the Tariff Commission with suitable adjustment of the above mentioned elements."

99. In order to appreciate these contentions it is necessary to refer to the following reports:

1. Tariff Commission Report, 1973
2. Bhargava Commission Inquiry Report, 1974
3. The interim Report of the Bureau of Industrial Costs and Prices (June 1976)

100. The relevant portions are extracted hereunder:

Tariff Commission's Report, 1973:

"Para 3.4.10 : If the industry were fully controlled, it would obviously be difficult for it to bear any part of the export loss as its profit margin would be pegged at a certain level. In the case of sugar, however, since there is at present a partial decontrol and the industry is allowed to sell a part of its production the present figure for free sale is 30 per cent' it should be possible for the industry to recoup at least a part of its export losses from the proceeds of free market sales.

Cost Schedules for the future: The cost statement given in the previous paragraph is based on the average duration and recovery of each zone for the five years ending 1971-72. Given below is the cost schedule showing the cost under (i) constants, (ii) variables,

(iii) semi-variables and (iv) fixed charges.

This is presented with the object of enabling Government to determine the quantum of conversion charges including return for each future year for any (a) duration and (b) recovery.

Para 9.26.2: We have not assessed the profits made by the industry from its free market sales. When the price paid for cane is something different from the minimum price which has gone into the price structure of sugar there is considerable merit in the principle of flexibility envisaged in the system of partial de-control. We, however, want to stress the fact that the return of Rs 12.60 per quintal provided by us refers to sugar as a whole and not to only levy sugar as such or to levy sugar."

101. In dealing with extra realisation from free market sales Bhargava Commission observed as follows:

"2.14 The primary objective of the scheme is to provide incentives to cane growers to enter into agreements with factories for supply of cane and to fulfil their contracts. The scheme envisages various incentives including provision of credit facilities and supply of inputs by factories and cane growers' societies. However, the most important incentive is payment of an additional price to those cane growers who enter into agreement for supply of cane and fulfil them. It is proposed to find money for payment of the additional price out of extra sales realisations of sugar factories. In years of de-control or partial control ordinarily factories obtain prices for their sugar over and above the prices to which they are entitled according to the Tariff Commission Schedules. The scheme envisages sharing these extra sales realisations between factory and cane growers."

102. In paragraph 2.15 the details of the scheme were given as follows:

"SUGARCANE SUPPLIES STABILISATION SCHEME 2.15 The details of the scheme are as follows:

(1) A statutory minimum price for sugar-cane related to a basic recovery of 8.6 per cent with a premium for every 0.1 per cent increase in recovery on proportionality basis will be fixed by the Government of India. (2) The minimum price payable by individual factories will be fixed on the basis of the recovery of the factory for the normal crushing period of the previous season. (3) The statutory minimum price as fixed above shall be paid to all the cane growers subject to clauses (18) and (19) of this scheme.

(4) The factories shall share their extra sales realisation from sugar with the cane growers who execute agreements for supply of cane and fulfil contracts. (5) The extra sales realisations shall be calculated according to the following formula:

$S=R-L$ Where S stands for the amount shareable; R stands for the sales realisations ex-factory excluding excise duty paid or payable to the factory by the purpose; and L stands for sugar price as calculated on the basis of the statutory minimum cane price and according to the Tariff Commission schedules in force at the time. (In periods of control and partial control, L stands for the final levy price of sugar fixed by Government.) (6) The sales realisations will be in respect of the sugar produced during the season.

(7) The sales realisations will comprise- (1) the actual amount realised up to and inclusive of September 30; and

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

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

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

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

103. On the basis of the above recommendation Clause 5-A of the Sugar (Control) Order was promulgated. The relevant part of Clause 5-A reads as follows:

" 5-A. Additional Price for Sugar-cane purchased on order after October 1, 1974:

(1) Where a producer of sugar or his agent purchases sugar-cane, from a sugar-cane grower during each sugar year, he shall, in addition to the minimum sugar-cane price fixed under Clause 3, pay to the sugar-cane grower an additional price, if found due in accordance with the provisions of the Second Schedule annexed to this Order.

(2) The Central Government or the State Government, as the case may be, may authorise any person or authority, as it thinks fit, for the purpose of determining the additional price payable by a producer of sugar under sub-clause (1) and the person or authority, as the case may be, who determines the additional price, shall intimate the same in writing to the producer of sugar and the sugarcane grower connected with the supply of sugar-cane to such producer of sugar. (3)(a) Any producer of sugar or sugar-cane grower, who is aggrieved by any decision of the person or authority, referred to in sub-

clause (2), may, within thirty days from the date of communication of such decision under that sub-clause appeal to the Central Government or the State Government, as the case may be:

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

(b) The Central Government or the State Government, as the case may be, may after giving an opportunity to the appellant to represent his case and after making such further inquiry as may be necessary, pass such order as it thinks fit.

(c) The decision of the person or authority referred to in subclause (2) where no appeal is filed, and of the Central Government or State Government, as the case may be, where an appeal is filed, shall be final.

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

time, direct. (5) No additional price determined under sub-clause (2) shall become payable by a producer of sugar who pays a price higher than the minimum sugar-cane price fixed under Clause 3 to the sugarcane grower:

Provided that the price so paid shall in no case be less than the total price comprising the minimum sugar-cane price fixed under Clause 3 and the additional price determined under sub-clause (2).

Second Schedule:

The amount to be paid on account of additional price (per quintal of sugar-cane) under Clause 5-A by a producer of sugar shall be computed in accordance with the following formula, namely:

$$R-I+2A+B X= \text{-----}$$

RC Explanation in this formula:

1. 'X' is the additional price in rupees per quintal of sugarcane payable by the producer of sugar to the sugar-cane grower.
2. 'R' is the amount in rupees of sugar produced during the sugar year excluding excise duty paid or payable.
3. 'L' is the amount in rupees of sugar required to be sold as levy calculated on the basis of the levy price notified by Government as in force on 30th day of September of each sugar year for sugar produced during that year, excluding excise duty paid or payable.
4. 'A' is the amount found payable for the previous year but not actually paid [vide sub- clause (9)].
5. 'B' is the excess or shortfall in realisation from actual sales of the unsold stocks of sugar produced during the sugar year, as OD 30th day of September [vide Item 7(ii) below] which is carried forward and adjusted in the sale realisations of the following year.
6. 'C' is the quantity in quintals of sugar-cane purchased by the producer of sugar during the sugar year.
7. The amounts 'R' and 'L' referred to in Items 2 and 3 shall be computed as under-

(1) the actual amount realised during the sugar year; and

(ii) the estimate value of the unsold stocks of sugar held at the end of September 30, calculated in regard to free sugar stocks at the average rate of sales made during the fortnight 16th to 30th September and at the notified levy prices 'Prices as applicable to levy stocks as on 30th September'.

Explanation.- In this Schedule 'Sugar' means any form of sugar containing more than ninety per cent sucrose."

104. It is true that Clause 5-A deals with additional price payable to the sugar-cane grower. However, if the recommendations made by the Bhargava Commission and the method of computation are taken into consideration it will be clear that the producer of sugar will be entitled to retain an amount equivalent to the amount paid to the cane grower under Clause 5-A. That amount cannot be taken into consideration for determination of the price of levy sugar. This will be evident from paragraphs 2.17, 2.20, 2.21 and 2.39 of Chapter 11 of Bhargava Commission Report. They are extracted below:

"2.17. Statutory minimum prices for individual factories are fixed by the Government of India in accordance with the quality formula' We have incorporated the formula in the Scheme to ensure that the incentive to cane growers for producing cane of better quality is retained. In discussing this formula earlier (in Part

11), we have made certain recommendations which, in our opinion, will improve the effectiveness and usefulness of the formula.

The Scheme provides for a basic recovery of 8.5 per cent and the payment of premium on proportionality basis. It also provides for the fixation of the minimum prices payable by individual factories on the basis of the average of the recovery of the previous normal crushing period of the factory. The reasons for using the average recovery of the normal crushing period in preference to the average recovery of the optimum period for this purpose have already been stated.

2.20. The provision of clause (6) about the sale realisations being in respect of the sugar produced during the season is intended to ensure, as far as possible, that cane growers who supplied the cane from which the sugar was produced should benefit from the prices obtained for the sugar. The manner in which the sales realisations should be calculated, presented a problem. It is necessary that the additional price which may be payable to cane growers out of extra realisation should be announced in October so that it may influence sowings of cane and execution of agreements for supply of cane. Keeping this in view, it is necessary to calculate early in October the value of the sugar produced during the season. About 70 per cent of sugar produced in a season is ordinarily sold out by the end of September. For such stocks, the figures of actual realisations would be available by the end of X X September.

2.21. As regards the unsold stocks, the value thereof could be estimated in more than one way on the basis of the market prices prevailing at the end of September, on the basis of the average of the sales of sugar up to the end of September, on the basis of the average of the sales made during the last fortnight of September, etc. The Scheme provides for an evaluation of the unsold stock on the last

basis mentioned. The problem, however, remained of accounting for the difference between the estimated price and the actual subsequent realisations from the stocks which remain unsold on September 30. This difficulty has been overcome by the provisions for the differences being carried forward to the next year for adjustment in the sugar sales realisations.

2.39. After considering all these facts we have decided that the extra realisations on the sale of sugar be divided between the growers and the industry in the ratio of 50:50. A provision of this effect has been made in clause (9) of the Scheme. It should be mentioned that after deducting the tax obligations to be borne by the industry, the actual accruals will be in the proportion of 70 to the cane growers and 30 to the industry. This share of cane growers approximates the share of the cost of cane in the cost of sugar."

105. For the regular production of sugar there must be regular supply of sugar-cane.

106. On this aspect of the matter, Justice E.S. Venkataramiah (as he then was) observed in Writ Petition No. 432 etc. filed in the High Court of Karnataka as follows:

"It is well known that the availability of sugar-cane for manufacturing sugar depends on several factors such as the probable price which the sugar-cane can fetch when it is ready for harvest, the price of other foodstuffs which can be grown on the land which has to be utilised for growing sugar-cane, the period occupied in raising the sugarcane crop and the uncertain climatic conditions. In order to maintain regular supply of sugar it is necessary to have regular supply of sugarcane. The supply of sugar-cane depends upon the total average brought under sugar-cane cultivation. The agriculturist should have the necessary incentive to grow sugar-cane instead of some other crop and that is provided by the Sugar-cane (Control) Order which authorises the Central Government to fix the minimum price which the producer of sugar should pay to the cane grower on a future date. This necessarily involves the determination of the minimum price payable under Clause 3 of the Sugar-cane (Control) Order at the commencement of the planting season. After the minimum price of sugar-cane is so fixed, at the commencement of the sugar year [as defined in Clause 5-A of the Sugar-cane (Control) Order], it is necessary for the Central Government to fix the price payable for levy sugar and also determine the quantity of sugar which a producer should supply to the Central Government or its nominee, to enable the producer to arrange his programme of production well in advance and also to pay extra price to the sugar-cane grower over and above the price fixed under Clause 3 of the Sugar-cane (Control) Order to attract supply of sufficient quantity of sugar-cane to his factory, which of course he would be able to adjust against the additional price payable under Clause 5-A after the close of the sugar year. After the sugar year is over, the authority which is empowered to determine the additional price would determine it in accordance with the formula found in the Second Schedule and payment of additional price would be made to the cane grower accordingly. At this stage the amount which the producer can retain out of the extra realisation made by him would also be known.

It is significant that the Bhargava Commission recommended that the factory owner should share the extra realisation with the cane grower. The expression 'to share' means 'to participate in'. It, therefore, follows that a sum equivalent to the amount paid by way of additional price would go to the benefit of the producer. If that is the true legal position, the method adopted by the Central Government in determining the price of levy sugar under the 1975 order would have to be treated as faulty. No part of the extra realisation can be taken into consideration while determining the price of levy sugar. It is no doubt true that in Panipat case' the Supreme Court having regard to the law as it stood then observed that it would be open to the Central Government to take into consideration the extra realisation of a producer by the sale of levy free sugar also while determining the price that has to be determined under Clause 3(3-C). I am of the view that the above view of the Supreme Court stands superseded by Clause 5-A of the Sugar-cane (Control) Order which was introduced subsequently. It is the duty of the Court to give effect to Clause 5-A of the Sugar-cane (Control) Order without being influenced by any observations made by the Supreme Court earlier when a similar clause was not in force. The case put forward on behalf of the Central Government that even after the promulgation of Clause 5-A it would be open to the Central Government to take into consideration the extra realisation for the purpose of determining the price of levy sugar under Clause 3(3-C), would be impracticable, because the determination of price under Clause 3(3-C) cannot be postponed to a date subsequent to the close of the sugar year. If that is allowed to be done, the producer of sugar would be compelled to carry on production of sugar without having an idea of the price that is likely to be determined by the Central Government under Clause 3(3-C)."

107. We are in agreement with the above observations since the approach to price determination is in the proper perspective. It may also be added that the ruling in Sitaram case³ is silent as to the impact of Clause 5-A of the Sugar-cane (Control) Order since what came up for decision in that case was the correctness of the zonal fixation of prices. Therefore, we uphold the contention of Mr Nariman that the changed methodology adopted from July 11, 1975 was directly contrary to the recommendations of Bhargava Commission which have come to be accepted by the Government. Accordingly, we hold that the Government could not, in law, proceed to a determination of the levy price by mopping up 100 per cent of the excess realisation of free sale sugar. This overlooks the fact that the producer had become statutorily entitled to 50 per cent of such excess realisation from October 1, 1974.

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

sugar year. Sugar price will have to be met only from the extra realisation made by the producer by the sale of sugar in free market which will naturally be more than the levy price.

109. In View of the above discussion, the impugned notifications except the one dated November 28, 1974 cannot be upheld. The reason why we leave out the notification dated November 28, 1974 is that the same came to be issued before the new pricing policy was introduced. We hereby direct the Union of India to amend the notifications taking into account the liability of the manufacturers under Clause 5-A of the Sugar-cane (Control) Order as regards cane price and refix the price of levy sugar having regard to the factors mentioned in Section 3(3-C) of the Act. The Government will have time to issue the amended notifications as directed above till December 31, 1993, 110 Though normally we would have quashed the notifications mere quashing of the notifications would lead to nebulous situation during the interregnum till the refixation of price we are obliged to give the above direction. In this connection we may usefully quote the following passage occurring at page 294 of Judicial Remedies in Public Law by Dive Lewis:

"The courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction. Quashing decisions may impose heavy administrative burdens on the administration, divert resources towards reopening decisions, and lead to increased and unbudgeted expenditure. Earlier cases took the robust line that the law had to be observed, and the decision invalidated whatever the administrative inconvenience caused. The courts nowadays recognise that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the courts' remedial discretion and may prove decisive."

111. We may also add that the interests of the appellants will have to be measured against the needs of good administration which include: the need for speedy finality in decision making, the public interest, the purpose of administrative process and the need to consider substance not form.

112. Pursuant to our interim orders bank guarantees have been furnished by the appellants. 50 per cent of the same could be encashed by the respondents. The other 50 per cent shall remain and the liabilities could be adjusted after the determination of price as directed above.

113. Accordingly, all the civil appeals, special leave petitions, writ petitions, transfer petitions, transferred cases, interlocutory applications and CMPs will stand as ordered.