

**OPINION ON IMPACT OF THE ESSENTIAL COMMODITIES (AMENDMENT & VALIDATION) ORDINANCE, 2009 AND CONSEQUENT AMENDMENT TO SUGARCANE (CONTROL) ORDER, 1966**

ISSUE: How does the Essential Commodities (Amendment and Validation) Ordinance, 2009 promulgated by the Union and the consequent amendment to Sugarcane (Control) Order 1966, impact the power of the States to fix SAP recognized by the Apex Court.

The opinion is set out under the following heads:

**RELEVANT LEGAL FUNDAMENTALS**

- The Concurrent List: In a situation of conflicting Union and State laws, the Union law will prevail and State law will become void
- Theory of “occupied field”

**SITUATION PRIOR TO THE RECENT AMENDMENTS**

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- Fields occupied by the union and state laws
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**SITUATION SUBSEQUENT TO RECENT AMENDMENTS**

- Amendment to the Essential Commodities act
- Amendment to the sugarcane (control) order, 1966
- Constitutional competence of union to give directions to state and non-justiciable nature of such directions

**SUMMARY OF OPINION**

## ISSUE

**How does the Essential Commodities (Amendment and Validation) Ordinance, 2009 promulgated by the Union and the consequent amendment to Sugarcane (Control) Order 1966, impact the power of the States to fix SAP recognized by the Apex Court.**

In order to determine answer to the above issue, the legislative situation prior to the amendments in question may briefly be examined, especially as declared by the Apex Court from time to time. Thereafter the changed scenario may be considered to gauge the impact of the amendment on the pre existing legislative situation.

Both the pre and post amendment legislative situations are examined with reference to the relevant judgments of the Apex court because the declarations of the Apex court are themselves law and any theorizing without factoring in those declarations may result in erroneous conclusions.

A few legal fundamentals that apply to the issue are set out first.

## RELEVANT LEGAL FUNDAMENTALS

**The Concurrent List: In a situation of conflicting Union and State laws, the Union law will prevail and State law will become void**

Both Parliament and the Legislature of any State may make laws in respect of matters in the 'Concurrent List.' (*Vide Article 246 (3) of the Constitution*)

However, where there is repugnancy in laws made by Union and the States, the Union law shall prevail. Further, the State law shall be void to the extent of such repugnancy. (*Vide Article 254 of the Constitution*)

### **Theory of "occupied field"**

To put things simply, so long as a Union law did not *occupy* a certain field, any State law relating to that particular field would be valid and operative. If the Union makes law relating to the same subject, the State law may still survive provided it is not repugnant to the Union law.

If on the other hand there is something in the State law that is in conflict with or is repugnant to the Union law, the State law *to the extent it is repugnant* will be void and inoperable. That portion that is not in conflict with the Union law will of course survive.

It is now a settled legal position that it is not enough that the Union has the competence to do something, it should actually do it or at least in some way evince an interest to do so. Then alone can it be said that the Union has *occupied the field*. Then alone can the repugnancy test be applied to determine if a State law is affected.

In the light of the above constitutional principles, it necessary to examine the following:

- What laws made by the Union and States existed prior to the amendments in respect of sugarcane,
- What was the field occupied by those laws,
- More specifically, was there any repugnancy between provisions of those Union and State laws,
- Were such issues adjudicated by the Apex Court,
- What law was laid down by the Apex Court in those adjudications,
- How has the current amendments impacted the position of the pre existing laws of the Union and the States,
- More specifically, is there anything in the State law that is repugnant to the Current Union law,
- What is the effect of the law laid down by the Apex Court in the changed scenario.

#### **SITUATION PRIOR TO THE RECENT AMENDMENTS**

Sugarcane is a matter covered by the Concurrent List. (*Tika Ramji v. The State of Uttar Pradesh: AIR 1956 SC 676*). Since sugarcane is a matter in the concurrent list, both the Union and the States may make law thereon.

#### **State Law**

The current law in the State of UP in respect of Sugarcane was enacted in the year 1953. It is the U.P. Sugarcane (Regulation and Supply) Act, 1953.

Admittedly it does not contain express provisions relating to price fixation.

#### **Union Law**

The current Union law that is relatable to Sugarcane was enacted by the Parliament in 1955. It is the Essential Commodities Act. Sugarcane is an essential commodity under the EC Act.

The Act empowers the Central Government to provide for regulating or prohibiting the production, supply and distribution of an essential commodity and trade and commerce therein for maintaining or increasing the supplies of any essential commodity or for securing their equitable distribution and availability at fair prices. Further, the CG may provide for controlling the 'price' at which essential commodity may be bought or sold. To be specific, this power lies in Sub-sections (2) and (3) of Section 3 of enactment.

In short, the Parliament, legislating in respect of a matter in the Concurrent List, left the CG with abundant powers to deal with all aspects of sugarcane (in fact any essential commodity) including power to determine its price.

We may also note that the power in respect of price is not confined to a minimum price, maximum price or remunerative price. As such any nature of price could be dealt with by the CG.

It is to be next examined if the CG did *actually exercise* those price fixing powers and occupy field or to what limited extent it occupied. This is necessary because as already indicated, constitutionally, a State law relating to a matter in the concurrent list would be inoperable if and only if the CG has actually reserved that territory of power for itself. It is not enough that the CG is competent to exercise that power; it must *actually exercise* that power which alone will render the State law in respect of that power inoperable.

### **Fields Occupied by the Union and State Laws**

#### *UNION PRICE: Statutory Minimum Price*

On 16.7.1966, the Central Government notified the Sugarcane (Control) Order, 1966 in exercise of its powers under Section 3 (1) of the EC Act. Vide Clause 3 of the Order, the CG reserved the power to fix *Minimum* price of sugarcane.

Following the above Order, the CG started an annual exercise of fixing SMP (Statutory Minimum Price) for cane.

#### *STATE PRICE: State Advised Price*

To begin with, the State of U.P. (and some other states) used to broker a negotiated price between farmers and mills. The purpose was to ensure a reasonably fair and remunerative price to the farmers for their produce. This price came to be called SAP (State Advised Price).

This exercise of the States neither enjoyed any legislative support nor was of an enforceable nature at the time it was conceived. *Strictus sensu*, the U.P. Sugarcane (Regulation and Supply) Act, 1953 does not contain any provision that enables the States to fix price for cane.

However, the same came to have judicial recognition of the Apex court in *U.P. Co-operative Cane Unions Federations Case, (AIR 2004 SC 3697)* which held that power of the State to fix such price is traceable to the word 'regulate' in Section 16 of the above referred State enactment. Since the declaration was by the Apex Court, it was law laid down and therefore it was deemed that the State of U.P. all along had statutory authority to fix SAP.

#### *Segregation of statutory fields of cane pricing*

It is now necessary to examine as to on what constitutional foundations the Apex Court concluded that both the Union and the States may fix cane price.

This is necessary to study the pre and post amendment legislative scenarios in respect of cane pricing.

The Apex court examined the question with reference to Article 254 of the Constitution. It examined the various provisions of Union and State laws that dealt with sugarcane pricing to examine competence of each of the governments to declare cane price and to see if there was any repugnancy as between cane pricing provisions of Union and State.

The gist of the Apex courts conclusions and declarations relating to the pricing field may be summarized as follows:

- *That the field of pricing is wide and can include Minimum Price, Higher price etc. which are distinguishable from each other,*
- *That a minimum price and a higher price is not repugnant to each other,*
- *That under the EC Act, the CG does have the necessary competence to deal with any aspect of price be it minimum price or higher price,*
- *That although the CG had competence to cover the field of higher price, it did not exercise that power vide a (Control) Order, but instead left the field open or vacant,*
- *That while the power to fix SMP reserved for itself by the Union was the power to fix a 'minimum price', the power of the State to fix SAP was the power to fix a 'higher price',*
- *That although both of them fixed cane price, they were dealing with different and distinct fields of pricing,*
- *That since the Union left the field of Higher price unoccupied and since the State was only exercising power in that unoccupied field, there was no conflict or repugnancy between provisions relating to Union and State provisions to fix cane price.*

In short, the conclusion of the Apex court was that although the Union could completely occupy the field of cane pricing by fixing a Higher price or a fair price or a remunerative price, it occupied only a limited portion of the field, being the area of 'minimum price'. That left the rest of the field open. The court reasoned that so long as the Union left the remaining field open, States were at liberty to operate there. The Union law and the State law operated in different fields. There was no repugnancy. Both laws were valid and enforceable.

#### **SITUATION SUBSEQUENT TO RECENT AMENDMENTS**

There are two recent amendments. First one is to the EC Act itself and the Second one is to the Sugarcane (Control) Order, 1966.

The amendments effected in each one are separately examined and following that the impact of each amendment will be examined.

### **Amendment to the Essential Commodities Act**

The Essential Commodities (Amendment and Validation) Ordinance, 2009 introduced changes in the Essential Commodities Act, 1955. This was effected by amending Section 3 (3C) thereof which deals exclusively with Levy sugar.

It may be clearly understood that the State has no role to play in the determination of Levy sugar price. This subject has no connection with States power relating to fixation of sugarcane price. Hence, State cannot have any locus to challenge the same.

### **Amendment to the Sugarcane (Control) Order, 1966**

Before examining the changes introduced, it would be useful to recall the reasons that the Apex Court Constitutional bench gave to uphold the power of States to fix SAP.

The Apex Court had said that the States power to fix SAP subsists because:

*"...the field for a price higher than the minimum price is clearly left open in the 1966 Order made by the Central Government" and*

*"Under Sub-section (1) of Clause 3 of the 1966 Order, the Central Government can only fix a minimum price of sugarcane."*

*"under the 1966 Order the Central Government only fixes the minimum price and it is always open to the State Government to fix a higher price."*

Therefore, had it not been for this situation, the States power would have been hit by constitutional invalidity.

That being what the Constitutional bench declared, it only remains to see if the situation has changed, if the CG has now occupied the field it had left open in the 1966 Order, if the CG can now fix a price that is not just a minimum price. If the answers to the above are in the affirmative, by virtue of those same declarations of the Constitutional bench, the power of the States would stand abated.

In its essence, the amendment to the 1966 Order effected the following:

- Replaced the words "minimum price", wherever they occur, with the words "fair and remunerative price."
- Defined "fair and remunerative price of sugarcane" to mean the price fixed by the Central Government under clause 3, from time to time, for sugarcane.

- Added new factor for computation of Fair and Remunerative Price which was hitherto not there.
- Stipulated that while fixing the fair and remunerative price for cane, reasonable margins for the growers of sugarcane on account of risk and profits are also to be taken into account.

Effect of amendment as compared with the declarations of the Constitutional bench shall be that:

- the field for a price higher than the minimum price is no more left open in the 1966 Order, and
- Under Sub-section (1) of Clause 3 of the 1966 Order, the Central Government can now fix a price that is HIGHER than a minimum price, being fair and remunerative price. This price is definitely a 'higher price' on account of the fresh obligation placed on the executive to take into account reasonable margins for the growers of sugarcane on account of risk and profits.

At any rate, it is clear that the Union has not directly restrained the State from fixing price for cane. It has merely occupied the field which it may legitimately legislate on. Whatever field that may remain thereafter would still be available to the State.

### **Constitutional competence of union to give directions to state and non-justiciable nature of such directions**

The amendment to sugarcane (Control) Order also introduced a fresh clause as follows:

*"3B. Price of sugarcane fixed above the fair and remunerative price.*

*If any authority or State Government fixes any price above the fair and remunerative price fixed by the Central Government under clause 3, such authority or State Government, shall pay the amount, which it fixes above the fair and remunerative price as fixed by the Central Government, to the grower of sugarcane or to the sugarcane growers' cooperative society, as the case may be."*

In so far as the competence of the Union executive to give directions to States is concerned, the same is left in no doubt by Article 256 and 257, relevant portions of which are extracted hereunder to illustrate the point:

**Article 256**  
***Obligation of States and the Union***

The executive power of every State shall be so exercised as to ensure compliance with the laws made by the Parliament and any existing laws which apply in that State, and the executive power the Union shall extend to the giving of such directions to a State as may, appear to the Government of India to be necessary for that purpose.

**Article 257**  
**Control of the**  
**Union over**  
**States in**  
**certain cases**

1. The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the *executive power of the Union*, and the executive power of the Union *shall extend to the giving of such directions to a State* as may appear to the Government of India to be necessary for that purpose.
2. xxx
3. xxx
4. xxx

Considering the above constitutional provisions, there is no doubt that it is well within the constitutional competence of the Union Executive to give directions to a State for, inter alia, the following purposes:

- Ensuring compliance with the *laws made by the Parliament*
- To ensure that the executive power of State shall not impede or prejudice the exercise of *executive power of the Union*.

**Conclusion:** The short point therefore is that the Union government may very well give directions in whatever nature it deems fit where it is a matter relating either to the legislative or executive domain of the Union. In both the cases, it is not possible to maintain a challenge before the courts.

**SUMMARY OF OPINION**

- The very constitutional principles that the Apex court applied in its Judgment in *U.P. Co-operative Cane Unions Federations Case* to arrive at the conclusion that States have power to fix SAP, now, in the changed scenario will operate against the States powers,
- The price for cane fixed by the CG is no more SMP and is in the nature of a price Higher than a minimum price, i.e., F&RP. Thus the field for fixing higher price is now firmly occupied by the CG. Since the CG has occupied the field for higher price, the competence of the State to fix *higher* price is now abated being hit by the constitutional interdiction contained in Article 254 as discussed in the beginning of this note,
- The act of the Union in occupying a field available to it and is recognized as such even by the Constitutional bench of the Apex Court can at no stretch of imagination be considered as an invasive act into the territory of the States legislative domain (more so where the matter relates to the Concurrent list).



- The Union does not restrict the State from exercising available powers in terms of the Concurrent list. The constitution permits the Union to occupy a territory covered by the State in so far as Concurrent List is concerned. It has done so. This does not mean that it has usurped any of the powers of the State or has restrained it in any way.
- The Union Government may very well give directions in whatever nature it deems fit where it is a matter relating either to the legislative or executive domain of the Union. Courts cannot entertain any challenge of those directions.

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