



GAHC010120782012

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1763/2012

M/S ISHWAR FOOD PRODUCTS PRIVATE LIMITED
A COMPANY INCORPORATED UNDER THE COMPANIES ACT
1956 AND HAVING ITS REGISTERED OFFICE AT TINGRAI HOOGRIJAN
ROAD
PATIA PATHAR GAON
P.O.- TINSUKIA - 786125 ASSAM.

VERSUS

THE STATE OF ASSAM and 5 ORS
REP. BY PRINCIPAL SECY. TO THE GOVT. OF ASSAM
AGRICULTURAL DEPARTMENT
DISPUR
GHY.

2:THE CHIEF EXECUTIVE OFFICER
ASSAM STATE AGRICULTURAL MARKETING BOARD
RAM KRISHNA MISSION ROAD
ULUBARI
GHY- 7.

3:THE CHAIRMAN
TINSUKIA DIST. REGULATED MARKET TINSUKIA.

4:THE SECRETARY
TINSUKIA DIST. REGULATED MARKET TINSUKIA.

5:ASSAM STATE AGRICULTURAL MARKETING BOARD
A BOARD CONSTITUTED UNDER THE ASSAM AGRICULTURAL PRODUCE
MARKET ACT
1972 REPRESENTED BY ITS CHAIRMAN



RAM KRISHNA MISSION ROAD
ULUBARI
GHY-7

6:THE SECY. TO THE GOVT. OF ASSAM
AGRICULTURAL DEPARTMENT
DISPUR
GHY.

Advocate for : MR.D SENAPATI
Advocate for : appearing for THE STATE OF ASSAM and 5 ORS

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

Date : 30-03-2021

JUDGMENT & ORDER (ORAL)

Heard Mr. D Senapati, learned counsel for the petitioner and Mr. NJ Gogoi, learned counsel for the respondent Nos. 3, 4, 5 and 6 being the authorities in the Assam State Agricultural Marketing Board. By the earlier order dated 09.04.2012, the respondent Nos. 1 and 2 being the authorities in the State of Assam in the Agriculture Department had already stood deleted.

2. The petitioner, amongst others, is involved in the activity of transporting agricultural produces as defined in the Assam Agricultural Produce Market Act, 1972 (referred as the Act of 1972). In course of its activities, the petitioner purchased the agricultural produces from several other States namely West Bengal, Bihar, Uttar Pradesh, Delhi, Rajasthan etc and at the time of purchase of the agricultural produces, the petitioner claims to be paying the market cess to the market committees of the respective place from where the agricultural produces are purchased. Thereafter, the agricultural produces are transported into the State of Assam either by road or by rail and for the purpose, they are also insured by the petitioner.

3. Section 2(xviii) of the Act of 1972 defines 'market committee' to mean a committee established u/s 7 of the Act of 1972 and a 'market area' to be any such area declared to be market area u/s 5 thereof. Section 5 of the Act of 1972 provides that upon the expiry of the period specified in the notification issued u/s 4 of the Act of 1972 and after considering such objections and suggestions as may be received before such expiry and after holding such enquiry as may be deemed necessary by

the State Government, by a notification in the official Gazette, the area specified in the notification u/s 4 or any portion thereof be declared to be a market area for the purpose of the Act of 1972. Section 5(1) is extracted below:-

“5(1) After the expiry of the period specified in the notification issued under section 4 and after considering such objections and suggestions as may be received before such expiry and after holding such enquiry as may be necessary the State Government may, by notification in the official Gazette, declare the area specified in the notification under section 4 or any portion thereof to be a market area for the purpose of this Act in respect of all agricultural produce specified in the said notification. A copy of the notification under this section shall also be published in the area concerned in the manner prescribed.”

4. Section 7 of the Act of 1972 provides that the State Government shall establish a market committee for every area declared to be a market area under sub-section (1) of Section 5 and it shall be the duty of the market committee to enforce the provisions of the Act and the rules and bye-laws framed thereunder in such market area. Section 7(1) of the Act of 1972 is extracted below:-

“7(1) The State Government shall establish a Market Committee for every area declared to be a market area under sub-section (1) of Section 5. It shall be the duty of the Market Committee to enforce the provisions of the Act and the rules and bye-laws framed thereunder in such market area.”

5. Section 21 of the Act of 1972 inter-alia provides that every market committee shall levy and collect a cess on the agricultural produces bought or sold in the market area at a rate not exceeding two rupees for every one hundred rupees of the aggregate amount for which a specified agricultural produce is bought or sold whether for cash or for deferred payment or other valuables considerations.

Explanation 1 to Section 21 of the Act of 1972 provides that for the purpose of section 21 all specified agricultural produces shall unless the contrary is proved be deemed to be bought or sold in the notified market area if such produce is taken out or proposed to be taken out of the said area, or the agreement of sale or purchase thereof in respect of such produce is entered into the said area, or in pursuance of such sale or purchase or agreement of sale or purchase such produce is delivered in the said area to the purchaser or to some other person on behalf of the purchaser of the specified agricultural produce concerned. Section 21(1), Explanation 1, 1(i), 1(ii) and 1(iii) are extracted below:-

“21(1) Every Market Committee shall levy and collect a cess on the agricultural produces bought or sold in the market area at a rate not exceeding two rupees for every one hundred rupees of the aggregate amount for which a specified agricultural produce is bought or sold whether for cash or for deferred payment or other valuables considerations.”

Explanation-1. For the purpose of this section all Specified Agricultural Produce shall unless the contrary is proved be deemed to be bought or sold in notified market area if –

- (i) *Such produce is taken out or proposed to taken out of the said area, or*
- (ii) *the agreement of sale or purchase thereof in respect of such produce is entered into the said area; or*
- (iii) *in pursuance of sale or purchase or the agreement of sale or purchase such produce is delivered in the said area to the purchaser or to some other person on behalf of the purchaser.”*

6. The vires of the Act of 1972 (as amended) was assailed by the present petitioner and other similarly situated persons resulting in WP(C) No.5491/2001 and other writ petitions. WP(C) No.5491/2001 and the other related writ petitions were given a final consideration by the judgment dated 12.09.2008, which is reported as Assam Roller Flour Mills Association –vs- State of Assam and Others, reported in (2009) 1 GLR 1. In paragraphs 94, 95, 96 and 97, it was held as under:-

“94. The realization of the cess, however, by all means would have to be in scrupulous observance of the necessary preconditions embodied in section 21 of the Act and rules 21, 22 and 23 of the Rules as discussed hereinabove.

The legal fiction engrafted in section 21 would apply only in absence of any direct evidence of sale to the contrary. The levy and collection of cess on the specified agricultural produce would ensue only on the sale or purchase thereof in the market area as comprehended therein as well as at the rate specified. The fictional factors would hold the sway only in absence of any direct evidence of sale or purchase repelling the same. In other words, the legal fiction would operate if the trader/dealer concerned fails to establish against sale or purchase of the specified agricultural produce in the concerned notified market area. This is so, be the collector of the cess is the concerned Market Committee or the Board on its behalf. In the latter eventuality, the additional prerequisites as prescribed by section 21(2) namely necessity of such realization and approval of the State Government would have to be essentially complied with.

95. The petitioners allegations of forceful collection of cess at the check gates by the Board through its Marketing Inspectors using the seal of different committees irrespective of the ultimate destinations of the goods and in contravention of the preconditions mandates by section 21(2), if true, the realization would per se be illegal, unauthorized, null and void. The sample documents produced by the petitioners to corroborate their stand that the goods intercepted at the check gates were on transit on completion of their sale outside the State of Assam though prima facie probative of the said plea in respect of transactions referred to therein those are inadequate to be acted upon to return a finding that such an inference is possible in all cases of such detentions and collections at the check gates. Whereas the statutorily stipulated imperatives for the application of the legal fiction are not in doubt, the documents produced by the petitioners, in absence of a probe into the individual facts cannot be accepted as an irrefutable guarantee of completion of sale or purchase of all consignments of specified agricultural produce halted, scrutinized and subjected to the impost under the Act. In exercise of powers under article 226 of the Constitution of India, this court is not equipped to embark on this exercise.

96. The view expressed by the Apex Court in agricultural Shalimar Chemical Works Ltd. (supra), in the contextual facts of that case on an interpretation of sections 19 and 20 of the Sale of Goods Act, 1930, was founded on a host of unimpeachable evidence of completion of the transaction of sale before the agricultural produce involved was weighed at Hyderabad. The facts unassailably demonstrated that the goods involved

were ascertainable and in a deliverable state at the time of their interception at Hyderabad. Testimony of such a type, if produced by a trader or dealer at the check gate or in any notified market area under the Act which rules out any further sale of the specified agricultural produce at that point of time would definitely disarm the Market Committee or the Board to levy or collect cess thereon as otherwise it would be violative of the essence the Board to levy or collect cess thereon as otherwise it would be violative of the essence of section 21 of the Act. In absence of such overwhelming evidence regarding all cases of unauthorized levy and collection of cess at the check gates, it is not possible for this court to adjudge the same as illegal and non est. However, if on an application of this precept on investigation of the individual facts, it transpires to be so then unreservedly the trader and the dealer concerned would be entitled to the consequential reliefs.

97. On the question of refund, therefore, we are of the considered view that having regard to multi faceted enquiries to be made, it would be appropriate to remit this issue to a body composed of constitute a Committee in terms of the above in consultation with the Board, Market Committees and the petitioner association. The petitioners/petitioner association would cooperate with the aforementioned authority in this regard as and when notified. In the interest of workability of the Committee, the composition thereof, ought to be compact yet representative. The petitioners and other similarly situated traders/dealers, may, if so advised approach the Committee and stake their claims for refund by disclosing all material facts and documents in support thereof. If the same is done, the Committee would:- (1) notify the concerned authority of the Board, and the Market Committee(s) involved of the claim(s) ;

(2) scrutinize the claims chronologically in order of the dates registration thereof on the basis of the records/documents produced by the parties and determine the validity of the levy at the check gate(s) and otherwise strictly in accordance with the relevant provisions of the Act as interpreted by this adjudication on individual basis, transaction wise;

(3) examine as to whether the burden of the levy has been passed on to the ultimate consumer ;

(4) decide by recording reason(s) as to whether the trader/dealers concerned are entitled to any refund ; and (5) if so, recommended the payment quantified to be refunded ;

As is obvious from hereinabove, the Committee would administer the exercise as ordered in terms of the determinations made in this decision after affording all reasonable opportunities of hearing to the parties. The decision taken, would be communicated to them in writing as well. In case of an order of refund, the Board or the Market Committee concerned would forthwith arrange for the disbursements in accordance with the Rules."

7. In paragraph 94 of the judgment, it was held that the legal fiction engrafted in section 21 of the Act of 1972 would apply only in absence of any direct evidence of sale to the contrary and the levy and collection of cess on the specified agricultural produces would ensue only on the sale or purchase thereof in the market area as comprehended therein at the rate specified. Further, the fictional factors would hold the sway only in absence of any direct evidence of sale or purchase repelling the same. In other words, the legal fiction would operate if the trader/dealer concerned fails to establish against sale or purchase of the specified agricultural produce in the concerned notified

market area.

8. In paragraph 96 of the judgment, it was provided that if any such document is produced by a trader or a dealer at the check gate or in any notified market area, under the Act which rules out any further sale of the specified agricultural produce at that point of time would definitely itself arm the market committee or the Board to levy or collect cess thereon as it would otherwise violate the essence of the Section 21 of the Act of 1972. Provisions of paragraph 96 is clear to the extent that any document being produced by the trader or the dealer that the sale or purchase of the specified agricultural produce had taken place prior to the specified agricultural produce passing through the check gate of the concerned market area, it would have to be accepted that such sale or purchase had not taken place within the specified market area.

9. By providing so, by the judgment dated 12.09.2008 in Assam Roller Flour Mills Association (supra), the vires of the Act of 1972 which was under challenge was rejected by the Division Bench. But at the same time, the legal fiction so created as indicated above was accepted and the procedure to be made applicable for its implementation was also provided.

10. The petitioners and other similarly situated persons, who had instituted WP(C) No.5491/2001 assailing the vires of the Act of 1972 being aggrieved had approached the Supreme Court against the judgment of the Division Bench as indicated above resulting in SLP(Civil)(CC) No.3062-3070 of 2010. It is stated that the proceeding before the Supreme Court is still pending. Against the provision of the judgment of the Division Bench of 12.09.2008 providing for the legal fiction u/s 21 of the Act of 1972 and the procedure provided therein for implementing the legal fiction so created, the respondent Assam State Agricultural Marketing Board had also filed an appeal before the Supreme Court, which is numbered as SLP (Civil) (CC) No.16725/2012. It is stated that the appeal instituted by the respondent Assam State Agricultural Marketing Board is also presently pending before the Supreme Court. In the aforesaid circumstance, the respondent Assam State Agricultural Marketing Board in respect of some of the cases had levied and collected a cess from the traders or dealers, who had bought in the specified agricultural produces into certain market areas under the Board.

11. In such situation, a Contempt Case No.401/2008 was also registered which resulted in the order dated 23.10.2009, wherein the authorities under the Assam State Agricultural Marketing Board were found to have committed a contempt of Court. Against the said judgment in the contempt proceeding, the respondents in the Assam State Agricultural Marketing Board had instituted an appeal being SLP(Civil)(CC) No.2765/2010, wherein by the order dated 30.03.2010 the Supreme Court had



stayed the order passed in the contempt proceeding. It is stated that the appeal against the order in the contempt case is also presently pending before the Supreme Court. In the Civil Appeal proceeding before the Supreme Court in SLP(Civil)CC 2765/2010, the order dated 30.03.2010 was passed, which is extracted below:-

“Permission to file the SLP is granted.

Issue notice on the application for condonation of delay as well as on the special leave petitions.

Assam State Agricultural Marketing Board is permitted to collect tax in accordance with the Judgment passed by the Division Bench of High Court dated 12.9.2008, uninfluenced by the Order passed in the contempt proceedings dated 23.10.2009.

Post along with SLP(C) No.11317 of 2009.”

12. A reading of the order dated 30.03.2010 would go to show that the respondent Assam State Agricultural Marketing Board is permitted by the Supreme Court to collect the cess in accordance with the judgment dated 12.09.2008 in WP(C) No.5491/2001 and other writ petitions and such collection of cess be done being uninfluenced by any such order dated 23.10.2009 passed in the contempt proceeding. The implication of the order dated 30.03.2010 of the Supreme Court as extracted above would be that the respondent Assam State Agricultural Marketing Board would be at liberty to levy and collect the cess as provided in paragraphs 94 and 97 of the judgment of the Division Bench dated 12.09.2008 in WP(C) No.5491/2001.

13. In this writ petition, the grievance raised by the petitioners is that in spite of being so provided in paragraphs 94 and 97 of the judgment dated 12.09.2008 in WP(C) No.5491/2001, the respondents in the Assam State Agricultural Marketing Board are levying and collecting cess from the petitioners even in respect of those specified agricultural produces which according to them were either sold or purchased at a destination outside the market area over which the cess is being levied and collected. In the circumstances, a declaration is sought for in the writ petition that all such levy and collection of cess for those specified agricultural produces sold or purchased outside the market area be declared to be illegal. For the purpose, the petitioners have also produced a chart indicating such purported illegal levy and collection of cess, which is annexed as Annexure-11 to the writ petition.

14. As the Supreme Court had clearly provided in the order dated 30.03.2010 that the respondent Assam State Agricultural Marketing Board would be at liberty to collect the cess in accordance with

the judgment dated 12.09.2008 in WP(C) No.5491/2001 and other writ petitions and as already indicated that in paragraph 94 of the said judgment it has been accepted that the legal fiction had been created by Section 21 of the Act of 1972 that in all such cases where the trader or the dealer fails to produce any relevant document, material etc to show that the sale or purchase of the specified agricultural produce had taken place outside the territorial jurisdiction of the concerned market area, it shall be deemed that such sale or purchase had not taken place within the market area and the procedure for such collection having also been provided in paragraph 97 thereof, we provide that in respect of all such levy and collection of cess by the respondent Assam State Agricultural Marketing Board, the onus is on the trader or dealer to produce any relevant document or material to show that the sale or purchase of the specified agricultural produce had taken place at a location outside the market area. If any such material or document is produced by the trader or dealer, the Assam State Agricultural Marketing Board shall not levy and collect any such cess in respect of such specified agricultural produce, subject to the provisions of explanation (iii) to Section 21 of the Act of 1972. As a corollary, on the other hand if the trader or dealer fails to produce any such acceptable and convincing document or material to show that the sale or purchase had taken place outside the market area, the Assam State Agricultural Marketing Board will be at liberty as provided in the order dated 30.03.2010 of the Supreme Court in SLP(Civil) CC No.2765/2010 to levy and collect the agricultural cess as may be admissible under the Act of 1972 (as amended) and the Rules framed thereunder.

15. In respect of the claims referred in Annexure-11 to the writ petition, the petitioners would be at liberty to produce any such document or material before the Chief Executive Officer of the Assam State Agricultural Marketing Board, which may indicate that the sale or purchase of the corresponding specified agricultural produce was either sold or purchased at a location outside the concerned market area, again subject to the Explanation 1(iii) to Section 21 of the Act of 1972. If the petitioners are able to produce any admissible and acceptable material, the Chief Executive Officer shall pass a reasoned order thereon. On the other hand, if the petitioners fail to produce any such document or material, the legal fiction declared by the Division Bench in paragraph 94 of the judgment dated 12.09.2008 in WP(C) No.5491/2001 and other writ petitions shall prevail and the concerned trader or dealer would be liable to be levied and all the cess collected as may be admissible under the Act of 1972 and the Rules framed thereunder.

16. The requirement of passing a reasoned order either rejecting or accepting the claim of the respective trader or dealer be made within a period of three months from such individual claims being made. For the purpose, the petitioners are required to make a fresh claim before the Chief Executive



Officer of the Assam State Agricultural Marketing Board and the Chief Executive Officer may pass the reasoned order within a period of three months of making any such claim.

The writ petition is disposed of in the above terms.

Interim order, if any, stands vacated.

JUDGE

Comparing Assistant