

GAHC010312522019



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

Case No. : WP(C) 1326/2020

1:M/S. BHATTER TRADERS AND ANR.
A PROPRIETORSHIP FIRM HAVING ITS OFFICE AT 207, BHATTER TRADERS,
J.P. AGARWALLA PATH, SIVASAGAR, ASSAM, REP .BY ITS MANAGER SRI
RAJESH BHATTER

2: RAJESH BHATTER
S/O SRI HARI KRISHNA BHATTER
R/O B.G. ROAD
SIVASAGAR
ASSA

VERSUS

1:THE STATE OF ASSAM AND 5 ORS.
REP. BY THE PRINCIPAL AND SECRETARY TO THE GOVT. OF ASSAM,
DEPTT. OF AGRICULTURE, HAVING THEIR OFFICE AT DISPUR, GUWAHATI,
DIST. KAMRUP, (M), ASSAM

2:ASSAM STATE AGRICULTURAL MARKETING BOARD
A BOARD CONSTITUTED UNDER THE ASSAM AGRICULTURAL PRODUCE
MARKET ACT
1972
REP. BY ITS CHAIRMAN
RAM KRISHNA MISSION
MISSION ROAD
ULUBARI
GUWAHATI-7
ASSAM

3:ASSAM STATE MARKETING COMMITTEE
HAVING ITS OFFICE AT
RAM KRISHNA MISSION ROAD
GUWAHATI
ASSAM

4:CHIEF EXECUTING OFFICER
ASSAM STATE AGRICULTURAL MARKETING BOARD
HAVING ITS OFFICE AT RAM KRISHNA MISSION ROAD
ULUBARI
GUWAHATI-7
ASSAM

5:SIVASAGAR DISTRICT REGULATED MARKET COMMITTEE
SIVASAGAR
ASSAM

6:JORHAT DISTRICT REGULATED MARKET COMMITTEE
JORHAT
ASSA

Advocate for the Petitioner : MS. M L GOPE

Advocate for the Respondent : SC, AGRICULTURE MARKETING BOARD.

BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

ORDER

Date : 13-03-2020

Heard Ms. N. Gogoi, learned counsel for the petitioner and Mr. A. Choudhury, learned counsel for the respondent nos. 2, 4, 5 & 6.

At the outset, it is submitted by Mr. Choudhury that there is no entity called "Assam Marketing Committee", arrayed in this writ petition as party respondent no. 3.

Ms. Gogoi has submitted that the matter may be taken up on some other date, as she is led by other learned counsel in the case and they are not available in the Court today because of their personal difficulties. On the other hand, Mr. Choudhury expressing urgency in the matter, has strongly objected to such prayer and submitted that in view of the nature of the interim order passed on 26.02.2020 making the same operative till today as the returnable date, that too, without assigning any reason, the same has affected the entire operation of collection of cess of the respondent Assam State Agricultural Marketing Board (the Board, for short). Due to the restraint order, the Board has been prevented from

collecting the cess which it is otherwise entitled to collect under the provisions of Section 21 of the Assam Agricultural Produce Market Act, 1972, as amended, (the Act, 1972, for short). The respondent Board has, in the meantime on 12.03.2020, filed their affidavit-in-opposition in the matter. The respondent Board authorities as applicants, have also preferred an interlocutory application, I.A. (Civil) 938/2020, seeking vacation/modification of the interim order dated 26.02.2020, with the alternative prayer not to extend the operation of the interim order dated 26.02.2020 beyond the returnable date i.e. 13.03.2020. Mr. Choudhury referring to the order dated 26.02.2020, has submitted that in view of the interim order so passed, a prima facie consideration for extension or otherwise of the said interim order on the returnable date is necessary upon consideration of the issues involved in the writ petition. For ready reference, the interim order dated 26.02.2020 is reproduced hereunder :-

“Heard Ms M. L. Gope, learned counsel for the petitioner. Mr. S. Barua, learned Standing Counsel, ASAMB representing respondent no.2 sought for two weeks time to file affidavit-in-opposition. Considering the same time is allowed. However keeping in view the interim prayer as sought for, respondents shall not collect cess till the next returnable date. List on 13.3.2020.”

Upon consideration of the said interim order, I find sufficient force in the said submission of Mr. Choudhury. Accordingly, a prima facie consideration for extension or otherwise of the above order is found necessary.

In the writ petition, it is projected that the petitioner is a proprietorship firm which is engaged in the business of “agricultural produce” like pulses, chana, etc. and for the said purpose, it brings raw materials from outside the State of Assam. In respect of the agricultural produce brought by the petitioner from outside to the State of Assam, the Board has been levying cess in purported exercise of the powers under Section 21 of the Act. Section 21 of the Act states as under :

“Power to levy cess. 21.

(1) Every Market Committee shall levy and collect a cess on the agricultural produce 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 valuable considerations.

(2) The Assam State Agricultural Marketing Board shall also have the power to

levy and collect cess for any or all of the Market Committee(s) in the market areas in addition to the powers of the Market Committee (but not both), whenever felt necessary with approval of the State Government, on the agricultural produce bought or sold in such market area(s) at a rate not exceeding two rupees for every one hundred rupees of aggregate amount for which a specified agricultural produce is bought or sold whether for cash or for deferred payment or other valuable considerations.

(3) No cess will be levied on goods manufactured from the agricultural produce on which cess is proposed to be levied and which are ultimately exported out of the Country.

Provided that no cess will be levied on goods manufactured from the agricultural produce on which cess is proposed to be levied and which are ultimately exported out of the country.

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.]*

Explanation —2. The cess referred to in Section 21 shall be paid by the purchaser of the specified agricultural produce concerned.”

It has been contended that the levy of cess under Section 21 of the Act was challenged in a similar event before this Court and a Full Bench of this Court vide its judgment and order dated 04.04.2001 passed in Writ Appeal No. 392/1999 (Tinsukia Trading Co. vs. The State of Assam), reported in *2001 (1) GLT 520*, has held that the respondent Board authorities under the Act, 1972 have no authority to collect cess for “agricultural produce”, which are transported into the notified market area in the State of Assam. The further contention is to the effect that to overcome the effect of the said judgment and order dated 04.04.2001, the respondent Board in order to collect cess on “agricultural produce”, has inserted Section 21A in the Act, 1972 by amendment in the year 2006. Another contention is that after the enactment of the Goods and Services Act, 2017 which has come into force w.e.f. 01.07.2017, the cess which is being levied by the respondent Board authorities, has been subsumed in the Goods and Services Tax (GST). Thus, no State is empowered to levy cess in respect of buying, selling and supply of goods and services. Apart from the above, a

number of other contentions have been raised which are not required to be gone into at this stage of prima facie consideration for extension or otherwise of the interim order dated 26.02.2020, quoted above.

As regards the judgment and order dated 04.04.2001 of the Full Bench, it has emerged that the said judgment and order was assailed by the respondent Board before the Supreme Court of India in a special leave petition which was eventually numbered as Civil Appeal No. 3969/2001 after grant of leave. It was contended therein that a Full Bench by its order dated 04.04.2001 had struck down Rule 21(7) of the Assam Agricultural Produce Market (General) Rules, 1975 but at the time of striking down the said rule, it was no longer in existence, having been amended by the Assam Agricultural Produce Market (Amendment) Act, 2000 (the 2000 Amendment Act, for short). By an order dated 13.08.2001, the Supreme Court had stayed the operation and effect of the decision of the Full Bench on the condition that in the event of the appeal being dismissed, any amount which had been collected and became refundable shall have to be paid by the respondent Board authorities with interest. Civil Appeal No. 3969/2001 was disposed of by taking into consideration the amendments made during the pendency of the Civil Appeal, by an order dated 08.12.2005 holding, inter-alia, that any amount which should be collected by the respondent Board authorities would be subject to the outcome of the writ petition, W.P.(C) No. 5491/2001 (*Assam Roller and Floor Mills Association vs. State of Assam and others*) and other similar writ petitions, then pending before this Court. It is contended on behalf of the respondents herein that by the above 2000 Amendment Act, Section 21 of the Act has been amended. The said batch of writ petitions, W.P.(C) No. 5491/2001 (*Assam Roller Flour Mills and others vs. State of Assam and other*) and other writ petitions, came to be disposed of by a Division Bench of this Court by a common judgment and order dated 12.09.2008, reported in *2008 (4) GLT 366*. In the said batch of writ petitions, a number of provisions which had been inserted by the Assam Agricultural Produce Market (Amendment) Act, 2000 and the Assam Agricultural Produce Market (Amendment) Act, 2006 including the amendments brought in Section 21 of the Act, 1972, were assailed. In respect of the challenge made to the amendments brought in Section 21 of the Act, 1972, the Division Bench in paragraph 48 has observed as under :

“The legal fiction thus comprehends a licit supposition of eventualities, which

may or may not exist to achieve a legislative purpose. A court on the discernment of the objective, can permissibly infer the existence of hypothetical state of affairs and all conceivable consequences and corollaries logically ensuing therefrom. A purposive construction of the legal fiction needs to be adopted to achieve the legislative goal, the only constraint being that thereby the purpose of the fiction ought not to be stretched beyond the intended. The statutory purpose of the legal fiction, axiomatically is the controlling determinant, all other assumptions of relevant facts subsisting or not, to attain the same, being allowable. The significance and essentiality of a legal fiction being to fructify some legislative end, it ought to be permitted a full play subject to the restraint of unintended extension thereof annihilating the very objective of its creation.

Section 21 of the Act authorizes the levy and collection of cess specified on the agriculture produce bought or sold in the market area at the rate specified. Explanation-I envisages a rebuttable presumption that unless the contrary is proved, a specified agricultural produce would be deemed to have been bought or sold in the notified market area in the three eventualities enumerated in Clause (i), (ii) and (iii) thereof. The obvious legislative aim is to obviate the possibility of any transaction of sale or purchase of a specified agricultural produce in the notified market area going unnoticed and to prevent consequential evasion of cess. The presupposition is not in absolute terms and is liable to be displaced, if proved otherwise. Though three incidents have been comprehended which signify to hypothesize a sale or purchase of such produce in the notified area, these per se are neither antithetical nor incompatible with the essential attributes of such transactions as contemplated in law. Instead, the contingencies referred to in the three Clauses infer the existence thereof and seek to complement the same. The events, namely agreement of sale or purchase, delivery of the produce involved and the movement thereof as a consequence, can by no means be dismissed as features totally alien to a transaction of sale or purchase as known in law. Having regard to the market proliferation of such transactions in the recent times, the fiction understandably at the first instance seeks to relieve the Market Committee or the Board as the case may be of the seemingly impracticable task of stalking each and every transaction effected in the notified area and instead furnishes an option to the person concerned to dislodge the presumption of deemed sale or purchase. The legal fiction obligates the traders/dealers to be scrupulously vigilant and law compliant. Indubitably, they are obliged to pay the cess, if realizable in law. There is no scope to presume that the levy would be exacted even if not payable. The eventualities comprehended in the three clauses of Explanation I are plausible consequences and/or corollaries relatable to a transaction of sale or purchase of a specified agricultural produce in a notified area and are not in our view transgressive of the contours of the purpose for which the legal fiction had been envisioned. The fiction is neither extra territorial nor ipso facto repugnant to the legally acknowledged features of sale and/or purchase. It is

also not sui generis in its form or characteristics, identical provisions being available in many contemporaneous laws. More significantly it is vividly arranged on a corresponding provision in the Model Act, 1998 enacted in alignment with the recommendations of the High Power Committee on agricultural marketing suggesting measures to remove disparities in different State Marketing Acts and for their effective implementations. The Model Act 1998 present a paradigm of provisions so as to facilitate a balanced development of the agricultural marketing system of the country through uniform implementation of the agricultural produce marketing Acts. The legal fiction understandably seeks to cater to a mandate of national consensus in agricultural marketing system. The challenge to the amendment in Explanation I of Section 21 by the Act 2000 on this count therefore does not commend to us for acceptance.”

The Division Bench had also taken note of the fact that the Agricultural Produce Market (General) Rules, 1975, as amended by the Agricultural Produce Market (General) (Amendment) Rules, 2003 framed in exercise of the power under Section 49 of the Act, 1972 amongst others have provided for a detailed procedure for levy and collection of cess. Rule 25 of the said Rules provides for refund of market fee recoverable in excess of amount actually due or on a transaction which is exempted under the Rules. The amount recoverable is to be repaid out of the market development event or market committee fund dependable on the account on which it had been credited. The Division Bench in paragraph 94 has further observed 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 Rule 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 pre-requisites as prescribed by Section 21(2) namely necessity of such realization and approval of the State Government would have to be essentially complied with.”

The above judgment of the Division Bench dated 12.09.2008 has been challenged before the Supreme Court of India in Special Leave to Appeal No. 11317/2009 and other connected matters by a number of traders stated to have dealt in agricultural produce. Leave was granted in those matters by an order dated 25.10.2013 and accordingly, the matters have been numbered as Civil Appeal No. 9655/2013, 9656/2013, 9657/2013 and 9666/2013.

It is submitted on behalf of the respondent Board that as on date, the said civil appeals are pending before the Supreme Court without any interim restraint order. It is found that, in the interregnum, a contempt petition being Cont. Case (C) No. 401/2008, came to be filed against certain officials of the respondent Board alleging forceful recovery of cess in violation of the judgment and order dated 12.09.2008. In a judgment rendered on 23.10.2009, a Division Bench of this Court had held a number of officials of the respondent Board guilty of contempt and punishments were imposed accordingly. Against the said order dated 23.10.2009 passed in Cont. Case(C) No. 401/2008, the contemnors preferred an appeal being Criminal Appeal No. 1967/2009. Certain observations made by the Division Bench in the judgment and order dated 23.10.2009 had also been challenged before the Supreme Court in a special leave petition, which has been numbered as SLP(C) No. CC 2765/2010. The permission has been granted to file the special leave petition on 30.03.2010 by the following order :

“Permission to file 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.”

From a perusal of the above order dated 30.03.2010, it prima facie appears that the respondent Board has been permitted to collect the cess in accordance with the judgment and order passed by the Division Bench of this Court on 12.09.2008, uninfluenced by the order dated 23.10.2009 passed in Cont. Case(C) No. 2310/2009. It is submitted by Mr. Choudhury that the above order dated 30.03.2010 is operative as on date. It is by virtue of the operation of the said order, the respondent Board is authorized to levy and collect cess in terms of the provisions of Section 21 of the Act. In so far as the contention regarding impermissibility to levy cess in terms of the provisions of Section 21 of the Act, 1972 in view of the advent of GST, a communication dated 31.07.2017 issued by the Government of Assam in the Agricultural Department to the Chief Executive Officer of the respondent Board has been brought to the notice of this Court. On perusal of the same, it transpires that the State Government has observed that normal realization of cess under Section 21 of the Act, 1972 on specified agricultural commodities from market areas will continue. As in its judgment and order dated 12.09.2008, it is observed that the Act, 1972 and the Rules have put a detailed mechanism for refund of cess in place, it is found that in the event the petitioner is able to

demonstrate that the cess is not leviable in its case, any cess collected illegally is liable to be refunded by the respondent Board. I have also taken note of the decisions of the Supreme Court of India in *Assistant Collector of Central Excise Chandan Nagar West Bengal vs. Dunlop India Ltd. & Ors.*, reported in (1985) 1 SCC 260 and in *Union Territory of Pondicherry vs. P.V. Suresh and Ors.*, reported in (1994) 2 SCC 70, wherein the factors required to be considered at the time of passing interim orders against revenue have been indicated on the premises of existence of alternative statutory remedy. It is observed therein that prudence, discretion and circumspection are called for at the time of passing such an interim order. Mere existence of a prima facie case is not sufficient to grant an interim order against Revenue but several other factors like balance of convenience, irreparable injury, public interest, etc. are also to be taken into consideration.

Having due regard to the observations made in the order dated 30.03.2010 which is stated to be in operation till date; the fact situation obtaining in the present case and the consideration required to be given before passing any interim order against collection of revenue, as laid down in *Dunlop India Ltd.* (supra) and in *P. V. Suresh* (supra), I am of the prima facie view that the extension of the interim order dated 26.02.2020 is not found expedient at this stage and accordingly, the same is not extended. It is, however, made clear that if the respondent Board collects cess in connection with the business of the petitioner and if the petitioner succeeds in the writ petition, the respondent Board authorities shall be liable to refund such cess collected from the petitioner during the pendency of the writ petition. This common order is passed both in respect of the present writ petition and the interlocutory application, I.A.(Civil) No. 938/2020. Consequently, the interlocutory application, I.A.(Civil) No. 938/2020 stands closed.

Ms. Gogoi has submitted that she has received a copy of the affidavit-in-opposition filed by the respondent Board authorities today and an affidavit-in-reply will be filed on behalf of the petitioner by 26.03.2020.

List the matter on 08.04.2020.

JUDGE

Comparing Assistant