(2010) 08 GAU CK 0080

In the Gauhati High Court

Case No : Writ Petition (Civil) No.3332 of 2010

Gangh and Sons APPELLANT

Vs

State of Assam and Ors. RESPONDENT

Date of Decision : 03-08-2010

Acts Referred:
Assam Agricultural Produce Market Act, 1972 — Section 21, 21, 22, 22, 23, 23

Citation : (2012) 6 GLR 423

Hon'ble Judges : B.K.Sharma, J

Bench : Single Bench

Advocate : Mr. G.N. Sahewalla, Md. Aslam Mr., Mr. D. Senapati , Mr. J. Bora for the petitioner.??Mr. S. Chamaria, Mr. S. Saikia, Mr. K.N. Choudhury, Mr. R. Dubey, Mr. R. Kakati, Mr. S. Saikia , Mr. N.G. Sarma for the respondents., Advocates appearing for Parties

Judgement

1. In terms of the earlier orders passed I have heard Mr. G.N. Sahewalla, learned senior counsel for the petitioner as well as Mr. K.N. Choudhury, learned Additional Advocate General, Assam on the interim prayer.

2. The petitioner, a proprietorship concerned is doing business in trading of commercial produce as defined under Assam Agricultural Market Produce Act, 1972 and as the licence holder for facilitating its trade in the agricultural produce, same are purchased by the petitioner from several States in North India, namely, Bihar, Punjab, Uttar Pradesh, etc.

According to the petitioner, the agricultural produce are purchased by it by paying the Market Cess to the Marketing Committee of the respective places and thereafter, the goods are dispatched to Assam, either by road or by rail at the risk of the petitioner by issuing the goods. The petitioner is aggrieved by levy of Cess on rice purchased by it from Bihar against invoice dated 30.4.2010 (Annexure 4). The petitioner has also prayed for a declaration to the effect that the respondent Nos.3 and 5 and its officials have acted illegally in levying Cess on rice purchased by the petitioner at the check gate called SrirampUr Marketing

Check Gate. According to the petitioner, the said check gate being not within the notified market area of Guwahati SubDivisional Marketing Committee and no sale or purchase transaction whatsoever having been taken place at the said check gate, no Cess can be levied by the said respondents and their officials. The petitioner has also made a grievance against nonconsideration of the documents produced by it towards establishing that the rice purchased in the State of Bihar is a transaction of sale and purchase completed outside the State of Assam. Another grievance made is against the Annexure VI "FormM" purportedly filled up by the respondents themselves which according to the petitioner is contrary to the provisions of rule 23 of the Assam Agricultural Produce Markets (General) Rules, 1975.

3. The interim prayer made in the writ petition is to the following effect:

"During the pendency of the rule your lordships may be pleased to direct the respondent Nos.3 and 5 and its officials not to levy any cess under the Assam Agricultural Produce Market Act, 1972 at the Srirampur Marketing Check Gate and no cess should be leviable unless and until reason(s) are assigned in writing for arriving at the conclusion that documents produced does not establish the fact of completion of the transaction of sale and purchase outside the State of Assam and/or pass such other further orders as your lordships shall deem fit and proper."

4. Learned counsel for the parties have exclusively referred to the judgment and order dated 12.9.2008 passed by the Division Bench of this court in a batch of writ petitions, 1st one being WP(C) No. 5491/2001 (Assam Roller Flour Mills Association v. Debeswar Bora and Ors.). The challenge made in the said writ petitions was to the constitutional validity of sections 3D, 3E, clause (ii) and (iii) of Explanation 1 to section 21 as well as section 21(1), 21(2), 21(3), 21(A), 23 and 25(xiii) of the Assam Agricultural Produce Market Act, 1972 as amended by Amendment Acts of 2006 with the consequential relief.

5. As contended by the petitioner in the present proceeding and for the purpose of an interim order, we are concerned with two of the issues involved in the said judgment and order, which are the legality and validity of the legal fictions introduced by explanation to section 21 of the Act as amended and the forceful collection of Cess at the check gates by the respondent Board through its Marketing inspectors using the seals of various marketing Committees irrespective of the ultimate destinations of the goods and in contravention of the preconditions mandated within section 21(2). The petitioners have exclusively referred to the observations made in the aforesaid judgment but for the purpose of an interim order in the instant proceeding, I refer to the following paragraphs :

"88.."

"As it is, every trader as denned under the Act engaged in the business of buying and selling of agricultural produce in the notified market area is liable to pay cess. Conferment of power on the Board to levy and collect the cess per se would not have the effect of divesting him of any accrued right. This is, however, not to signify our approval to any levy and collection of cess dehors the Act or the Rules. Section 21(2) embodies a conscious decision of authorizing the board to levy and collect cess on occasions envisaged therein for and on behalf if any one or more of the Market Committee(s). The possibility of double exaction has, thus, been cautiously ruled out.

Noticeable, the corresponding changes following the amendments effected by Act, 2006 arming the Board with the power also to levy and collect cess have not yet been incorporated in the Rules. The State Government ought to have been incorporated in the Rules. The State Government ought to have been vigilant, alert and prompt so as to avoid any misgivings in this regard. This omission notwithstanding, having regard to the legislative edict that he Board under section 21(2) would) levy and collect cess only in certain eventualities as envisaged for any or more of the market Committee(s) and the exhaustive procedure laid down in the rules visualizing the process therefore, visavis, the Market Committee(s), we do not feel persuaded to annul this provision on the count of what of adequate mechanism detailing an exclusive procedure to enable the Board to exercise such power. The legislative policy engrafted in section 21(2) having been sustained by us, we are inclined to hold that as for all intents and purposes, the Board is levying and collecting cess for any or more of the Market Committee(s), it would do so as its agent and, therefore, the provision of rules 21,22 and 23 till the rules are amended appropriately, would serve as inbuilt guidelines for it (Board) in this regard. A purposeful construction needs to be adopted eschewing a myopic and pedantic approach to actualize the statutory commitments."

"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 herein above.

6. 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 allegation of forceful collection of case 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 mandated 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 through prima facie probative of the said plea in respect of the 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 prove into the individual facts cannot be accepted as an irrefutable guarantee or 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 Market Committee (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 of 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 gate, it is not possible for this court to adjudge the same as illegal and nonest. However, if on an application of this precept on investigation of the individual fact, it transpires to be so then unreservedly the trader and the dealer concerned would be entitled to the consequential reliefs."

7. Alleging violation of the directions contained in the said judgment and order a contempt petition being Cont. Case No. 401/2008 was filed and the same was disposed of by judgment and order dated 23.10.2009 holding that the respondents were guilty of civil contempt. Against the said judgment and order, an appeal has been preferred before the hon''ble Apex Court and the appeal was entertained by order dated 30.10.2010. By the said order, it has been provided that the respondent Board would be entitled to collect tax in accordance with the aforesaid judgment and order dated 12.9 2008 uninfluenced by the order passed in the contempt proceedings dated 23.10.2009

Pursuant to the aforesaid judgment and order uated 23.10.2009 passed in Cont. Proceedings, the Chief Executive Officer of the respondent

Board issued an office order dated 24.10.2009 directing all officers not to collect

Cess on any of the specified Agricultural commodities coming from outside the State of Assam at the check gates with immediate effect. However, pursuant to the aforesaid order dated 30.3.2010 passed by the Apex Court the said Officer of the respondent Board has issued another order dated 21.4.2010 notifying and ordering that the collection of Cess under section 21 of the Act on Agricultural Produce bought or sold in the market area shall continue in terms of the order of the court dated 12.9.2008 passed in WP(C) No.5491/2001. In the order it has further been directed that the concerned officers would realize Cess if the traders failed to dislodge the presumption engrafted in section 21 of the Act.

8. Section 21 of the Act along with its explanation as quoted below :

"21. Levy and collection of cess on the sale and purchase of the Agricultural produces : [Sections 21 and 49(2)(V]

(1) The cess levied on the sale and purchase of Agricultural Produce in a notified market area under section 21 of the Act shall be applicable only once in the same notified market area.

(2) The responsibility of paying the cess prescribed under section 21 of the Act shall be of the buyer and such cess shall be leviable as soon as 5 Agricultural Produce is bought or sold by a licensee.

(3) The cess shall be paid to the Committee or to a Paid Officer duly authorised by the market Committee to receive such payment within 4 days of the day of transaction.

Explanation : In computing the period of 4 days specified in Subrule (3) of rule 21 the day of transaction shall be included.

(4) A receipt in FormK shall be granted forthwith to the person making payment in respect of any cess paid under these rules.

(5) Every officer or servant employed by a committee for the collection of cess shall be supplied by the Committee with a badge of office in such forms as may be prescribed by it. The badge shall be worn by the officer or servant concerned while discharging his duties.

(6) Every such officer or servant shall before entering on his duties furnish such security as may ''be prescribed by the Byelaws of the Committee concerned.

(7)

(8) In case of a transaction which involves the performance of one or more of the acts mentioned in clauses (i) to (iii) of the Explanation 1 of section 21 of the Act, within the boundary of two or more notified market area, the Oess shall be payable to the Committee within whose jurisdiction the Specified Agricultural Produce is delivered.

Exemption from payment of Cess : (Section 21)

(1) The trader who claims exemption from payment of cess on goods manufactured from the Agricultural Produce on which cess is proposed to be levied and which are ultimately exported out of the country shall make declaration and give certificate to the Market Committee in Form K1.

(2) The trader concerned in the sale or purchases of any quantity of Agricultural Produce from which he manufactures goods, which are ultimately exported out of the country shall maintain in Form L true and correct accounts of the sale or purchase, as the case may be, of the said Agricultural Produce and of any goods manufactured from it."

9. The petitioner upon a reference to the provisions of section 21 of the Act and rules 21, 22, and 23 of the aforesaid Rules has contended that the legal fictions would operate only if the trader/dealer concerned fails to establish against the sale or purchase of the specified Agricultural Produce in the concerned notified market area. It has been contended that, although the petitioner and other traders have been producing all the documents in respect of goods purchased by them outside the State of Assam to conclusively prove/establish the fact of completion of the transaction by sale and purchase outside the State of Assam, same are being outrightly rejected without any consideration by the officials of the respondent Nos.3 and 5 stationed at the interState borders and on contrary, the said officials filled up the returns under their own hands and unless and until the Cess are paid, the vehicles are not allowed to be moved. It is in this context, the petitioner has referred to the Annexure VI ''Form M'' with the endorsement "Delivery within the notified market area of GSMC Cess realized in full S/d illegible 2.5.2010 Marketing Inspector Guwahati SubDivisional Market Committee".

10. The respondents in their counteraffidavit filled in respect of the interim prayer have contended that the decision to levy and collect Cess by the Board as per the provisions of the Act and the Rules, was taken pursuant to the aforesaid order dated 30.3.2010 passed by the Apex Court. It has been contended that, in the writ petition, the petitioner is completely silent as to the purpose for which the quantities of rice are purchased by it in course of business. It has also been contended that the petitioner is duty bound to disclose the nature of transactions carried on by the petitioner by purchasing rice as a trader. As regards the levy and collection of Cess from the petitioner, it has been contended that the issue has already been decided by the Division Bench in the aforesaid judgment and order.

11. As noticed above, the direction of the Apex Court is to levy Cess only in accordance with the aforesaid judgment and order dated 12.9.2008, uninfluenced by the order dated 23.10.2009 passed in the contempt proceeding. In the said judgment and order, as noted above, it has been observed that the power to levy Cess under section 21 of the Act is vested with the Market Committees and also on the Board. The realization of the Cess however, by all means, as observed in the said judgment will 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. The legal fiction would operate only if the Trader/Dealer concerned fails to establish against sale or purchase of the specified agricultural produce in the concerned notified market area.

In paragraph 95 of the judgment it has been held that, if the allegations of forceful collection of Cess at the check gates by the respondent Board through its marketing Inspectors using the seal of different commodities irrespective of the ultimate destinations of the goods and in contravention of the preconditions mandated by section 21(2) is true, then the realization would be per se illegal, unauthorised, null and void. It was only in the context of probative value to the sample documents produced by the petitioners to corroborate their stand of forceful collection of Cess, this court declined to make any roving enquiry exercising its power under article 226 of the Constitution of India. However, it was observed that the testimony of such a type, envisaged in the judgment referred to in para 96, 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 collect Cess thereon.

12. As noted above, the allegation of the petitioner is that the representative of the official respondents themselves filled up ''FormM'' with the endorsement therein quoted above (Annexure VT). According to the petitioner, the course of action adopted by the respondents is without assigning any reason in writing.

13. In view of the above and in tune with the directions contained in para 94 of the aforesaid judgment, it is hereby provided that the realization of the Cess will 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 in the judgment. 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 ensure only on the sale or purchase thereof in the market, area as comprehended therein as well as at the rate specified. 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. Further, as observed in para 95 of the judgment, collection of Cess at the check gates by the marketing Inspectors irrespective of the ultimate destination of the goods and in contravention of the preconditions mandated in section 21(2) will not be taken recourse to.

In the event of levying Cess irrespective of the aforesaid pleas/points, which might be urged.by the petitioners, the authorities levying Cess would furnish/ assign reason in writing for arriving at the conclusion that the documents produced do not establish the fact of sale or purchase repelling the fictional factors. The reason to be specified shall also indicate as to how the Trader/Dealer concerned has failed to establish against sale or purchase of the specified Agricultural Produce in the concerned notified market area. Unless and until such reasons are assigned/furnished in writing depicting derivation of satisfaction of operating the legal fiction as envisaged in the aforesaid provisions of the Act in the Rules, there shall not be any levy of Cess in the manner and method in which the same is being done presently.

15. All the observations made above are only for the purpose of the interim order and shall in no way affect the rights and contentions of the parties involved in proceeding.

Learned counsel for the parties have shown urgency in the; matter and accordingly, it is fixed for hearing on 31st of August, 2010 before which date and as prayed for by Mr. K.N. Choudhury, learned Additional Advocate General, the respondents may file their counteraffidavit.

