(1992) 12 PAT CK 0038

In the Patna High Court

Case No : C.W.J.C. No. 7699 of 1992

M/s Shri Shankar Makhana Bhandar — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

Date of Decision : 21-12-1992

Acts Referred:
- Bihar and Orissa General Clauses Act, 1917 — Section 4(36)
- Constitution of India, 1950 — Article 226, 227
- General Clauses Act, 1897 — Section 28

Citation : (1993) 1 PLJR 490

Hon'ble Judges : S. Hoda, J;G.S. Sharma, J

Bench : Division Bench

Advocate : Ramesh Kumar Agrawal, for the Appellant; Ram Balak Mahto and S.K. Saraf, for the Respondent

Final Decision : Allowed

Judgement

1. In this writ application under Articles 226 and 227 of the Constitution of India, the petitioners have prayed that the respondents, Agricultural Produce Market Committee was not entitled to levy and to collect market fee on the sale and purchase of MAKHANA under the provisions of Bihar Agricultural Produce Markets Act, 1960 (hereinafter referred to as the Act) as the same has not been notified in terms of section 3 of the Act and rules framed under the Act. The petitioners are either proprietorship or partnership firm and their place of business are situated in the town of Darbhanga and within the jurisdiction of the respondents no. 2 to 6. The petitioners inter alia, carry on business in MAKHANA. The petitioners are purchasing and selling MAKHANA within the jurisdiction of respondents no. 2 to 6 after payment of market fee as demanded by the respondents. It has been stated that the respondents, State Government has not issued any notification in official Gazette u/s 3 or section 4 of the Act with respect of MAKHANA for the respondent Market committee in schedule of the Act, MAKHANA was not incorporated therein nor the State Government has added MAKHANA in the Schedule of the Act by publishing notification in the Official

Gazette as required under the Act. The State Government issued notification dated 29.10.84, bearing S.O. 1187 u/s 4 of the Act for 108 market committee including, the respondent Market committees for the purpose of regulation of sale purchase, storage and processing of agricultural produce only mentioned in the Schedule of the Act. By memo no. 14841 dated 27.10.1967, the State Government had added MAKHANA in the schedule of the Act but the same has not been published in the official Gazette as per requirment of section 39 of the Act and till today the same has not been published in the official Gazette. It has been stated that as MAKHANA has not been added in the schedule of the Act by publication in the official Gazette, the same is not a schedule item. Therefore, no fee can be realised on its transaction. MAKHANA has not been notified as agricultural produce in terms of sections 3 and 4 of the Act, hence no fee can be realised on its transaction.

2. No counter affidavit has been filed in this case inspite of opportunity given to the respondents.

3. Mr. Ramesh Kumar Agarwal, Learned Counsel for the petitioners, in order to substantiate his argument, has referred to several provisions of the Act. Section 2(1) (a) defines the term agricultural produce as the produce specified in the schedule of the Act, Section 3 empowers the State Government to declare its intention by notification of exercising control over purchase, sale, storage and processing of agricultural produce in such area as may be specified by notifying such objection and suggestion within a period of not less than two months and it reads as follows:

(1) Notwithstanding anything to the contrary contained in any other Act for the time being in force, the State Government may, by notification, declare its intention of regulating the purchase, sale, storage and processing of such agricultural produce and in such area, as may be specified in the notification.

(2) A notification under sub-section (1) shall state that any objection or suggestion which may be received by the State Government within a period of not less than two months to be specified in the notification, shall be considered by the State Government.

4. Section 4 provides for declaration of market area after consideration of objection and suggestion received and runs as follows:--

(1) After the expiry of the period specified in the notification issued u/s 3 and after considering such objection and suggestions as may be received before such expiry and after holding such enquiry as it may consider necessary, the State Government may be notifications, declare the area specified in the notification u/s 3 or any portion thereof to be a market area for the purposes of this Act, in respect of all or any of the kinds of agricultural produce specified in the notification u/s 3.

(3) Subject to the provisions of section 3, the State Government may at any time

by notification exclude from a market area any area or any agricultural produce specified therein or include in any market area any area or agricultural Produce included in a notification issued under sub-section (1).

5. u/s 5 by notification the details of Principal market yard and the sub-market yard are to be declared. Section 6 provides for establishment of market committee by notification. Section 27 gives power to the market committee to levy and collect fee on the agricultural produce bought or sold in the market area at a given rate. Section 39 gives the power to the State Government to amend the Schedule of the Act by notification.

6. Relying upon the aforesaid provisions, Learned Counsel has submitted that market fee can be levied only on such agricultural produce which are included in the schedule of the Act. MAKHANA was neither included in the Schedule of the Act nor memo no. 14841 dated 27.10.1987 was published in the official Gazette as required u/s 39 of the Act so Makhana cannot be said to have been included in the schedule.

7. Learned Advocate General appearing on behalf of the respondent relied on Annexure 2 of the writ petition and submitted that in view of the Bihar Agricultural Produce Markets (Validation) Act, 1982 (hereinafter referred to as the Validation Act) no further publication in the official Gazette is required and by virtue of the said Validation Act MAKHANA would be deemed to have been included in the schedule and as such market fee is payable on the sale or purchase of MAKHANA. Section 2 of the Validation Act reads as follows :--

Notwithstanding the non-publication of the notification nos. 14841 dated the 27th October 1967 in the Bihar Gazette and 2028, dated the 12th February 1972 in the Bihar Gazette in time, the orders made for regulating the market with respect to such items, and market fees levied, collected or to be levied and collected shall not be illegal and invalid merely on the ground, and notwithstanding anything contained to the contrary in any judgment decree or order of any court the Schedule of notification nos. 14841, dated the 27th October 1967 and 2028 dated the 12th February 1972 shall always be deemed to be valid and effective and all levies made or market fees collected shall be deemed to have been validly realised, done and issued as if the provisions of this Act were in force at all material times when such realisation was made, action taken, things done and orders issued and no suit or proceeding shall be maintainable for refund of the levies made on fee collected or actions taken under those notifications.

8. Unless the agricultural produce is notified and included in the schedule in accordance with law, no market fee can be levied on such an agricultural produce. In the present case, nothing has been brought on the record that the procedure laid down in section 3, section 4 (3) and section 39 of the Act have been observed in respect of MAKHANA,

9. In the case of M/s Sree Behariji Mills Ltd. and others v. State of Bihar and

others reported in AIR 1983 Patna 311 : 1983 PLJR 408 this very question was in issue in respect of ATA, SUJJI and MAIDA and the provisions of the Validation Act which was at the stage of the Ordinance being ordinance no. 35 of 1982 was noticed and the Division Bench held as follows :--

7. The question as to when the schedule to the Act got amended appears to be simple. The power in this regard has to be exercised under sec. 39 only by a notification. The expression ''notification'' has been defined by S. 4 (36) of the Bihar and Orissa General Clauses Act. 1917 to mean a notification in the Gazette. Section 28 of the General Clauses Act provides that where in any Bihar Act, it is directed that any notification shall be issued, such notification shall be deemed to be duly made if it is published in the Gazette unless the Act otherwise provides. See. 39 is not suggesting any alternative method and therefore, it must be held that until the order was published in the Bihar Gazette, the schedule was not amended. The language of Section 30 does not suggest that the schedule could be amended with retrospective effect by a later notification. I, therefore, hold that the schedule stood amended on 15th May, 1980 when the order in this regard dt. 12th Feb. 1972 was published in the Bihar Gazette and not earlier.

8. It was contended on behalf of the respondents that items applicable to the Market Committee automatically stood amended by inclusion of Ata, Sujji and Maida with effect from the date on which the schedule of the Act stood amended. There does not appear to be any merit in this argument, either, Sec. 4 (3) of the Act permitting the amendment in the list of schedule of agricultural produce has been subjected to the provisions of Sec. 3, which enjoins a notification to be issued declaring the intention of the State Government in this regard Sub-sec. (2) of Section 3 makes it obligatory for the notification to state that any objection or suggestion to the proposed step would be considered by the Government. Section 4 reiterates the duty of considering the objections and suggestions received from public. Holding of an enquiry in this connection is also contemplated by section. A valuable right has, therefore, been granted by the statute to the traders, agriculturists and other affected persons to offer objections and suggestions which have to be decided on merits before taking final decision. Admittedly no notification under S. 3, was issued with reference to Ata, Sujji and Maida. By holding that the list of agricultural produce in regard to the Market Committee stood amended without resorting to the aforesaid procedure, the right of raising objection by concerned persons bestowed by the Act would stand forfeited and this cannot be allowed. The observation of the Supreme Court in Govind Lal v. Agricultural Produce Market Committee (AIR 1976 SC 263) relied on by Mr. Shreenath Singh, Learned Counsel for the petitioners supports this view.

9. The Learned Counsel for the respondents alternatively contended that in view of the Bihar Ordinance No. 35 of 1982 referred to earlier, the petitioners case must be rejected and the writ application dismissed. The relevant portion of the ordinance has been quoted in paragraph 6 above. It may be noted that Ss. 3, 4

and 39 or and other provision including the schedule of the Act has not been amended and the right of objection of the concerned members of the public to addition of items of produce has not been disturbed. It must therefore, be held that unless the necessary notifications mentioned and discussed above are issued, the objections filed to the proposed modification of the schedule are considered and a final decision in this regard is taken thereafter, the lists of agricultural produce in regard to the particular market committee cannot be deemed to have been amended by reason of the Ordinance. The Market Committees are, therefore, not entitled to the fee on the disputed items. The demands in this respect cannot be upheld.

10. In view of the provisions of the Act noticed above and the decision of this Court as mentioned above, the Market committees are, therefore, not entitled to the fee on MAKHANA and the demand in this respect cannot be upheld. In the result, this writ application is allowed and the respondents are directed not to demand or collect any fee on MAKHANA.