

(2012) 01 AHC CK 0346
In the Allahabad High Court
Case No : Writ - C No. 62443 of 2011

M/s. Star Paper Mills Ltd.

APPELLANT

Vs

Deputy Director (Administration/Marketing) And Others

RESPONDENT

Date of Decision : 20-01-2012

Acts Referred:

Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 — Section 17(3)

Citation : (2012) 3 ADJ 134 : (2012) 2 AWC 1987

Hon'ble Judges : Sunita Agarwal, J;Ashok Bhushan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Hon"ble Ashok Bhushan, J.—Heard Sri Rahul Agrawal, learned Counsel for the petitioner and Sri B.D. Mandhyan, learned Senior Advocate assisted by Sri Satish Mandhyan, for the respondents No. 1 and 2 as well as learned Standing Counsel representing the respondents no. 3 and 4.

2. Counter and rejoinder affidavits have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being finally decided.

3. Brief facts giving rise to this writ petition are; the petitioner is a paper manufacturing unit at Saharanpur. The petitioner uses timber/wood as basic raw material for manufacturing paper. The petitioner purchased timber/wood from the U.P. Forest Corporation during the year 1986-98. The demand of Mandi fee from the petitioner u/s 17(iii)(b) was raised by Mandi Samiti in the year 1986, which demand was challenged by the petitioner by means of a writ petition being writ petition No. 6710(MB) of 1986 at Lucknow Bench of this Court. Another writ petition being writ petition No. 3290 (MB) of 1991 was filed against further demand. Both the writ petitions were dismissed by this Court vide judgment and order dated 11.12.1998 on the ground of alternative remedy available to the petitioner. After dismissal of the writ petition, recovery proceedings were initiated

against the petitioner by issuing a notice dated 20.7.1999, demanding an amount of Rs. 61,55,900/- as mandi fee for the period 1986-98 and development cess of Rs. 1,48,238/- along with interest. Towards satisfaction of the aforesaid recovery proceedings, the petitioner made payment by two cheques of Rs. 10,00,000/- each dated 7.12.1999 and 13.3.2000. The petitioner filed SLP against the judgment and order dated 11.12.1998 which was disposed of by the Apex Court on 19.9.2006, affirming the judgement of the High Court with a direction to the Mandi authorities not to make any recovery till the objections preferred by the petitioner are finally adjudicated. Subsequent to the above decision of the apex court, objections of the petitioner were rejected by the Mandi Authority, against which statutory revision was filed which too was dismissed. Against the orders dismissing the revision of the petitioner and the demand of Mandi fee, the petitioner filed writ petition No. 24998 of 2008 and four other writ petitions, which were connected and heard together by Hon'ble Single Judge of this Court. Hon'ble Single Judge after hearing the petitioner, learned Counsel for the Mandi Samiti as well as learned counsel for the U.P. Forest Corporation, set aside the orders impugned in the writ petition vide judgment and order dated 1.12.2008 and held that demand of Mandi fee from the petitioner which was a purchasing trader was wholly illegal and without jurisdiction. Against the judgment dated 1.12.2008 of the Hon'ble Single Judge allowing the writ petition of the petitioner, Krishi Utpadan Mandi Samiti Nazibabad filed a Special Leave to Appeal in the Hon'ble Supreme Court which SLP was dismissed by order dated 30.10.2009. After dismissal of the SLP of Krishi Utpadan Mandi Samiti, the petitioner wrote letters to the respondents praying for refund of amount of Rs. 20 lacs, which was recovered from the petitioner in pursuance of the demand of the payment of Mandi fee. The petitioner also wrote to the recovery officer/Sub Divisional Magistrate, Sadar, Saharanpur for refund of the amount. The Secretary of the respondent no. 2 wrote a letter dated 27.8.2010, copy of which has been filed as Annexure-6 to the writ petition to the respondent no. 1 asking his guidance on the request of the petitioner to refund amount of Rs. 17,18,076/- from the respondent no. 2. Subsequently letters dated 12.11.2010, 23.12.2010 and 4.10.2011 were written by the Secretary to the respondent no. 1 reiterating its request that direction regarding refund has not yet been issued, whereas the Firm is repeatedly asking for refund of the amount and due to non refund, the amount of interest is increasing. The petitioner wrote to the Director Administration and Marketing State Krishi Utpadan Mandi Samiti for refund of the amount and thereafter filed the present writ petition praying for the following reliefs:

(a) issue a writ, order or direction in the nature of MANDAMUS directing the respondent No. 2 to immediately refund the sum of Rs. 17,18,076/- to the petitioner along with interest @ 18% per annum from the year 1999-2000 till the date of refund to the petitioner;

(b) issue a writ, order or direction in the nature of MANDAMUS directing the respondent No. 2/ respondent no. 4 to immediately refund the balance sum of

Rs. 2,81,924/-to the petitioner along with interest @ 18% per annum from the year 1999-2000 till the date of refund to the petitioner

4. Sri Rahul Agrawal, Learned Counsel for the petitioner in support of the writ petition contended that demand of Mandi fee from the petitioner with regard to period 1986-98 on purchase of wood/timber from U.P. Forest Corporation having been declared illegal and without jurisdiction by the judgment of this Court dated 1.12.2008, against which SLP filed by Krishi Utpadan Mandi Samiti was also dismissed, the petitioner was clearly entitled for the refund of the amount as a consequence to the judgment of this Court dated 1.12.2008. It is submitted that all pleas raised by Mandi Samiti justifying the levy of market fee on the petitioner were gone into and considered on merits and repelled by this court on 1.12.2008. The judgment dated 1.12.2008 has become final between the parties and the respondents are obliged to refund the amount illegally recovered from the petitioner of Rs. 20 lacs as mentioned above. It is submitted that the petitioner is also entitled for interest since the petitioner was deprived of the amount for a long period. Learned Counsel for the petitioner submitted that various pleas raised in the counter affidavit filed on behalf of the Mandi Samit justifying the demand of Mandi Fee from the petitioner, cannot be allowed to be raised since the same issues have already been adjudicated and have attained finality by judgment of this Court dated 1.12.2008. Learned Counsel for the petitioner in support of his submissions, has referred to and relied on various judgments of the apex Court, which shall be referred, while considering the submissions hereinafter.

5. Sri B.D. Mandhyan, leaned Senior Advocate appearing for Mandi Samiti, refuting the submissions of learned Counsel for the petitioner contended that the petitioner is not entitled for refund of the amount, which was recovered by the respondents in satisfaction of Mandi fee levied on the petitioner. It is submitted that the petitioner is fully liable to pay the Mandi fee. Sri Mandhyan Submits that in the present case, the liability to pay Mandi fee is covered by Section 17(iii)(b) sub clauses (2) and (4) and the demand is not covered by Section 17(iii) (b) sub clause (3). He submits that apex Court in its judgment in the case of Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another, has already held that petitioner which was party to those proceedings, is liable to pay market fee on the purchase of wood and timber from the Government under licence granted to it and the Government was held to be producer. He submits that Hon"ble Single Judge judgment dated 1.12.2008 is contrary to the pronouncement of the apex Court in Ram Chandra Kailash Kumar and Co. and others Vs. State of U.P. And another (supra). Sri Mandhyan further placed reliance on the judgment of the apex Court in the case of Krishi Utpadan Mandi Samiti, Haldwani Etc. Etc. Vs. M/s. Indian Wood Products Ltd., and another, , wherein the apex Court held that liability to pay is on the purchaser and even if seller fails to realise the market fee from him in transaction of sale, the liability to pay the said fee remains on the purchaser. Reliance has also been placed on another judgment of the apex Court in the case of Krishi Utpadan Mandi Samit

Dudhi and another Vs. Rajesh Kumar Jaiswal, (2005) 11 SCC 427. Sri Mandhyan further submits that Mandi Samiti was entitled to levy market fee and market fee which has been collected from the petitioner, could not be directed to be refunded since it cannot be denied that it was entitled for realisation of market fee. The fact that it has been realised from the petitioner is immaterial since in any view of the matter, the petitioner was liable to pay the market fee to U.P. Forest Corporation. It is further submitted that permitting refund of market fee shall be unjust enrichment in the hands of the petitioner and even if there is any defect in procedure of recovery i.e. instead of recovering it from U.P. Forest Corporation, it has been recovered from the petitioner, the petitioner cannot claim any refund. It is further submitted that this Court in the judgment dated 1.12.2008 did not direct for refund of the amount and it is not open for the petitioner now to claim any refund.

6. We have heard learned counsel for the parties and perused the record.

7. From the submissions which have been advanced by learned counsel for the parties, following issues fall for consideration in this writ petition.

1. Whether the judgment dated 1.12.2008 of this Court holding that Mandi Samiti was not entitled to recover the Mandi fee from the petitioner has become final or it is still open for the Mandi Samiti to contend that the petitioner was liable for payment of Mandi fee on purchase of wood/timber for the period 1986-98 and the transaction was not covered u/s 17(iii) (b) (3) of Krishi Utpadan Mandi Adhiniyam, 1964 and the judgment of Hon''ble Single Judge dated 1.12.1998 is incorrect in view of the judgments of apex Court in the case of Ram Chandra Kailash Kumar and Co. and others Vs. State of U.P. and another (supra), Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others and Krishi Utpadan Mandi Samit Dudhi and another Vs. Rajesh Kumar Jaiswal (supra) ?

2. Whether the petitioner is not entitled for claim of any refund in this writ petition in view of the fact that no direction for refund has been issued in the judgment dated 1.12.2008 ?

3. Whether the Mandi Samit, being entitled for realisation of Mandi fee, cannot be asked to refund the amount wrongly collected from the petitioner though it was not liable to pay?

4. Whether refund of Mandi fee realised from the petitioner amounting to Rs. 20 lacs, shall be unjust enrichment in the hands of the petitioner ?

8. Coming to the first issue as noticed above, Sri B.D. Mandhyan, learned Senior Advocate appearing for the Mandi Samiti, has emphatically submitted that the judgment of Hon''ble Single Judge dated 1.12.2008 was an incorrect judgment, which was delivered contrary to the pronouncements made by the apex Court in Ram Chandra Kailash Kumar and Co. and others Vs. State of U.P. and another (supra), Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood

Products Ltd. and others as well as Krishi Utpadan Mandi Samit Dudhi and another Vs. Rajesh Kumar Jaiswal (supra). Sri Mandhyan submitted that it was held in Ram Chandra Kailash Kumar and Co. and others Vs. State of U.P. and another (supra), that for purchase of timber wood by the petitioner for manufacture of paper, the purchaser i.e. the petitioner was liable to pay the market fee. He submits that the petitioner was party to the said proceedings and once the said judgment has been given, it has become final. Two judgements of the apex Court in Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others and Krishi Utpadan Mandi Samit Dudhi and another Vs. Rajesh Kumar Jaiswal (supra) have been further relied.

9. Before we proceed to consider the submissions of learned counsel for the parties, it is useful to refer Section 17(iii) (b) which is to the following effect:

17 (iii) (b) market fee, which shall be payable on transactions of sale specified agricultural produce in the market area at such rates, being not less than one percentum and not more than two and half percentum of the price of the agricultural produce so sold as the State Government may specify by notification, and development cess which shall be payable on such transactions of sale at the rate of half percentum of the price of the agricultural produce so sold and such fee or development cess shall be realised in the following manner

(1) if the produce is sold through a commission agent, the Commission Agent, may realise the market fee and the development cess from the purchaser and shall be liable to pay the same to the Committee;

(2) if the produce is purchased directly by a trader from a producer, the trader shall be liable to pay the market fee and development cess to the Committee;

(3) if the produce is purchased by a trader from another trader, the trader selling the produce may realise it from the purchaser and shall be liable to pay the market fee and development cess to the Committee;

Provided that notwithstanding anything to the contrary contained in any judgment, decree or order of any Court, the trader selling the produce shall be liable and be deemed always to have been liable with effect from June 12, 1973 to pay the market-fee to the Committee and shall not be absolved from such liability on the ground that he has not realised it from the purchaser:

Provided further that the trader selling the produce shall not be absolved from the liability to pay the development cess on the ground that he has not realised it from the purchaser;

(4) in any other case of sale of such produce, the purchaser shall be liable to pay the market fee and development cess to the Committee.

Provided that no market fee or development cess shall be levied or collected on the retail sale of any specified agricultural produce where such sale is made to the consumer for his domestic consumption only.

Provided further that notwithstanding anything contained in this Act, the Committee may at the option of, as the case may be, the commission agent, trader or purchaser, who has obtained the licence, accept a lump sum in lieu of the amount of market fee or development cess that may be payable by him for an agricultural year in respect of such specified agricultural produce, for such period, or such terms and in such manner as the State Government may, by notified order specify;

Provided also that no market fee or development cess shall be levied on transaction of sale of specified agricultural produce on which market fee or development cess has been levied in any market area if the trader furnishes in the form and manner prescribed, a declaration or certificate that on such specified agricultural produce market fee or development cess has already been levied in any other market area.

10. The provisions of Section 17(iii)(b) of Krishi Utpadan Mandi Adhiniyam, 1964 as it existed at the relevant time is quoted below:

17 (iii) (b) market fee, which shall be payable on transactions of sale specified agricultural produce in the market area at such rates, being not less than one percentum of the price of the agricultural produce so sold, as the State Government may specify by "notification, and as such fee shall be realised in the following manner

(1) if the produce is sold through a commission agent, the Commission Agent, the Commission agent may realise the market fee from the purchaser and shall be liable to pay the same to the Committee;

(2) if the produce is purchased directly by a trader from a producer, the trader shall be liable to pay the market fee and development cess to the Committee;

(3) if the produce is purchased by a trader from another trader, the trader selling the produce may realise it from the purchaser and shall be liable to pay the market fee to the Committee; and

(4) in any other case of sale of such produce, the purchaser shall be liable to pay the market fee to the Committee.

11. The petitioner's case before Hon'ble Single Judge in writ petition No. 24998 of 2008 decided on 1.12.2008 was that U.P. Forest Corporation as well as the petitioner both are traders within the meaning of Krishi Utpadan Mandi Adhiniyam, 1964 and all purchases by the petitioner, who is a trader from any trader, the liability is of the selling trader to pay the market fee. Whereas before Hon'ble Single Judge in the aforesaid writ petition, the Mandi Samit has refuted the said submission and contended that the liability to pay market fee was on the purchaser i.e. petitioner by virtue of sub clauses (2) or sub clause (4) of Section 17(iii)(b). It is useful to note that all the submissions which are being raised by Sri Mandhyan, learned Senior Advocate before us, were raised before the Hon'ble Single Judge when the writ petition was decided on 1.12.2008. The

submissions based on judgment of the apex Court in Ram Chandra Kailash Kumar and Co. and others Vs. State of U.P. and another (supra) was noted and has been dealt by Hon''ble Single Judge in paragraph 35 to 39. Paragraphs 35 to 39 of the judgment of Hon''ble Single Judge are quoted as below:

35. On the other hand, the Mandi Samiti, in Paras 3, 19 and 25 of the counter-affidavit has admitted that the petitioner is a trader. In Writ Petition No. 3290 (MB) of 1991, decided on 11.12.1998, a Division Bench of this Court held that the petitioner is a trader and was engaged in the processing of the agricultural produce. This judgment was affirmed by the Supreme Court in the civil appeal which was disposed of vide judgment dated 19th September, 2006. Further, the Supreme Court in the case of Ram Chandra Kailash Kumar (supra), had raised an issue in Para 9 Sub-clause (13) as under:

(13) Wood cut and brought from the jungle by a manufacturer of paper such as Star Paper Mills, Saharanpur could not be subjected to levy of fee.

36. The answer to the said query was given by the Supreme Court in Para 24 which is quoted hereunder:

24. This item presented some difficulty in solution. A licence is granted to a Paper Mill and to other kinds of dealers for cutting wood from the jungle and bringing it to their factories for manufacture of various articles such as paper etc. It was argued that there was no transaction of sale and purchase involved in the above operation. Moreover the wood is cut from the jungle area which although has been roped in the market area but no service is rendered in that jungle area by any Market Committee. In our opinion in the licence is involved sale of wood and a right to go to that land to cut that wood. The wood may be used by the manufacturer for manufacturing furniture or may be used in the manufacture of paper or any other commodity. That is immaterial. The owner of the Jungle where-from the wood is cut and brought will be a producer within the meaning of the Act and the licensee-producer of that wood would be a purchaser of an agricultural produce within the meaning of Sub-clause (2) of Section 17(iii)(b) of the Act liable to pay market fee. It matters little what use is made of the wood by him. The question of quid pro quo and service cannot be decided by a dichotomy of service to every payer of fee as held by this Court in Kewal Krishan Puri's case. The matter has to be judged in a broad sense and not in the sense of rendering service to every individual payer of the fee.

37. The Supreme Court found that the status of the petitioner was that of a purchasing trader and was, therefore, liable to pay the Mandi fee since the owner of the jungle, namely, the State of U.P., was the producer.

38. In the light of the aforesaid, it is clear that the petitioner having purchased wood from the Corporation is a trader. Likewise, the Corporation, having sold the wood to the petitioner is also a trader. Consequently, the transaction would fall u/s 17(iii)(b)(3) of the Adhiniyam. In the light of the judgment of the Supreme Court in the case of Mahalaxmi Rice Mills (supra), and other decisions, it is clear

that the liability to pay the Mandi fee was upon the selling trader, namely, the U.P.F.C. Consequently, the imposition of demand raised by the Mandi Samiti from the petitioner who is a purchasing trader was totally unjustified. No such demand could be raised, levied or collected from the petitioner on the transactions in question made by the petitioner. Since no Mandi fee could be charged, the question of imposition of development cess or interest does not arise.

39. The submission of the learned Counsel for the Mandi Samiti that the petitioner was held to be a purchaser in the earlier round of litigation and was required to pay the Mandi fee, which had been affirmed by the Supreme Court and, therefore, the petitioner could not be allowed to raise the same issue, and was consequently barred by the principles of *res judicata*, is bereft of merit. The submission that the petitioner had earlier purchased the wood from U.P.F.C. is patently erroneous and is not borne out from the record. Para 24 of the Supreme Court judgment in *Ram Chandra Kattash Kumar (supra)*, clearly indicates that the wood was purchased by the petitioner from the owner of the Jungle, i.e., the State Government. The wood was not purchased from U.P.F.C. There is nothing on record to hold that the wood was purchased from U.P.F.C. in the transactions that was before the Supreme Court in *Ram Chandra Kailash Kumar's* case (*supra*). The judgment of the Supreme Court further reveals that the State Government was held to be a producer, and therefore, the transaction had fallen u/s 17(iii)(b)(2) of the *Adhiniyam*."

12. Hon"ble Single Judge clearly held that transaction would fall in section 17(iii) (b) (3) of the 1964 Act. Hon"ble Single Judge also had clearly held that judgment in the case of *Ram Chandra Kailash Kumar and Co. and others Vs. State of U.P. and another (supra)* was on a different set of facts where the petitioner had purchased the wood from the State Government, which was the owner of the jungle and was purchaser whereas in the present case, the wood was purchased from U.P. Forest Corporation, which is a trader within the meaning of 1964 *Adhiniyam*. In so far as reliance of *Sri Mandhyan* on two judgements of the apex court in the case of *Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others* and *Krishi Utpadan Mandi Samit Dudhi and another Vs. Rajesh Kumar Jaiswal (supra)*, the judgment of the apex Court in *Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others* was specifically noted by Hon"ble Single Judge and Hon"ble Single Judge had noted that the said judgment had been disapproved by the apex Court in subsequent judgements in *M/S. Mahaluxmi Rice Mills and Others Vs. State of U.P. and Others*, . It is useful to note the judgment of the apex Court in *Mahaluxmi Rice Mills (supra)*, where the earlier judgment of the apex Court in *Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others* was referred to and dealt with. The three Judges Bench did not approve the view taken by the two Judges Bench in *Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others*. The reasoning given by the apex Court in *Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others* was

expressly disapproved. It is useful to quote paragraphs 9,10,11 and 12 of Mahaluxmi Rice Mills which are as follows:

9. It is significant to note that the word used for the seller to realise market fee from his purchaser is "may" while the word used as for the seller to pay the market fee to the Committee is "shall". Employment of the said two monosyllables of great jurisprudential import in the same clause dealing with two rights regarding the same burden must have two different imports. The legislative intendment can easily be discerned from the frame of the sub-clause that what is conferred on the seller is only an option to collect market fee from his purchaser, but the seller has no such option and it is imperative for him to remit the fee to the Committee. In other words, the Market Committee is entitled to collect market fee from the seller irrespective of whether the seller has realised it from the purchaser or not.

10. In *Krishi Utpadan Mandi Samiti vs. Indian Wood Products Ltd.* (supra) the learned Judges were persuaded by the ratio laid down by this Court in *Krishi Upaj Mandi Samiti and Others Vs. Orient Paper and Industries Ltd.*, wherein provisions of a similar Act which is in force in the State of Madhya Pradesh were considered and held that the primary liability to pay the fee is placed upon the buyer. But the corresponding provision in the Madhya Pradesh Act is differently worded and hence the question of the liability to pay market fee as per sub-clause (3) of Section 17(iii) of the Act could not have been solely based on the ratio in the said decision. It is difficult for us to agree with the reasoning that "the use of the word "shall" in the said clauses means that where the selling trader collects fees from a purchasing trader he is under an obligation to make over the fee to the Market Committee and where the selling trader does not collect the fee from the purchasing trader the liability to pay the market fee remains to be that of the purchaser."

11. The Constitution Bench in *Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another*, considered the provisions of the Act though in a different context. Their Lordship, while dealing with Section 17(iii) (b) of the Act looked at the distinction between sub-clause (2) and sub-clause

(3) and observed that if paddy is purchased in a particular market area by a rich miller and the same paddy is converted into rice and then sold, the rice miller will be liable to pay market fee on his purchase of paddy from the agriculturist-producer, but he cannot be asked to pay market fee over again under sub-clause (3) in relation to the transaction of rice. The Bench then added:

If, however, paddy is brought by the rice-miller from another market area, then the Market Committee of the area where paddy is converted into rice and sold will be entitled to charge market fee on the transaction of sale in accordance with sub-clause (3).

The Constitution Bench then referred to a transaction of sale of Ghee and pointed out two types of dealers in such transaction -(1) a dealer who purchases milk or

cream from the villagers & others and manufactures Ghee in his plant, and (2) a dealer who purchases such Ghee from the Manufacturer of Ghee and sells it to another trader in the same market area. It is held that when the first dealer sells Ghee to another dealer then under sub-clause (3) the manufacturing dealer will be liable to pay market fee to the Market Committee on the transaction of Ghee, but he will be entitled to pass on the burden to his purchaser. In that context learned Judges stated thus:

Apropos the Market Committee, however, the liability will be of the manufacturing dealer.

12. The aforesaid observations of the Constitution Bench makes the position clear that the Market Committee is fully entitled to collect the market fee from the seller and it is for the seller to pass the burden on the purchaser if he so chooses. It is not the look out of the Market Committee to see that seller gets the amount of fee paid by the purchaser. Thus the appellants cannot shirk the responsibility to pay the market fee to the Market Committee when the transaction falls within the purview of sub-clause (3) of Section 17(iii) (b) of the Act and then it would be open to them to recover the same from the purchaser-Government.

13. The judgment of the apex Court on which reliance has been placed namely; *Krishi Utpadan Mandi Samit Dudhi and another Vs. Rajesh Kumar Jaiswal (supra)* was again based on earlier judgment of *Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others*, which having been disapproved by the three Judges Bench, the said judgment also does not help Sri Mandhyan in the present case.

14. Hon"ble Single Judge in judgment dated 1.12.2008 has also considered the submissions of Sri B.D. Mandhyan which was based on the aforesaid two judgements of *Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others* and *Krishi Utpadan Mandi Samit Dudhi and another Vs. Rajesh Kumar Jaiswal (supra)*, and noticed that since the judgment of the apex Court in *Krishi Utpadan Mandi Samiti Haldwani and others Vs. Indian Wood Products Ltd. and others* has not been approved in *Mahaluxmi Rice Mills*, the same cannot be followed. Following was laid down by Hon"ble Single Judge in paragraph 32:

32. In view of the aforesaid, it is difficult for this Court to agree with the submission of Shri B. D. Mandhyan, the learned senior counsel for the respondents to the effect that the decision in *Indian Wood Products (supra)*, is still being followed and has not been overruled. In my opinion, it is clear that the decision in the *Indian Wood Products (supra)*, has been disapproved by the Supreme Court itself in the three Judges decision in the case of *Mahalaxmi Rice Mills (supra)*. Insofar as the decision of the Supreme Court in *Krishi Utpadan Mandi Samiti, Dudhl and Anr. v. Rajesh Kumar Jaiswal 2005 (11) SCC 427*, Is concerned, this Court is of the opinion that the said decision did not refer to the

decision of the three Judge Bench of the Supreme Court in the case of Mahalaxmi Rice Mills (supra), and consequently, the said decision is per incuriam. In any case, a decision of three Judges Bench of the Supreme Court will have precedence over a decision given by a Bench of two Judges of the Supreme Court. The Supreme Court in the case of Central Board of Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, , has held that a judgment of a Bench of a larger strength is binding.

15. From the above, it is clear that all the submissions which are being raised by Sri B.D. Mandhyan regarding liability of the petitioner to pay market fee, has been considered and repelled by Hon"ble Single Judge in its judgment dated 1.12.1998. Against the judgment dated 1.2.1998, the Krishi Utpadan Mandi Samiti filled SLP in the apex court which was dismissed by the apex court on 30.10.2009. Thus, the judgment dated 1.12.2008 between the parties have attained the finality. When the liability regarding payment of market fee from the petitioner with regard to transactions made between 1986-98 have attained finality, it is not open for the Mandi Samiti to contend contrary to the decision of this Court which has become final. The judgment dated 1.12.1998 shall operate as res-judicata between the parties.

16. The apex Court had occasion to consider the issue of finality of judgment inter-parties in several cases. The apex Court in Sree Narayana Dharmasanghom Trust Vs. Swami Prakasananda and Others, laid down following in paragraph 6:

6. Thus it is settled law that even the dismissal of SLP in limine operates as a final order between the parties and any order passed by the High Court Tribunal subsequently operates as a res judicata as far as the parties thereto. are concerned. It is true that in Indian Oil Corpn. Ltd. v. State of Bihar [(1386) 3 SCR 558] this Court had pointed out that when the writ petition was dismissed by this Court in limine, the jurisdiction of the High Court under Article 226 is not precluded. The dismissal of the writ Petition under Article 32 does not operate as res judicata. That principle is entirely different from the review of an order under Order 47 Rule 1. Under these circumstances. we are of the view that the High Court is well justified in refusing to review the order passed in the revision. However, since the records have been called by the High Court and the matter is pending, the trial Court could not dispose of the matter within the time limit, specified earlier, by this Court." Therefore, we cannot find fault with the trial Court for non-disposal of the matter. However, the civil court is directed to dispose of the suit as indicated earlier within six months from now.

17. Again in Gorie Gouri Naidu (Minor) and another Vs. Thandrothu Bodemma and others, following was laid down in paragraph 4:

It however appears to us that previously between the parties another suit was instituted in the Court of the learned Subordinate Judge Srikakulam being original suit No.50 of 1954. In the said suit, the validity of the deed of gifts made by Sowamma was questioned. It was held by the learned Subordinate Judge

that the said deed of gifts were not valid under the Hindu Law. The appeal was taken to the Andhra Pradesh High Court being appeal No.514 of 1968 and by judgment dated 12.2.1971, the High Court disposed of the said appeal No.514 of 1968 wherein the High Court disposed of the said appeal No.514 of 1968 wherein the High Court held that such deed of gift was invalid in law. By the impugned judgment, the Division Bench of the Andhra Pradesh High Court has held that in view of such declaration of the said deed of gifts as invalid, no claim of title on the basis of the said deed of gift or family settlement can be made. In our view, such decision of the division Bench is Justified since the said earlier decision in declaring the deeds of gift as invalid, is binding between the parties. There is no occasion to consider the principle of estoppel since considered by the learned Single Judge in the facts and circumstances of the case for holding the said transfers as valid, in view of the earlier adjudication on the validity of the said deeds in the previous suit between the parties. The law is well settled that even if erroneous, an inter party judgment binds the party if the court of competent jurisdiction has decided the lis. We, therefore, find no reason to interfere with the impugned decision of the High Court. This appeal therefore fails and is dismissed without any order as to costs.

18. Same view has been expressed by the apex Court in paragraph 17 in the case of K.A. Abdul Jaleel Vs. T.A. Shahida, , which is to the following effect :

As indicated hereinbefore, Balakrishnan, J. (as His Lordship then was) speaking for a Division Bench in a matter arising out of a preliminary issue on the question of jurisdiction held that the dispute over properties between parties to a marriage cannot be confined to the parties to a subsisting marriage. We agree with the said view. The said decision being inter-parties and having attained finality would operate as res judicata.

19. In Mehar Singh Saini, Chairman, Haryana Public Service Commission and others, In Re: Mehar Singh Saini, Chairman, HPSC and Others, following was laid down by the apex Court in paragraph 131:

131. Pradeep Sangwan's case is just one of the examples of improper selection made by the private respondents. The Vigilance Bureau had instituted different inquiries. Enquiry Nos. 1 and 3 resulted in registration of FIR No.20 of 2005 and the notices dated 21st December, 2006 and 4th January, 2007 along with other letters issued to the Commission for making available the records in question. Every possible effort was made to spend public money, time and energy by the Commission to withhold the records rather than to provide the same to the investigating agencies to ensure expeditious completion of the inquiry/ investigation. Avoidable impediments, with the aid of law or otherwise, were created to ensure that the notices issued by the authorities and even observation of the Courts were not complied with. As far as the claim of the Commission with regard to privilege over its documents is concerned, it stood finally concluded by the order of the High Court against which the SLP was withdrawn. It is not for us to re-examine that issue, all over again, in the facts of the present case. It is 101

impermissible to examine an order passed by the High Court or Supreme Court which has attained finality inter-se the parties that too in a collateral proceeding. This will be opposed to the doctrine estoppel per rem judicatam.

20. The judgment dated 1.12.2008 between the parties in which it has been held that the petitioner was not liable to pay market fee on the transaction, has attained finality and it is not open for the respondents to challenge the judgment and contend that the said judgment is erroneous or incorrect. In Paragraphs 40 and 41 of the judgment of Hon"ble Single Judge dated 1.12.2008, it was clearly held that levying the demand of Mandi fee from the petitioner, was illegal and without jurisdiction. Paragraphs 40 and 41 are quoted below:

40. In the present case, the transaction is different. The wood has been purchased from U.P.F.C. who has been held to be a trader and therefore, the transaction now falls in Section 17(iii)(b)(3) of the Adhiniyam.

41. In view of the aforesaid, this Court finds that the impugned orders levying the demand of Mandi fee from the petitioner, who is a purchasing trader, was wholly illegal and without jurisdiction. The impugned orders, consequently, cannot be sustained and, on this ground itself, the writ petition is liable to be allowed. Consequently, it is not necessary for this Court to give a finding on the other issues raised.

21. Coming to the second issue i.e. the submission of Sri Mandhyan that no direction having been issued by Hon"ble Single Judge in the order dated 1.12.2008 for refund of the amount already recovered, the petitioner is not entitled to claim any refund. From the materials brought on record in the writ petition, it is clear that the amount of Rs. 20 lacs was realised from the petitioner in pursuance of recovery certificate issued against the petitioner demanding the Mandi fee by recovery certificate dated 20.7.1999. The demand of Mandi fee from the petitioner having been held to be illegal and without jurisdiction, the refund is consequential to the quashing of the orders levying and demanding market fee from the petitioner. The petitioner in writ petition has annexed the letter of the Secretary of mandi samiti as Annexure-6 to the writ petition, in which Secretary has written to the respondent no. 1 asking their direction regarding refund and has also noted that due to non receipt of any direction, the liability of interest is also increasing. In the rejoinder affidavit, the petitioner has also brought on record, the letter dated 10.9.2010 of respondent no. 2 written to the Director Rajya Krishi Utpadan Mandi Parishad, informing that Secretary of the Mandi Samiti has made demand for refund in pursuance of the judgment of the High Court and necessary direction in this context be issued. It is thus, clear that after the judgment of this Court, the issue pertaining to refund of the amount in consequence of the judgment dated 1.12.2008 was being pursued by the respondents themselves and they were well aware that in consequence of the judgment of this Court, the refund is to be made and for that necessary directions were sought for from the higher authorities. The submission of learned Counsel for the respondents that since the judgment dated 1.12.2008 did not

direct for refund, the writ petition is not maintainable, cannot be accepted.

22. The petitioner became entitled for refund of the amount after the levy and demand of market fee was set aside by this Court and declared illegal. The writ petition cannot be refused to be entertained on the ground that this Court did not direct for refund in its order dated 1.12.2008. As observed above, the refund of the amount illegally collected was consequential to the quashing of the demand. The submissions of learned Counsel for the respondents that since the respondent is entitled for market fee and even if there is some error in procedure of recovery, the recovery of the amount by the Mandi Samiti cannot be faulted, cannot be accepted. The present is not a case where there is any procedural irregularity in the recovery. The liability of payment of the market fee has been held to be of seller i.e. U.P. Forest Corporation. The Mandi Samit is thus, entitled to recover the same from seller as the recovery of the amount from purchaser has been held to be illegal. The respondents cannot be allowed to retain the amount illegally recovered on the pretext that since they were entitled for market fee.

23. The submissions of Sri B.D. Mandhyan, learned Senior Advocate on issue No. 3 is that even if the mandi fee has been wrongly realised from the petitioner, the mandi Samiti is entitled for realisation of the market fee and it is not liable to be refunded to the petitioner. Hon"ble Single Judge after considering the submissions of parties vide its judgment dated 1.12.2008 has categorically held that impugned orders levying the demand of mandi fee from the petitioner was wholly illegal and without jurisdiction. When the levy itself was found to be illegal and without jurisdiction, any recovery made in pursuance of the levy, cannot be held to be justified. When levy of market fee itself having been set aside the amount realised by the respondents from the petitioner in pursuance of the said levy also become illegal and cannot be allowed to retain by the Mandi Samit.

24. The Mandi Samiti is entitled to recover the levy of mandi fee from selling trader, who had primary liability to pay the market fee. Thus, the submissions of learned Counsel for the respondents that market fee which has been realised form the petitioner should be allowed to be retained by Mandi Samiti and cannot be directed to be refunded, is without any substance.

25. The submissions next which has been advanced by learned Counsel for the respondent is that refund of mandi fee realised from the petitioner shall be unjust enrichment in the hands of the petitioner as the amount must have been passed on to the consumers of paper by the petitioner by including it in its cost. The above submission is based only on presumption of the Mandi Samiti. The above submission of the petitioner is based only on presumption since no facts to support the above submission has either been pleaded or proved. Moreover, the principle of undue enrichment is inapplicable in the case of fees (such as market fees). It is confined to the case of an indirect tax. In this context, the following observations of the Hon"ble Supreme Court in Commissioner of Central Excise, Lucknow, U.P. Vs. Chhata Sugar Co. Ltd., are important:

In our view, the above test is important because a tax is capable of being passed on to the consumer or the buyer whereas a fee is a counter payment by the buyer who receives the benefit of the services for which he is charged and such fees are not capable of being passed on as fees to the consumer or the buyer.

26. The petitioner's categorical case is that the petitioner was not liable to pay any market fee and development cess. The Mandi fee having been illegally recovered from the petitioner under recovery certificate, which threatened attachment of the factory and other coercive measures, cannot be permitted to be retained by the respondents. The letters of the Mandi Samiti to the respondent no. 1 filed along with writ petition as well as along with rejoinder affidavit, clearly indicate that the respondents were well aware of their liability to refund the amount and they were also conscience that delay in refund of the amount shall further make them liable for payment of interest.

27. Now comes the question as to what relief the petitioners are entitled in the writ petition. The petitioner in the writ petition apart from claiming refund of amount of Rs. 17,18,076/-from the respondent no. 2 has claimed interest at the rate of 18% from the year 1999-2000. Prayer has also been made for issuance of direction to the respondent no. 4 to refund the amount of Rs. 2,81,924/-along with interest @18% per annum from the year 1999-2000 till the date of refund to the petitioner, which amount was sent to the respondent no. 4 as recovery charges.

28. In view of the foregoing discussions, the petitioner is clearly entitled for refund of the amount as claimed by the petitioner from the respondents. Insofar as claim of the interest by the petitioner on the aforesaid amount, it is clear that the amount was realised in the year 1999-2000 from the petitioner in pursuance of the recovery certificate. It was on 1.12.2008 when this Court in writ petition filed by the petitioner declared the levy of the demand of the mandi fee from the petitioner as illegal and without jurisdiction, against which judgment dated 1.12.2008, the SLP filed by the respondents was also dismissed on 30.10.2009. We are of the view that ends of justice would be served in directing payment of interest only from 1.12.2008 at the rate of 9%. Consequently, the writ petition is allowed. The respondents are directed to refund the amount as claimed by the petitioner from the respondents with simple interest @ 9% per annum w.e.f. 1.12.2008.

29. The parties shall however, bear their own costs.