
(1969) 02 P&H CK 0024

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ No. 3324 of 1968

Prem Chand Ram Lal

APPELLANT

Vs

The State of Punjab and Others

RESPONDENT

Date of Decision : 11-02-1969

Acts Referred:

Constitution of India, 1950 — Article 226

Punjab Agricultural Produce Markets (General) Rules, 1962 — Rule 18(1), 18(2), 24, 29

Punjab Agricultural Produce Markets Act, 1939 — Section 23, 28, 43, 6(3)

Citation : AIR 1971 P&H 50

Hon'ble Judges : Bal Raj Tuli, J

Bench : Single Bench

Advocate : D.S. Nehra and K.S. Nehra, for the Appellant; S.K. Jain, for A.G., G.P. Jain, G.C. Garg and S.P. Jain, for the Respondent

Judgement

1. Messers. Prem Chand Ram Lal is a firm dealing in Gur, Shakkar, Khandsari, Banaspati Oil etc., at Sangrur, and holds the license under the Punjab Agricultural Produce Markets Act (hereinafter called the Act), from the Market Committee, Sangrur. The firm is also licensed under the Punjab General Sales Tax Act, the Central Sales Tax Act and the Punjab Licensing Order for the sale of Gur, Shakkar and Khandsari etc., The firm started business with effect from 1st April, 1967 and during the year 1967-68, in the course of its business, it imported Gur, Shakkar and Khandsari etc. from outside Mandis of Haryana and U. P. for purposes of trade. These goods were purchased from the commission agents (Pacca Arhtias) in packed condition against regular bills and were transported through the railways or by road under railway receipts and goods receipts and octroi was duly deposited at the time of te import. These goods were sold by the petitioner-firm at its shop to the customers in the same packed conditions in which they were imported. The emphasis of the petitioner is on the fact that the transactions of importing goods from outside Mandis had nothing to do with the producers or the Kacha Arhtias. The petitioner-firm did not file any returns with regard to the imported goods in form "M" and only filed returns in respect o the

transactions made with the producers, the value of which was shown as Rs. 2781/- for the year. In November, 1967, the Secretary of the Market committee, Sangrur, called upon the petitioner-firm to produce its accounts to enable him to levy the market fee on the goods brought by it from outside Mandis of Haryana and U. P. etc. In reply the petitioner submitted that the entries relating to goods bought and sold in the market yard were maintained in the returns filed by it in form "M" and the necessary fee thereon had already been deposited. The petitioner-firm maintained that it was not liable to pay any market fee on the transactions with regard to the imported goods and was only liable to pay market fee on the transactions had with the producers of the agricultural produce. After some correspondence, the Administrator of the Market committee levied Rs. 5014/- as market fee on the basis of best judgment assessment and imposed an equal amount by way of penalty by order dated 30th September, 1969. A demand of Rs. 10,028/- was raised against the petitioner-firm and a demand notice was issued for the payment thereof which was received by the petitioner on 14th October, 1968. The Petitioner-firm filed the present writ petition on 28th October, 1968, praying for the quashing of the assessment order and the notice of demand, copies of which are Annexures "L" and "K" to the writ petition. The returns have been filed by the respondents.

2. The first point argued before me is that no market fee can be levied under the Act in respect of the transactions of purchase or sale which are not made with the producers of the agricultural produce. I find myself unable to agree with that submission. The argument of the learned counsel is that the object of the Act is to regulate the buying and selling of commercial crops, by providing suitable and regulated market, by eliminating middlemen and bringing face to face the producer and the buyer and to ensure a fair price to the producer. He following passage from the judgment of their Lordships of the Supreme Court in *M.C.V.S. Arunachala Nadar etc. Vs. The State of Madras and Others*, is relied upon :-

"With a view to provide satisfactory conditions for the growers of commercial crops to sell their produce on equal terms and at reasonable prices, the Act was passed on 25th July, 1933. The preamble introduces the Act with the recital that it is expedient to provide for the better regulation of the buying and selling of commercial crops in the Presidency of madras and for that purpose to establish markets and make rules for their proper administration. The Act, therefore, was the result of a long exploratory investigation by experts in the field, conceived and enacted to regulate the buying and selling of commercial crops by providing suitable and regulated market by eliminating middlemen and bringing face to face the producer and the buyer so that they may meet on equal terms, thereby eradicating or at any rate reducing the scope for exploitation in dealings."

These observations were made by their Lordships with regard to the Madras Commercial Crops Markets Act, 20 of 1933, but this alone cannot be said to be the object of every Marketing Act, like the Punjab Act. the preamble of the Punjab Act is as under :-

"An Act to consolidate and amend the law relating to the better regulations of the purchase, sale, storage and processing of agricultural produce and the establishment of markets for agricultural produce in the State of Punjab."

This Act, therefore, envisages the establishment of markets for the purchase or sale of agricultural produce and for that purpose the dealers who run their shops in the market area become a very important part of the market. Their transactions relating to the purchase or sale in agricultural produce as specified in the Schedule to the Act are to be regulated. The source of supply of the agricultural produce seems to me to be immaterial. The market fee is leviable u/s 23 of the Act which is in these terms :-

"A committee may, subject to such rules as may be made by the State Government in this behalf, levy on advalorem basis fees on the agricultural produce bought or sold by licensees in the notified market area at a rate not exceeding fifty naye Paise for every one hundred rupees ;

Provided that -

(a) no fee shall be liveable in respect of any transaction in which delivery of the agricultural produce bought or sold is not actually made, and

(b) a fee shall be liveable only on the parties to a transaction in which delivery is actually made."

It is thus clear that the market fee is liveable in respect of transactions in which delivery of the agricultural produce is actually made in the notified market area. The State Government has framed the rules known as the Punjab Agricultural Produce Markets (General) Rules, 1962. (hereinafter called the Rules), in exercise of its powers u/s 43 of the Act and Rule 24 prescribes the mode of sale of agricultural produce brought into the market for sale. It is not stated in this rule that it relates only to the agricultural produce brought into the market by producers. It is not permissible to add the words "by the producers" in this rule, as the rule is perfectly intelligible in the form in which it is couched. According to this rule, the agricultural produce brought into the market is to be sold by public action, the manner of which has been set out in detail. The rule, however, does not apply to retail sales as may be specified in the bye-laws of the committee. Rule 29 relates to the levy of the fee on the sale and purchase of agricultural produce for which provision is made in Section 23 of the Act. Rule 31 provides for the maintenance of accounts with regard to the transactions and the fee to be paid to the market committee and the manner of its assessment. The learned counsel for the petitioner states that the goods imported by the petitioner-firm are not sold by public auction in the market but by private contracts and that no provision with regard to the retail sales has been made in the bye-laws. If that be so, under Rule 24 the petitioner-firm cannot sell the agricultural produce brought by it into the notified market area except by public auction and it may be infringing the provisions of that rule if the sale is not made by public auction in the absence of any provision with regard to the retail sales. The learned counsel

has relied upon from "I" and "J" which are issued by the auctioneer to the purchaser and the seller of agricultural produce which are sold in the market and submits that forms "M" and "N" and relate to the same transactions. Forms "I" and "J" relate to only those transactions which take place by public auction through Kacha Arhtias From "I" is issued by the Kacha Archtia to the buyer and form "J" is issued by him to the seller but sale by auction is by no means confined to the agricultural produce brought into the market area by the producers themselves and, therefore, the said rules and the forms do not indicate conclusively that the market fee can be levied only on those transactions of purchase or sale in which one of the parties is a producer. The market fee is one of the three principal sources of revenue to the market committee, the other two being license fee and the fines levied by the Courts in respect of the defaults or offences committed under the Act. The receipts from all the sources including these three sources constitute the Market Committee Funds as is described in Section 27 of the Act. Section 28 of the Act enumerates the various purposes for which the Market Committee Funds can be expended as under :-

"28. Subject to the provisions of Section 27, the Market Committee Funds shall be expended for the following purposes :-

- (I) acquisition of sites for the market ;
- (II) maintenance and improvement of the market ;
- (III) construction and repair of buildings which are necessary for the purposes of the market and for the health, convenience and safety of the persons using it ;
- (IV) provision and maintenance of standard weights and measures ;
- (V) pay, leave allowances, gratuities, compassionate allowances and contributions towards leave allowances, compensation for injuries and death resulting from accidents while on duty, medical aid, pension or provident fund of the persons employed by the Committee ;
- (VI) payment of interest on loans that may be raised for purposes of the market and the provisions of a sinking fund in respect of such loans ;
- (VII) collection and dissemination of information regarding all matters relating to crop statistics and marketing in respect of the agricultural produce concerned ;
- (VIII) providing comforts and facilities, such as shelter, shade, parking accommodation and water for the persons, draught cattle, vehicles and pack animals coming or being brought to the market or on construction and repair of approach roads, culverts, bridges and other such purposes ;
- (IX) expenses incurred in the maintenance of the offices and in auditing the accounts of the Committees ;
- (X) propaganda in favour of agricultural improvements and thrift ;

- (XI) production and betterment of agricultural produce ;
- (XII) meeting any legal expenses incurred by the Committee ;
- (XIII) imparting education in marketing or agriculture ;
- (XIV) payments of travelling and other allowances to the members and employees of the Committee, as prescribed;
- (XV) loans and advances to the employees ;
- (XVI) expenses of and incidental to elections ; and
- (XVII) with the previous sanction of the Board, any other purpose which is calculated to promote the general interests of the Committee or the notified market area."

The various purposes mentioned in Section 28 of the Act do not lead to the conclusion that the markets are established only for transactions of agricultural produce in which one of the parties is the producer. These purposes are of all the dealers in the notified market area whether they transact their sales or purchases it the producers of agricultural produce or with others, like consumers. I am of the opinion that the market fee is levied for providing facilities to the licensees working in the notified market area and is equitably levied on the quantum of business done by them. These licensees get the privilege of dealing in all kinds of agricultural produce mentioned in the schedule to the Act on a regulated basis with the result that cut-throat competition is eliminated and reasonable profit is assured to them. They are provided with numerous facilities on a collective basis and the market committee requires funds for maintaining the market in a proper shape and to perform the duties imposed on it by the Act, the rules and the bye-laws. They levy of the market fee has been held to be valid and constitutional by their Lordships of the Supreme Court in Mohammad Hussain Gulam Mohammad and Another Vs. The State of Bombay and Another, . In that case Section 11 of the Bombay Agricultural Produce Markets Act, 1939 was under consideration. The said section give power to the market committee subject to the provisions of the rules and subject to such maxima as may be prescribed, to levy fees on the agricultural produce bought and sold by licensees in the market area. it is to be noted that this section is in identical terms as Section 23 of the Act except that in the Act words "bought or sold" are used while in Section 11 of the Bombay Act, the words "bought and sold" are used. It was contended in that case that the fee provided for by Section 11 was in the nature of sales tax. Repelling this contention, their Lordships observed as under :-

"Now there is no doubt that the market committee which is authorised to levy this fee renders services to the licensees, particularly when the market is established. Under the circumstances it cannot be held that the fee charged for services rendered by the market committee in connection with the enforcement of the various provisions of the Act and the provisions for various facilities in the

various markets established by it, is in the nature of sales tax. It is true that the fee is calculated on the amount of produce bought and sold but that in our opinion is only a method of realising fees for the facilities provided by the committee. The attack on Section 11 must, therefore fail."

3. The validity of the market fee was again considered by their Lordships of the Supreme Court in *Lakhan Lal and Others etc. Vs. The State of Bihar and Others etc.*, . The Act under consideration was the Bihar Agricultural Produce Markets Act, 1960 and this is what their Lordships observed ;

"The next contention is that the fees levied by the market committee are in the nature of taxes as the committee does not render any services to the users of the market and the levy of fees is therefore, illegal. This contention is not tenable. The market committee has taken steps for the establishment of a market where buyers and sellers meet and sale and purchases of agricultural produce take place at fair prices. Unhealthy market practices are eliminated, market charges are defined and improper ones are prohibited. Correct weighment is ensured by employment of licensed weighment and by inspection of scales, weights and measures and weighing and measuring instruments. The markets committee has appointed a dispute sub-committee for quick settlement of disputes. It has set up a market intelligence unit for collecting and publishing the daily prices and information regarding the stock, arrivals and despatches of agricultural produce. It has provided a grading unit where the technique of grading agricultural produce is taught. The contract form for purchase and sale is standardised. The provisions of the Act and the Rules are enforced through inspectors and other staff appointed by the market committee. The fees charged by the market committee are co-related to the expenses incurred by it for rendering these services. The market fee of 25 naye paise per Rs. 100/- worth of agricultural produce and the license fees prescribed by Rules 71 and 73 are not excessive. The fees collected by the market committee form part of the market committee fund which is set apart and ear-marked for the purposes of the Act. There is sufficient quid pro quo for the levies and they satisfy the test of "fees" as laid down in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, ."

4. A Division Bench of this Court (*Narula and Sandhawalia, JJ*) in Civil Writ No. 1578 of 1966 (*Punj*), *M/s. Ram Sarup and Brothers v. Punjab State*, upheld the validity of the market fee levied under the Act. The learned Judges followed the two Supreme Court judgments, cited above, and observed as follows :-

"On the material available before us, it is obvious that the amount of market-fee which can possibly be recovered by a Committee does not in any manner appear to be disproportionate to the services which it is expected to render to the assesses of such fee, by performing the duties referred to in Section 28. In our opinion no proper foundation has in fact been laid in this case by the petitioner on which it could build the argument sought to be made out on its behalf."

In that case a point was raised to the effect that in computing the amount of fee the sales and purchases effected by the petition in other market area in respect of which the market fee had already been paid and which did not involve any transaction with a producer, should have been excluded by the market committee while fixing the liability of the petitioner but it was not decided by the learned Judges.

5. The learned counsel for the petitioner is not correct when he says that a provision for retail sales has been made in the Act or the Rules. Rule 18 of the Rules grants exemption from taking license for the purchase and sale of agricultural produce by hawkers and petty retail shopkeepers who do not engage in any dealing in agricultural produce other than such hawking or retail purchases. For the purposes of this exemption a person whose turnover of sales and purchases of agricultural produce does not exceed twenty thousand rupees drawn a year is to be treated as a petty retail shopkeeper. It is thus clear that if the turnover of sales and purchases made by the petitioner in the instant case exceed rupees twenty thousand during the year, it has to take out the license and comply with all the provisions of the Act, the rules and the bye-laws. The exemption from taking out licenses for the purchase of agricultural produce granted to the dealers under Clause (f) of rule 18 (1) and (2) was withdrawn with effect from September, 3, 1964 and since that date the dealers who indulge in transaction relating to the purchase or sale of agricultural produce with persons other than the producers directly, are also required to take out licenses and the moment they become licensees with regard to those transaction also, they become liable to pay the market fee in respect thereof u/s 23 of the Act. I have not been able to find any reason for exempting such like transactions from the levy of market fee as has been contended for by the learned counsel for the petitioner.

6. The learned counsel for the petitioner has also drawn by attention to a judgment of their Lordships of the Supreme Court in Krishna Coconut Co. and Another Vs. East Godavari Coconut and Tobacco Market Committee, in which the interpretation of the words "bought and sold" used in Section 11(1) of the Madras Commercial Crops Market Act, 1933, was under dispute, Section 11(1) of that Act is in these words :-

"The Market Committee shall, subject to such rules as may be made in this behalf, levy fees on the notified commercial crop or crops bought and sold in the notified area at such rates as it may determine."

The facts were that coconut and copra had been declared as a commercial crop to which the provisions of the said Act applied. The licensed dealers in that notified area purchased the coconut and copra from the producers and petty dealers and sold them to customers outside the notified area and in some cases outside the State. The contention of the dealers was that they had not "bought and sold" coconut and copra in the notified area. Dealing with this submission, their Lordships observed as under :-

"That being the position, the next question is whether the Committee could levy fee u/s 11(1) on the transactions effected by the appellants before they sold those goods to their customers. Mr. Agarwal's contention was that the fee levied u/s 11(1) could only be in respect of goods "bought and sold" and not in respect of transactions where goods were only "bought" or only "sold". According to him it is only when a person bought goods and sold those identical goods within the notified area that the fee u/s 11(1) could be levied. According to him, the transactions effected by the appellants consisted in their purchasing the said goods; they stopped at the stage of goods "bought". Therefore, the other ingredient for a valid levy of the fee not being present, the fee levied in the present case was not in accordance with the requirements of Section 11(1) and was unwarranted. This contention raises the question as to the meaning of the words "bought and sold" in Section 11(1). At first sight they would appear to be susceptible of three meanings; viz., (1) that they mean duality of transactions where the same person buys goods and sells those identical goods in the notified area; (2) that they mean, "bought" or "sold" the conjunctive "and" meaning in the context of the sub-section the disjunctive (3) that they apply to a transaction of purchase as the concept of purchase includes a corresponding sale. When a person buys an article from another person, that other person at the same time sells him that article and it is in that sense that Section 11(1) uses the words "bought and sold". The incidence of the fee u/s 11(1) is on the goods thus "bought and sold"."

The analysis of this judgment shows that their Lordships held that the market fee was liveable on coconut and copra bought from petty dealers as well. To that extent, this judgment goes contrary to the submission of the learned counsel. Since the words used in Section 23 of the Act are "bought and sold" and not "bought or sold", the judgment does not help the learned counsel. Another fact that is clear is that the first transaction with regard to the agricultural produce wherein that produce is "bought or sold" and delivery thereof is given within the notified area, attracts the levy of the market fee. This judgment, therefore, far from helping the petitioner helps the respondents.

7. In view of the provisions of Section 6(3) of the Act, no person, unless exempted by rules made under this Act, can, either for himself or on behalf of another person, or of the State Government, within the notified market area, set up, establish or continue or allow to be continued any place for the purchase, sale, storage and processing of the agricultural produce so notified by the State Government or purchase, sell, store or process such agricultural produce except under a licence granted in accordance with the provisions of the Act, the rules and the by-laws made thereunder and the conditions specified in the licence. The licence thus obtains the exclusive privilege of transacting business in respect of purchase and sale of agricultural produce in the notified market area and he is expected to pay for this privilege and the facilities that he is provided with by the market committee as enjoined by the Act and the rules. The responsibility of paying the market fee is of the buyer and if he is not a licensee, then of the

seller who is permitted to realise the same from the buyer according to Rule 29(2). Such fees are liveable as soon as an agricultural produce is bought or sold by a licensee. The words "bought or sold" in Section 23 of the Act and in Rule 29 of the rules significantly point out that the market fee is liveable when a licensee for the first time purchases or sells the agricultural produce. In sub-rule (1) of R. 29 it has been provided that no market fee shall be levied on the same agricultural produce more than once in the same notified market area. It is thus clear that on the first transaction with regard to the agricultural produce made within the notified market area, the market fee will be liveable. I cannot understand why the petitioner is objecting to the levy of the market fee when it has to be paid by the purchaser of the agricultural produce. The petitioner is admittedly the seller of Gur, Shakkar and Khandsari which have been classified as agricultural produce in the schedule to the Act. It is not his liability to pay the market fee because he can pass it on to the purchaser and can realise it from him along with the price of the produce.

8. In view of the above discussion, I am of the opinion that the petitioner is liable to pay the market fee on the sale of Gur, Shakkar and Khandsari made in the notified area of Sangrur Market Committee, provided the delivery in pursuance of the sale was made within the area of the notified market committee. It is immaterial that the said agricultural produce was imported from other Mandis in Haryana in U. P. and was imported into the notified market area in packed condition and was sold out by the petitioner in the same condition.

9. The second point raised by the learned counsel for the petitioner is that the market fee levied by the market committee is a tax in the garb of fee. There is no merit in this submission in view of the judgments of their Lordships of the Supreme Court and the Division Bench of this Court cited above. The learned counsel has not been able to advance any other argument in support of his plea. This submission is, therefore, repelled.

10. The learned counsel then argued that it was not open to the State Government to delete Clause (f) of Rule 18 (1) and (2) and that the deletion of the clause is arbitrary and outside the purview of the Act. I regret my inability to agree to this submission. In view of my decision above that the market fee can be levied on all transactions of sale or purchase made in the notified market area in which delivery is given, it cannot be held that the deletion of Clause (f) from Rule 18 (1) and (2) was arbitrary or outside the purview of the Act. Formerly the State Government had allowed an exemption to the dealers who did not purchase the agricultural produce from the producers directly or sold the agricultural produce not purchased from the producers directly from the provisions of the Act but later withdrew this exemption, vide Notification No. GSR 206/P.A.23/61/S. 43/Amd (8)/64, dated 3rd September, 1964. The State Government could withdraw this exemption by the same power by which it had granted it. I, therefore, repel this submission of the learned counsel as well.

11. I, however, find force in the last argument of the learned counsel that the

assessment order made by the Administrator of the Market Committee is arbitrary and not in accordance with the Rules. The petitioner-firm had been maintaining that it was not liable to pay the market fee on the transactions of sale of Gur, Shakkar and Khandsari, which they had imported from outside Mandis of Haryana, U.P. etc. and that they were liable to pay market fee only in respect of those transactions in which the agricultural produce had been purchased from the producers directly and that agricultural produce was sold. The petitioner-firm was never informed by the Market Committee that this contention of theirs was not correct. The notice to the petitioner-firm was given on 27th September, 1968 for appearance before the Administrator, Market Committee, on 30th September, 1968 and to produce its books of account for the assessment of market fee from it. It was further stated in the absence of compliance of the notice, the committee would make the assessment under R. 31 (8) of the Rules. Reply to this notice was sent on 2nd October, 1968 but the Administrator passed his order on 30th September, 1968. He passed his order on the report of the Mandi Supervisor and the Secretary of the market committee under R. 31 (8) of the Rules. The report of the Supervisor is dated 30th September, 1968 and is addressed to the Secretary of the Market Committee, Sangrur, in which it is stated that in the Mandi from 1961-62 to 1966-67 the average annual income of the committee was derived from 7858 quintals of Gur and Shakkar but in 1967-68, the fee had been received only with regard to 3380 quintals. Therefore, for the remaining 4450 quintals the petitioner-firm was liable to the market fee. The price of 4450 quintals was assessed at Rs. 10,00,000/-. On similar grounds the import of Khandsari by the petitioner-firm was assessed at 78- quintals of the value of Rs. 2,53,500/-. Thus the market fee was assessed on an out-turn of Rs. 12,53,500/-. The Secretary endorsed this report of the Mandi Supervisor on the same date and on the basis thereof, the Administrator passed the order of assessment.

12. To say the least, this manner of assessment is more arbitrary. It is true that the committee is entitled to make best assessment judgment but it must be based on some reasonable data and not merely on imagination. It was open to the Administrator, Market Committee, or its Secretary to find out from the records of the Railway, the Transport Companies and the Octroi Department of the Municipality as to the quantity of Gur, Shakkar and Khandsari imported by the petitioner-firm into the Mandi. On the basis thereof some assessment by exercising judicial discretion could be made but to presume that the entire balance of Gur, Shakkar and Khandsari which fell short of the annual average was imported and sold by the petitioner-firm alone is wholly unwarranted. There are admittedly some other dealers in the notified market area and it was in the fitness of things to make an inquiry from those dealers also. It is evident that no mind was applied to the problem as the Mandi Supervisor made the report sitting in the office and the Secretary endorsed it without there being any objective data before either of them. The Administrator merely accepted their estimate and passed the impugned order.

13. A Division Bench of the Orissa High Court considered the making of the best judgment assessment in *Jami Narasaya Prusty and Bros. Vs. State of Orissa*, . In that case the assesses submitted a return of their sale for three quarters but did not include in the return of the first quarter the sum of Rs. 125 being the sale amount of five watches and the officer for that reason added Rs. 15,000 not only to the return made for the period during which the watches were sold but to the returns of all the three periods. The assesses thereupon filed an application under Article 226 of the Constitution for quashing the assessments. It was held that the assessments for the three periods should be quashed inasmuch as they were based upon mere guess-work and there was no proper basis for making the best judgment assessment. As the error was apparent on the face of the order, it was not necessary for the assesses to go in appeal under the Sales Tax Act before invoking the jurisdiction of the High Court under Art. 226. A Division Bench of the Kerala High Court in *Balakrishna and Sons Vs. Sales Tax Officer and Another*, , held that -

"In making a best judgment assessment, the assessing authority discharges quasi-judicial functions and the order he passes must not be capricious, arbitrary or punitive. The order must also disclose the basis for the best judgment assessment, so that the higher authorities may know the grounds on which the assessment has been based."

14. A learned Single Judge of the Kerala High Court (*Vaidialingam, J.*, now a Judge of the Supreme Court), in *Namadeva Shenoy Vs. Sales Tax Officer, Special Circle*, , observed as under :-

"It is needless to state that when the officer proceeds to make a best judgment assessment, there is a duty on his part to make available to the petitioner every point or aspect that he proposes to take into account in making the best judgment assessment, and give the assessee opportunity to place all the objections that may be available to him both under law and on facts, regarding the proposal. After completing all these formalities, it is open to the assessing authority to make the final assessment." In that case the pre-assessment notice issued to the assize stated that the books of account produced by the assessee had been rejected on account of certain defects and that the officer was estimating the turnover to the best of his judgment, but it did not, as such, indicate the basis the officer had proposed to adopt for making the best judgment assessment. It was held that it could not be said that the assessee had been given a fair and full opportunity to place all his points of view regarding the return that he had filed and, therefore, the order making the best judgment assessment must be set aside.

15. A learned Single Judge of the Calcutta High Court in *Jhagru Shaw and Others Vs. Commissioner of Commercial Taxes and Others*, , held as under :-

"It is now a well-known proposition of law that if a Revenue Officer is to make an assessment to the best of his judgment, against an assessee who is in default as

regards supplying information, he must not act dishonestly, or vindictively or capriciously, because he must exercise his judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment and for this purpose he may take into consideration local knowledge and repute in regard to the assesses circumstances and his own knowledge of the previous returns by and the assessments of, the assessee and all other matters which he thinks would assist him in arriving at a fair and proper estimate. Though there must be necessarily some guess work in the matter, it must be honest guess work."

16. In *M. Appukutty Vs. Sales Tax Officer, Spl. Circle I, Kozhikode*, a Single Judge of the Kerala High Court (P. Govindan Nair J.) held as under :-

"Principles of natural justice demand that there should be a fair determination of a question by quasi-judicial authorities. Arbitrariness will certainly not ensure fairness. If giving a mere opportunity to show cause and to explain would satisfy the principles of natural justice, the notice to show cause becomes an empty formality signifying nothing, for, after issuing the notice to show cause, the authority can decide according to his whim and fancy. The judicial process doesn't end by making known to a person the proposal against him and giving him a chance to explain. It extends further to a judicial consideration of his representations and the materials and a fair determination of the question involved.

If the quasi-judicial authority disregards the materials available or if it refuses to apply its mind to the question and if it reaches a conclusion which bears no relation to the facts before it, to allow those decisions to stand would be violative of the principles of natural justice. Arbitrary decisions can also, therefore, result in violation of the principles of natural justice which is a fundamental concept of Indian jurisprudence. In certain cases, where an authority refuses to apply its mind to the question and makes a decision as it likes, it may amount to even a malafide decision.

The existence of an alternative remedy is not an absolute bar to the issue of a writ of certiorari when there has been violation of the principles of natural justice and infringement of fundamental rights. The remedy available by way of appeal to the Appellate Authority and then by way of second appeal to the Tribunal and then by a revision to the High Court is not adequate where an assessee is compelled in the meantime to pay the tax imposed on him by an arbitrary assessment which has been solely guided by the whim and fancy of the assessing authority.

When sales tax is imposed illegally in an arbitrary and capricious manner there is an infringement of the fundamental right of an assessee to carry on his trade or business. Although quasi-judicial authorities have jurisdiction to decide rightly as well as wrongly, no judicial or quasi-judicial authority has the right to decide in an arbitrary manner and if it so decides, the High Court should safeguard the

interest of the victim of such decision by interfering under Art. 226 of the Constitution. Further, in such cases, Art. 265 of the Constitution is also violated, inasmuch as there is no collection of tax by the authority of law even assessments are made in an arbitrary fashion."

17. Their Lordships of the Supreme Court in the State of Kerala Vs. C. Velukutty, , observed as under :-

"Under Section 12(2) (b) of the Act, power is conferred on the assessing authority in the circumstances mentioned thereunder to assess the dealer to the best of his judgment. The limits of the power are implicit in the expression "best of the judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess-work in a "best judgment assessment", it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case. Though sub-section (2) of Section 12 of the Act provides for a summary method because of the default of the assessee, it does not enable the assessing authority to function capriciously without regard for the available material.

Can it be said that in the instant case the impugned assessment satisfied the said tests? From the discovery of secret accounts in the head office it does not necessarily follow that corresponding set of secret accounts were maintained in the branch office, though it is probable that such account were maintained. But, as the accounts were secret, it is also not improbable that the branch office might not have kept parallel accounts, as duplication of false accounts would facilitate discovery of fraud and it would have been thought advisable to maintain only one set of false accounts in the head office. Be that as it may, the maintenance of secret accounts in the branch office cannot be assumed in the circumstances of the case. That apart, the maintenance of secret accounts in the branch office might lead to an inference that the accounts disclosed did not comprehend all the transactions of the branch office. But that does not establish or even probabilities the finding that 135 per cent or 200 per cent or 500 per cent of the disclosed turnover was suppressed. That could have been ascertained from other materials. The branch office had dealings with other customers. Their names were disclosed in the accounts. The accounts of those customers or their statements could have afforded a basis for the best judgment assessment. There must also have been other surrounding circumstances, such as those mentioned in the Privy Council's decision cited supra. But in this case there was no material before the assessing authority relevant to the assessment and the impugned assessments were arbitrarily made by applying a ratio between disclosed and concealed turnover in one shop to another shop of the assessee. It was only a capricious surmise unsupported by any relevant material. The High Court, therefore, rightly set aside the orders of the Tribunal."

18. In *Poliseti Subbaraidu and Co. v. Commissioner of Income Tax, A.P.* (1969) 69 ITR 738 a Division Bench of the Andhra Pradesh High Court held that "as the

estimate was made by the department without disclosing to the assessee the details of material relied upon and the details of comparable cases, it was arbitrary and capricious."

19. In view of the these judgments, I am of the opinion that the order of assessment passed by the Administrator, Market Committee, Sangrur, on 30th September, 1968 was arbitrary and not in accordance with the Rules and the principles of natural justice. After the petitioner-firm had failed to produce the account books, it was the duty of the Administrator or the Secretary to make honest enquiries from other sources as indicated above and then to estimate the quantity of Gur, Shakkar and Khandsari sold by the petitioner-firm on which it was liable to pay the market fee. After collecting should communicate that information the petitioner-firm and give it an opportunity to show that the material collected was faulty and could not be made the basis of the assessment. It is true that an element of guess-work enters the estimate of best judgment but it must be an honest estimate as has been emphasised by the learned Judges in the cases cited above. I have, therefore, no option but to set aside the order of assessment and the notice of demand issued in pursuance thereof, Annexures "L" and "K", respectively, to the writ petition.

20. The learned counsel for respondents 2 and 3 raised a preliminary objection to the maintainability of the writ petition which is based on sub rule (13) of Rule 31 of the Rules. This sub-rule provides for an appeal against the assessment order made under sub-rules (8) and (9) to the Chairman of the Board but no such appeal is to be entertained unless the applicant deposits the amount of fee assessed as due from him in full with the Committee concerned. In the first place, the provision of an alternative remedy is not an absolute bar to the maintainability of a writ petition under Art. 226 of the constitution. In the second place, the provision of appeal has been made in the rules and not in the Act but it is fettered with a condition that the amount of fee assessed has to be paid before the appeal can be heard. There is no provision in the Act enabling the State Government to impose such a fetter on the right of appeal. In *M/s. J. N. Sharma and Sons v. Assessing Authority* 1967 CLJ 512 Rule 61-A of the Punjab General Sales Tax Rules was held to be ultra vires sub-section (3A) of Section 21 of the Punjab General Sales Tax Act on the ground that the restriction imposed by the rule was far greater than the permitted restriction referred to in Section 21 (3A) of the Act. the fetter imposed by that rule was that the revising authority shall not hear the revision unless the petitioner had deposited the assessed sales-tax.

21. A Division Bench of this Court in *Daya Krishan v. Assessing Authority cum Excise and Taxation Officer (Enforcement)* (1966) 68 PLR 673, held as under :-

"Rules 61-A and 62 of the Punjab General Sales Tax Rules are not an aid to the revisional jurisdiction of the Excise and Taxation Commissioner, but cut at the roots of that jurisdiction conferred by the Legislature. These Rules substantially nullify the revisional powers conferred by Section 21 of the Punjab General Sales

Tax Act, and are inconsistent therewith. The requirement of payment of dispute demand as a condition precedent for being heard against the creation of that demand is not inherent in the jurisdiction to hear either an appeal or a revision. Such a hurdle can be created only by the competent Legislature and not by framing a rule which is inconsistent with the section conferring the powers of appeal or revision. The impugned rules substantially take away the right conferred by Section 21 of the Act except in certain rare cases where the Commissioner may find that it is impossible for the aggrieved party to deposit the amount in question. Both the Rules are repugnant to Section 21 of the Act and are of no effect."

I, therefore, hold that the provision of appeal in R. 31(13) of the Rules is not an adequate or suitable alternative remedy as it requires the petitioner to deposit the assessed fee before his appeal can be heard. The writ petition is, therefore, competent.

22. For the reasons given above, the writ petition is accepted and the assessment order dated 30th September, 1968, Annexure "L" to the writ petition and the notice of demand dated 3rd October, 1968, Annexure "K" to the writ petition, are hereby quashed. The respondents will be at liberty to make fresh assessment in accordance with law and keeping in view the observations made above. In the circumstances of the case, I make no order as to costs.

23. Petition allowed.