(2001) 04 GAU CK 0030

In the Gauhati High Court

Case No : Civil Rule No. 1142, 1272 of 1997, WP (C) No. 1125, 257 of 1999 W.P. (C) No. 3355, 4952, 1794 of 2000 and W.A. No. 646 of 1997, W.A. No. 378, 392 of 1999 and W.A. No. 39 of 2000

Tinsukia Trading Co. APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 04-04-2001

Acts Referred:

Assam Agricultural Produce Market (General) Rules, 1975 — Rule 21(3), 21(7), 4
Assam Agricultural Produce Market Act, 1972 — Section 121, 13, 14, 15, 16

Citation : (2001) 1 GLT 520

Hon'ble Judges : N.C. Jain, C.J;P.G. Agarwal, J;A.H. Saikia, J

Bench : Full Bench

Advocate : Govt., Mr. M. Hazarika, Ms R. Bhattacharjee, Mr. G.N. Sahewalla, Mr. A.K. Goswami, Ms J. Senapati, Mr. T. Baidya, Mr. P. Board, Ms S. Senapati, Mr. A. Sattar, Ms M. Kumari, Mr. D.A. Kayum, Ms M. Hazarika, Ms N. Kalita, Mr. K.R. Surana, Mr. N. Dutta, Mr. S. Kataki, Ms A.J. Das, Mr. D.K. Mishra, Dr. A.K. Saraf, Mr. H. Roy, Mr. A. Dutta, Mr. S.A. Laskar, Mr. N. Haque, Mr. S. Rahman, Mr. A. Rashid, Mr. Z. Iqbal, Ms M. Lallinmawii, Mr. A. Choudhury and Mr. C. Choudhury, for the Appellant;

Judgement

A.H. Saikia, J.—This is a reference by the learned Single Judge referring the following question for an authoritative pronouncement. The Hon''ble Chief Justice was pleased to constitute this Full Bench to decide the said question of law.

"Whether the consignment of notified agricultural produce which are being transported into the declared market area in the State of Assam are liable to cess U/S 21 of the Act even before their sale and purchase in the market area in view of the decisions of the Supreme Court in Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another, and in Agricultural Market Committee Vs. Shalimar Chemical Works Ltd.,

2. Pronouncing the order dated 17.8.1999 in C.R. No. 1142/97 (Tinsukia Trading Co. & others v. State of Assam & Others) filed by the petitioner''s firm

questioning the legality and validity of realisation of cess under the provisions of Section 21 of the Assam Agricultural Produce Market Act, 1972, (for Short, ''the Act'') and Rule 21(7) of Assam Agricultural Produce Market (General) Rules, 1975 (for short, the Rules''), the learned Single Judge observed that the decision of the Division Bench of this Court in Anjali Trading Co. v. Assam Agricultural Marketing Board & others, reported in 1998(1) GLR 111 affirming the decision of the learned Single Judge in Anjali Trading Co. v. Assam Agricultural Marketing Board & others, reported in 1995(3) GLR 62 holding that the consignment of notified. agricultural produce which are being transported into declared market area in the State of Assam are liable to cess even before their sale or purchase in the market area is at variance with the decisions of the Apex Court Agricultural Market Committee Vs. Shalimar Chemical Works Ltd., and Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another, That is why the present reference was made to this Full Bench.

3. These batches of Writ appeals as well as Writ petitions have been brought under judicial scrutiny in order to determine the common questions as to :-

(i) Whether the provisions of Rule 21 (7) of the Rules is ultra-vires inasmuch as the State Government in exercising Rule making power U/S 49 of the Act has widened the scope of ''presumption'' by providing number of other factors beyond its Legislative competency?

(ii) Whether the Assam Agricultural Marketing Board, (for short, ''the Board'') has the power to collect levy and cess of the agricultural produce in the market area as per Section 21 of the Act merely on the basis of Resolution adopted by the Board?

(iii) Whether the Board and its employee are justified and empowered to realise cess on the agricultural produce at different check gates on the National High Way in Assam, particularly erected at Srirampur, New-Guwahati, Jagiroad, Jorhat, Titabor and Dergoan for such purposes?

(iv) Whether the Respondents-State Government may be directed to refund the cess already realised by it?

4. The common facts in brief, involved in all these cases in hand, are that the appellants/writ petitioners purchased the agricultural produce i.e. Rice, broken rice, wheat, mustard oil etc. from different placed in Punjab, Haryana, Uttar Pradesh by paying marketing cess to the marketing committee of those respective places and thereafter the said agricultural produce are imported to Assam by road and rail. When the trucks loaded with agricultural produce pass through Srirampur check gate on the Assam Bengal Boarder and Jagiroad check gate (after unloading the consignment of agricultural produces transported by rail at Guwahati) cess is realised at those check gates by the agricultural Marketing Board though the notified agricultural produce are not sold in any such market area. Agricultural produce are ascertained goods and are in deliverable state, and as such, the sale of agricultural produce is complete in the State of

Punjab, Haryana and U.P. from where the respondents purchased the agricultural produce. The Board has no authority or right to erect check gates on National High Way and realise cess on those check gates from the trucks carrying agricultural produce although no sale or purchase of transaction takes place at those places declared as market area.

5. We have heard Mr. P.G. Baruah, learned Advocate General, Assam in W.A. No.39/2000, Mr. .K. Misra, learned Sr. counsel assisted by Mrs. M. Hazarika and WA No.378/99, W.A. No.392/99, C.RNo. 1274/ 97, C.R. No. 1142/97, WP(C) No.4952/200 D.P.C. No. 1749/2001. Also heard Mr. GN Sahewalla, learned Sr. counsel appearing in W.P.C. No.257/99 and W.P.C. No. 1125/99, Mr. N. Dutta, learned Sr. counsel appearing in W.A.No.646/97. Mr. A. Sattar, learned counsel appearing in W.P.C. No.3556/2000 and Mr. S.A. Laskar, learned counsel appearing on behalf of the Board in all the cases.

6. Considering the nature and importance of the issues under reference we dc hereby propose to decide all the questions raised in those cases involving common question of facts and law.

7. To initiate the discussion on the questions raised, it will be appropriate, a priori, to have a look on the relevant provisions of the Act and Rules including the object and reasons of the Act.

8. The State Legislature of Assam enacted the present Act with the object and reasons published in the Assam Gazette dated 21.7.1992 which is as follows:-

"The object of a market is to facilitate the marketing activities by providing fair opportunities both to the buyers and sellers to strike bargain and to complete transaction. The promotion of this object should therefore be the duty of the traders as well as of the agriculturists. Where one is unable for one reason or the other to discharge his responsibilities and the other anxious to exploit his rival''s ignorance and helplessness it is avowed duty of the State to intervene and control unfair business and facilitate the fair one. The state can effectively intervene by regulation of market practices under which those using the markets are required to behave and perform their function, and under which only duty elected legal body (authority) is created to ensure that those prescribed rules of behaviours are strictly observed.

In fact, sale of agricultural produce involves a number of functions such as assembling, storing, grading, standardizing transporting and financing the producer and negotiating the sale. The individual producer does not have the specialised knowledge and adequate resource to perform all these functions. Hence he needs to be given not only better facilities for disposal of his produce in a well established regulated market but also proper help and advice with regard to grading and standardisation as well as adequate storage facilities and financial assistance to improve his slaying power. The implementation of the provisions of the various schemes of agricultural improvement and recommendation of the Government of India from time to time for effecting the above improvements demand the establishment of Regulated markets. The plan for regulation of market may, therefore, be said to be an integrated plan which intends to effectively link the various stages of marketing thereby brings benefit to the cultivators.".

9. The main thrust of the Act is to provide for better regulation for buying and selling of agricultural produce and establishment of markets for agricultural produce in the State of Assam and for matters connected therewith. This is the Act to prevent exploitation of growers of agricultural produce, to provide for establishment of organised market and market yards to ensure sale and purchase of agricultural produce at a fair price to be notified and to ensure correct weighment of such produce bought and sold in the market yards.

10. Section 3(1) of the Act confers power on the State Government to establish and constitute a State Agricultural Marketing Board consisting of Chairman and 10 other members to be nominated by the State Government in the manner prescribed for exercising the powers and duties conferred on the Board under the Act. The Board is vested with all the power of superintendence and control over the Market Committee in the manner prescribed u/s 3(10) of the Act.

11. Elaborating the manner in which the control and superintendence over Market Committee has to be exercised by the Board, Rule 4 of the Rules enunciates as follows:-

"4. Control and superintendence of Market Committee :-

For the purpose of enabling the Board to exercise superintendence and control over the Market Committee as per sub-section (10) of Section 3 of the Act:-

1. All the employees of the Market Committee shall under control and superintendence of the Board:

2. The Market Committee shall be guided by the Board. The Board may also frame Bye-laws -

(a) for better marketing of agricultural produce on cooperative lines;

(b) for uniform grading and standarisation of agricultural produce;

(c) for the general improvement of the markets or their respective notified market areas:

(d) for the classification of the committees on the basis of their income for the purpose of fixing the grades of their Secretaries and other employees;

(e) for any other purpose which, in the opinion of the Board is calculated to promote the interest of the Committee or to lead to improvement of marketing agricultural produce and agricultural in general.

3. The Board shall sanction the budget of the Committee and the Committees shall submit their annual budget to the Board not later than the last week of

February preceding the year to which the budget relates. If the budget is not received back by the Committee concerned within two months of the date of despatch it shall be presumed to have been sanctioned.

4. The Board shall examine the annual assessment of work and progress of the Committee; sent by the Chairman of the Committee in the form of Annual Reports including the audited accounts of the Committees for the precession financial year not later than the last Week of May of the succeeding year. In case the Board disagrees with the Chairman of the Committee concerned, the Secretary of the Board shall convey the opinion of the Board to the Chairman of the Committee concerned and in that case the Chairman of the Committee shall send appropriate replies to the objections within the time specified by the Secretary of the Board.

5. If the Board in its opinion finds that the financial position of a Committee does not warrant payment of traveling and daily allowances and also the remuneration etc. if any, to the members of the Committee in the rates approved by the Committees, the Board may fix such scales of daily and travelling allowances or remunerations as the Board may think proper.

6. References from Committees to any Government Department other than district authorities and local bodies shall be made through the Secretary of the Board. For the purpose of this sub-rule the term Government includes the State and also the Government of India as the case may be.

7. The Chairman or the Secretary of the Board or any other employees of the Board not lower than the rank of that of an Inspector authorised in this behalf by the Secretary of the Board may at any time inspect, examine and check the weighing instruments, weights, measures kept by a Committee. After inspection the inspecting authority may give such directions as it may deem proper and the Committee shall be bound to comply with such directions. The inspecting authorities as prescribed herein may at any time and without previous notice, inspect, examine and test any weighing instrument, weight or measures used kept or possess within notified market area by a licences, and every such licensee in possession of nay such weighing instrument, weight or measure shall when required, be bound to produce before the person entitled so to inspect examine and test it.

8. The Chairman or the Secretary of the Board or any other employees of the Board may at any time inspect and examine the records and accounts of the Committee and issue directions to the Committee as deem proper and the Committee shall be bound to comply with such directions.

9. The Board shall issue instructions and directions to the Committee whenever necessary towards the fulfilment of the objects and purposes of the Act and the Committee shall be bound to follow such instructions and directions.".

12. A bare perusal of these provisions would clearly show that there is no

provisions either in the Act or Rule empowering the Board to exercise the powers conferred on the Market Committee by the Act and the Rules.

13. Establishment of Market Committee has been provided in Section 7, which is quoted below:-

"7(2) The State Government shall establish a Market Committee for every area declared to be a market area under sub-section (1) of Section 5. It shall be the duty of the Market Committee to enforce the provisions of the Act and the Rules and bye-laws framed thereunder in such market area;

(2) The State Government may establish a separate Market Committee within the same market area or a part thereof provided it is satisfied that trading in a particular type of agricultural produce can be regulated only if and when an independent Market Committee already functioning is unable to undertake regulated trading in that commodity because of its peculiar nature:

Provided that not more than one Market Committee shall be established within the same market area or a part thereof for the same type of agricultural produce.".

14. Section 13 of the Act provides incorporation of Market Committee which reads as follows:-

"13(1) Every Market Committee shall be a body corporate by such name as the State Government may specify by notification in the Official Gazette. It shall have perpetual succession and a common seal, may sue or be sued in its corporate name and shall be competent to acquire and hold lease, shall or otherwise transfer any property and to contract lands to do all other things necessary for the purpose for which it is established.

(2) Where a Market Committee is established in any area, no person shall functions as a trader, commercial agent, broker, weighman, measurer, surveyor, Warehouseman or in such other capacity as may be determined by the Director in any market within the area to work in a processing or pressing factory, unless a licence is issued to such person by the Market Committee on payment of such fees and subject to such conditions as may be prescribed."

15. Market Committee is the only authority having its power to perform its functions, duties and to enforce powers conferred on it under Sections 14, 15, 16 and 21 of the Act and also under Rule 21(3) of the Rules which are quoted as under -

"14. The functions of a Market Committee shall be as follows:-

(i) to maintain and manage the market yard and to control, regulate and run the market in the interest of the agriculturists and traders holding licence from the Market Committee

(ii) to regulate and control transactions in the market and to deal with licence holder who, default to open, close and suspend trade in any notified agricultural produce to settle dispute, levy and recover market charges, fees on an agricultural produce, licences and other fees to impose fines and venalities;

(iii) to act as a mediator, arbitrator or Surveyor in all matters of differences, disputes, claims, etc. between licences or between them and agriculturists making use of the market as sellers or agricultural produce;

(iv) to control and regulate the admission to the market, to determine the conditions for the use of the market and to prosecute and confiscate the goods belonging to persons trading without a valid licence;

(v) to bring prosecute and defend or aid in bringing prosecuting or defending any suit, action, proceeding application or arbitration on behalf of the Market Committee or otherwise directed by the State Government;

(vi) to purchase, hire or acquire any land for construction of any house thereon or other movable or immovable property and other equipment for the purpose of its business, to raise fund from the Government or otherwise with the approval of the Director for the said purpose and to enter into agreements with the Government, local authority or otherwise and to comply with such arrangements; and

(vii) to do such other things as may be required for the purpose of achieving the objects and requirements of the Act and the rule and bye-laws framed thereunder."

"15. A Market Committee shall have the power to regulate entry or persons into the principal or sub-market yards, to supervise the behaviour of the persons so entered for transacting business and to take disciplinary action against the licence who fails to fulfil the conditions of the licence or any direction of the Market Committee, issued within the purview of this Act or Rules or bye-laws."

16. It shall be duty of every Market Committee to enforce the provisions of this Act, the conditions of licence granted under the rules and bye-laws framed under the Act in the market area and to provide such facilities as the State Government may, from time to time, direct in connection with the purchase and or sale of notified agricultural produce concerned."

21 (1) Every Market Committee shall levy and collect a cess on the agricultural produce bought or sold in the market area at a rate not exceeding one rupee for every one hundred rupees of the aggregate amount for which a notified agricultural produce is bought or sold whether for cash or for deferred payment or other valuable considerations:

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

Explanation 1 ; For the purposes of section all notified agricultural produce taken out or proposed to be taken out of a market area shall unless the contrary is provided, be presumed to be bought or sold within such area.

Explanation 2 ; The cess referred to in section 21 shall be paid by the purchaser of the notified agricultural produce concerned.

"R.21. Levy and collection of cess on the sale and purchase in the agricultural produces (Section 21 and 49(2)(v):-

(1).....

(2).....

(3) The cess shall be paid to the committee or to a paid officer duly authorised by the Market Committee to receive such payment within 4 days of the day of transaction."

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

16. Rule 21{7) of the Rule the vires of which has been challenged in all these cases in extracted below:-

"21. Levy and collection of cess on the sale and purchase in the agricultural produce (Section 21 and 49(2)(v):-

(7) For the purpose of this Rule agricultural produce shall be deemed to have been bought or sold in a notified area:-

(i) If the agreement of sale or purchase thereof is entered into in the said area; or

(ii) if in pursuance of the agreement of sale or purchase the agricultural produce is weighed in the said area; or

(iii) if in pursuance of the agreement of sale or purchase t-he agricultural produce is delivered in the said area to the purchaser or to some other persons on behalf of the purchased."

17. In the backdrop of those provisions of law vis-a-vis the factual position abovementioned, Mr. D.K. Misra, learned Sr. counsel assisted by Mrs. Hazarika, the learned counsel, leading the arguments on behalf of all the Writ petitioners/ appellants, states that the judgment and order dated 29.9.1999 passed in CR No. 1459/ 98 (Assam Roller Flour Mills Association v. Assam Agricultural Marketing Board & Others) by the learned Single Judge of this Court is under challenge is all these Writ appeals preferred either by appellants firm or State of Assam as well as the Board. In the said decision, the learned Single Judge held that collection of cess from the member of the association is in violation of section 21 of the Act and Rule 21 (7) of the Rules and the legal fiction provided for in Rule 21(7) are not within the competence of the State of Assam to whom power to frame rules was delegated by the Legislature for which Rule 21(7) was

declared as ultra-vires. In arriving at said finding, the learned Single Judge wholly relied on the decision of the Apex Court in Shalimar Chemical Works Ltd''s case (supra).

18. Though by the said Judgment, submitted by the learned Senior counsel for the appellant, Rule 21(7) of the Rules was declared as ultra vires, some other issues raised in the writ petition to the effect that (1) power of Marketing Board to levy and collect cess; (2) liability to pay cess exclusively on the purchasers; (3) legality of collection of cess at the various gates like Srirampur, Jaglgopha etc. and (4) refund of cess realised illegally, have not been discussed at all by the learned Single Judge. Mr. Misra, learned Sr. counsel strenuously argued that the Board has no power to levy or collect cess on notified agricultural produce at the check gates itself on behalf of the Market Committee constituted u/s 7 of the Act simply on the basis of a Resolution by the Board adopted on 30.11.1983. The Section 21 quoted above, empowers only the marketing committee for such levy and collection of cess on the agricultural produce. It is stated that the agricultural produce bought or sold in the market area can be levied and collected u/s 21 of the Act. However, Explanation (1) of Section 21 creates a legal fiction that all notified agricultural produce taken out or proposed to be taken out presumed to be bought or sold within such area. This is a rebuttable presumption and the presumption is limited to taking out or proposed to be taken out. Mr. Misra has also stated that the learned Single Judge in the impugned judgment dated 29.9.1999 observed that the decision of the Division Bench in Anjali Trading Co. case (supra) affirming the decision of the learned Single Judge is not applicable inasmuch as in that case vires of section 21(7) was not challenged when in Anjali Trading Co. case (supra) it was held that the realisation of the cess at the check gates are legal and within the authority of law and erection of check gates are neither illegal nor without authority of law. Relying on Shalimar case''s (supra) the learned Sr. counsel states that the law laid down in the Anjali Trading Co. case (supra) cannot be said to be a good law because the erection of check gates for the purposes of realisation of cess on the agricultural produce apparently illegal and unauthoirsed when no sale or purchase has taken place at such places. Realisation of cess, thus, cannot be permitted in terms of Section 21 of the Act as well as Rule 21(7) of the Rules.

19. In support of his argument, Mr. Misra, learned Sr. counsel has relied on several decisions of the Apex Court. Referring to the decisions in Braithwaite and Co. (India) Ltd. Vs. The Employees'' State Insurance Corporation, it is submitted that the legal fiction has been adopted in law for a definite and limited purpose. There is no justification for extending it beyond the purpose for which the legislature adopted it. In the instant case, the Rule 21(7) has widened the scope of ''presumption'' by providing further that a notified agricultural produce shall be deemed to have bought or sold in notified area if any agreement for sale or purchase thereof is entered into in the said area or it is pursuance of the agreement the agreement of sale or purchase of the agricultural produce is weighed in the said area or delivered in the said area to the purchaser or

someother persons on behalf of the purchased. In that view of the matter, this Rule is beyond the scope of rule making power and, therefore, it is ultra vires.

20. The learned Sr. counsel has also referred t the decision in Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another, and drawn our pointed attention to paragraph 29 of the said decision wherein it was held that the market fee is payable in the market area and if no transaction of sale or purchase takes place in the particular market area, no fee can be charged by the Market Committee in that area. If agricultural produce are merely brought in any market area and despatched outside it without any transaction of sale taking place therein then no market fee can be charged.

21. In paragraph 29 in Ram Chandra Kailash Kumar''s case the Apex Court held as follows:-

"29. This point urged on behalf of the appellants is well founded and must be accepted as correct.On the very wording of Clause (b) of Section 17(iii) market fee is payable on transactions of sale or specified agricultural produce in the market area and if no transaction of sale takes place in a particular market area no fee can be charged by the Market Committee of that area. If goods are merely brought in any market area and are despatched outside it without any transaction of sale taking place therein, then no market fee can be charged. If the bringing of the goods in a particular market area and their despatch therefrom are as a result of transaction of purchase and sale taking place outside the market area, it is plain that no fee can be levied."

22. We have carefully perused the proposition of law laid down by the Supreme Court in Ram Chandra''s case (supra). According to the Apex Court, therefore, if goods are merely brought in any market yard and despatched outside the market area without transaction of sale taking place therein, then no market fee can be charged in respect of the said case.

23. The learned Sr. counsel has also referred to a decision of this Court in Banamali Tea Estate Vs. State of Assam and Others, and also the decision of the Apex Court in Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, and Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, in which interpretation of fiscal statutes were discussed by the Apex Court. Applying ratio of these decisions it is submitted that there is no room for any intentment for fiscal statute and there is no equity about the tax. One has to look fairly only at what has been stated in the said taxing statute and interprets the section accordingly. Therefore, looking into the proposition of law laid down in these decisions also, Rule 21(7) is beyond legislative competence.

24. Mr. Misra, learned Sr. counsel also claims that since the Rule 21(7) is declared ultra vires by the learned Single Judge, they are entitled to refund of the cess already realised by the respondent-State Government by re-opening

counter/gate at Srirampur in terms of communication dated 29.7.1993 issued under the signature of Joint Secretary to the Govt. of Assam, Agriculture Department vide Annexure-III appended to the W.A.No.378/1999.

25. Mr. G.N. Sahewalla, learned Sr. counsel appearing in WP(C) Nos. 257/99 and 1125/99 submits as per Section 13, quoted above. Market Committee itself being a body corporate and its function being provided u/s 14 of the Act, cannot entrust its function to the Board for levying and collecting the cess of agricultural produce by erecting at Srirampur check gate and Jogiroad check gate. Mr. Sahewalla has further submitted that it is apparent from Section 16 itself that Market Committee has to provide such facilities as the State Government may from time to time direct in connection with purchase or sale of notified agricultural produce concerned. There has to be quid pro quo between the market fee collected and service rendered in the market area. The fee can be collected by the Market Committee only by providing facilities for sale or purchase of notified agricultural produce, but in the instant cases neither the market area has been established at Tinsukia nor has any service been rendered for providing facilities for such sale or purchase of agricultural produce and as such the Board has no authority to levy and collect cess on the notified agricultural produce at the check gates on the National High Way on transportation of notified agricultural produce in Assam.

26. The learned counsel has relied on the decision of the Supreme Court in Kewal Krishan Puri and Others Vs. State of Punjab and Another, . In the said decision, it was held that there has to be quid pro quo between the market fee collected and service rendered in the market area.

27. Mr. P.G. Baruah, learned Advocate General, Assam appearing in WA No. 39/2000, challenging the judgment and order dated 29.9.1999 in CR No. 1453/98 passed by the learned Single Judge has argued that the Marketing Board and its instrumentalities acted legally while collecting the cess either at Srirampur check gate or other check gates within the State of Assam on being empowered by Section 21 of the Act and Sub-Clause (7) of the Rules 21 of the Rules and the said Rule cannot be declared as ultra vires, but at the same time, advancing his submissions, the learned Advocate General has fairly conceded that so far Sub-Clause 7(ii) of the Rule 21 of the Rules is concerned, the said Clause requires to be declared as ultra vires inasmuch as the same has, ex facie, already widened the scope of presumption.

28. Mr. Baruah, learned Advocate General during the course of hearing, has informed the Court that on 11.1.2001 Section 21 of the Act has been amended by the Assam Agricultural Produce Marketing (Amendment) Act, 2000 (published in Assam Gazette, Extra-ordinary on 30.1.2001) substituting the existing Explanation-1 to Section 21. In our considered opinion, we do not feel inclined to look into the said amended provisions of Section 21 because the same is not before us either in any of the writ appeals or writ petitions on which we are delving upon to answer the questions referred to us in this reference.

29. On the other hand, Mr. SA Laskar, learned counsel, appearing on behalf of the Board, has vehemently argued that in the State of Assam the market areas have already been declared by Government and the Board has acted legally and within its jurisdiction in levying and collecting the cess at the check gates of the agricultural produce on its transportation into Assam from outside before its sale or purchase at particular place on the basis of resolution of the Board on 30.11.1983 by which Sriram gate was brought under direct control of the Board as evident from the Annexure-III appended to the Writ appeal No. 378/99 arising out of C.R.No. 1453/98. It is submitted that the law has already been settled in this regard by the decision of the Division Bench of this Court in Anjali Trading''s Case (supra) affirming the decision of the learned Single Judge of this Court in Anjali Trading''s case (supra).

30. Having given our thoughtful consideration to the submissions made by the learned counsel on behalf of the parties, we are of the considered view that the following questions are required to be answered by this Full Court in addition to the question of law referred to us by the learned Single Judge:

(1) Whether the Rule 21(7) of the Rule is ultravires.

(2) Whether the Board has the power to collect levy and cess on the consignment of notified agricultural produce brought into the declared market area in the State of Assam in terms of Section 21 of the Act.

(3) Whether the collection of cess of the notified agricultural produce at various gates like Srirampur, Jagiroad is permissible when no sale or purchase take place at such places.

(4) Whether the cess realsied already, shall be refunded to the appellants/writ petitioners'' Firm.

31. Keeping in view of the above questions, now let us look into the principle of law laid down by the judicial pronouncement of the Apex Court as well as this Court as referred herein above.

32. In Anjali Trading Co. Case (supra), the learned Single Judge held in paragraphs 13,14 and 15 as follows: -

"13. in the instant case, it is found from the writ application itself that in para 3 it is admitted that the goods are purchased by the petitioners and brought into State for the purpose of sale. So it will come within the definition of sale as provided under the Act. It is not the case of the petitioners that the goods brought are not sold within the market area as will be evident from the affidavit-in-opposition filed on behalf of the respondents. It is the further case of the respondents in their affidavit in para 6 as follows :

"That there is no levy of cess on consignment of notified produce which are bound for any unnotified areas in the State or where the consignment is legitimately based in such unnotified areas. Any cess levied on such consignment at the inter State check gate inadvertently is always refundable forthwith to the consignee."

14. So, the cess is levied only on goods brought to the notified areas and as will be evident from the provisions of the Act, the cess can be levied on the notified areas in case of notified goods. It is the further case of the respondents that the collection of cess of consignment of noticed agricultural produce is conducted at the Srirampur check gate by the staff of the Board where the purchasers of the produce to whom the consignment is being delivered is shown by the documents accompanying the consignment to be based and maintaining trading premises, within a declared market areas of any Market Committee under the Board. In such a case the trader is a purchaser as shown by the document accompanying the consignment and the goods are delivered within the notified area (within the declared market area), the levy of cess shall be attracted under the provisions of the Act and the Rules.

15. Regarding the challenge to construct the check gate at Srirampur and Boxirhat u/s 14 (vii), a perusal of Section 14(vii) itself will show that the authority is empowered to do such other things as may be required for the purpose of achieving the objects and reasons of the Act and the Rule sand Bye-laws framed therein. Levy of cess and collection of the same also must be deemed to be purpose for achieving the objects and reasons of the Act and the Rules otherwise if proper machinery, method and manner for realisation of the cess are not made and enforced, the levy of cess itself will be an illusory one. Accordingly, this contention that erection of check gates are illegal and without authority of law cannot be accepted."

33. Affirming the said finding of the learned Single Judge, the Division Bench of this Court in Anjali Trading Co. case (supra) held that u/s 14(vii) of the Act a Market Committee has ample power and jurisdiction to erect check gates at Srirampur etc. for realisation of cess and such action is quite reasonable and within the purview of section 14(vii) of the Act. In paragraph 16 this Court held:-

"16. On bare perusal of the provisions of law laid down u/s 14(vii) of the Act, it has been revealed that, a Market Committee has ample power and jurisdiction to do such other things as may be required for the purpose of achieving the objects and the requirements of the Act and Rules and bye-laws framed thereunder. For the purpose of achieving the object of the Act, the construction -of check gate at Srirampur and Boxirhat for realization of cess is quite reasonable and permissible within the purview of section 14(vii) of the Act and as such the erection of such check gates is not illegal and without authority, in this regard, the learned Single Judge of this Court made a reasonable order and accordingly, the same is affirmed.

In paragraph 18 it was held that payment of cess on consignment of notified agricultural produce like rice, broken rice and wheat etc. is mandatory in respect of the writ petitioners/appellants as their firm is located within the market areas and the said paragraph is quoted below:-

"18. The writ appellant in para 3 specifically mentioned that various articles which are produced in the State of Bihar, Bengal and U.P. are purchased by him and are brought into the State of Assam for purpose of sale. Therefore, these goods and articles were purchased by the writ appellants and brought into the State of Assam for purpose of sale and not for sale within the market area and therefore, the cess can be levied on the notified areas in case of notified goods. The authority concerned conducted the collection of cess of consignments of notified agricultural produce at Srirampur check gate where the purchasers of the produce to whom the consignment is being delivered is shown by the documents accompanying the consignment to be based and maintaining trading premises within a declared market area of any Market Committee under the Board. The learned Single Judge held, that in such a case the trader is a purchaser as shown by the accompanying the consignment and the goods are delivered within the notified areas (within the declared market area) the levy of cess shall be attracted under the provisions of the Act and the Rules. We are of the view that the payment of cess on consignment of notified agricultural produce like rice, wheat etc, is mandatory in respect of the present writ applicant, and his firm or trading premises is located within the declared market areas in the State, to which premises the produce is being declaring as seen in the document marked as Annexure-1 to the affidavit-in-opposition of the respondent."

34. On bare perusal of the aforesaid paragraphs as per the decision of Anjali Trading''s case (supra) it would clear that the cess can be levied on the notified area in case of notified goods, though no sale or purchase virtually takes place.

35. Be it mentioned herein that in Anjali Trading Co. case (supra) the vires of Rule 21(7) of the Rules has not been challenged for which there was no scope for dealing with the question of validity and legality of the Rules 21(7) of the Rules.

36. But this Court in C.R.No. 1434/98 disposed of on 29.9.1999 speaking through the learned Single Judge declared the Rule 21 (7) of the Rules is ultra vires. Applying the ratio of Shalimar''s case (supra), this Court had the occasion to deal with a case which is similarly situated with the present case. In Shalimar''s case (supra) Rule 74(2) and Bye-laws 214(5) of the Andhra Pradesh (Agricultural Produce Livestock Market Rules, 1969, (in short ''the Rules'') and the Bye-laws of the committee respectively were under challenged as ultra vires. The Apex Court held in the said case that the Explanation 1 of the Section 12 of the Andhra Pradesh (Agricultural Produce & Livestock Market Act, 1966 (for short the ''A.P. Act'') has created a legal fiction providing that if in any notified agricultural produce is taken out or proposed to be taken out of notified area it would be presumed to have been purchased or sold within the market area. The said Explanation 1 of Section 12 of the A.P.Act is exactly similar to the Explanation of Section (1) of Section 21 of the act already quoted above which states that all notified agricultural produce taken out or proposed to be taken out of a market area shall, unless the contrary is proved, be presumed to be bought

or sold within such area.

37. For better appreciation of the law laid down by the Apex Court in Shalimar''s case (supra) it is necessary to quote paragraphs 26, 27 and 28 of the judgment:-

"26. The principle which therefore emerges out is that the essential legislative function consists of the determination of the legislative policy and the legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but the legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates. These principles also apply to taxing statutes. The effect of these principles is that the delegate which has been authorised to make subsidiary rules and regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder. It cannot, in the garb of making rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of the Act.

27. Applying the above principles to the instant case, it will be seen that the market fee can be levied under the Act only on the sales and purchase of notified agricultural produce within the notified area. Explanation 1 to Section 12 creates a legal fiction and provides that if any notified agricultural produce is taken out of a notified market area, it shall be presumed to have been purchased of sold within such area. The presumption is a rebuttable presumption and can be shown to be not correct. The policy in enacting this provisions is only to cover such transactions of sale and purchase for which direct evidence may not be available. Since the notified agricultural produce can be sold only within the notified market area, and, that too, by a trader having a licence issued to him by the committee, it is obvious that if such commodity is moved out of the notified area, it would mean either that it has been sold or purchased otherwise, there would be no occasion to move such commodity. Out of the notified market area. The legal fiction was thus limited to the ''moving'' of the commodity from within the market area to a place outside the market area.

28. The Government to whom the power to make rules was given u/s 33 and the committee to whom power to make bye-laws was given u/s 34 widened the scope of ''presumption'' by providing further that if a notified agricultural produce is wheat, measured or counted within the notified area, it shall be deemed to have been sold or purchased in that area. The creation of legal fiction is thus beyond the legislative policy. Such legal fiction could be created only by the legislature and not by a delegate in exercise of the rule making power. We are, therefore, in full agreement with the High Court that Rule 74(2) and Bye-laws 24(5) are beyond the scope of the Act and, therefore, ultra vires. The reliance placed by the assessing authority as also by the appellate and revisional authority on those provisions was wholly misplaced and they are not justified in holding, merely on the basis of weighment of ''Copra'' within the notified area committee that the transaction of sale took place in that market area."

38. In the light of the principle culled out and enunciated in the decisions, above referred more particularly Ram Chandra Kailash Kumar''s case (supra) and Shalimar''s case (supra), we found force on the submission made by Mr. Misra as well as Mr. Sahewalla, learned Sr. counsel appearing on behalf of the appellants/ Writ petitioner''s firm and accordingly, we are inclined to subscribe to the said submissions of the learned counsel of the appellants/ Writ petitioners. On the other hand, the submission made by Mr. P.G. Baruah, learned Advocate General for the State of Assam as well as Mr. S.A. Laskar, learned counsel appearing for the Board do not convince us a wee bit and as such we safely agree to defer with their submissions for the reasons below.

39. Applying the ratio of Ram Chandra Kailash''s Case (supra) and Shalimar''s Case (supra) to the case in hand, we can unhesitantly hold that the State Government in the exercise of Rule making power u/s 49 of the Act has widened the scope of presumption laid down in the Explanation 1 to section 21 of the Act by framing Rule 21 (7) providing further that if in a notified area any agreement of sale or purchase is entered into or if in pursuance of such agreement of sale or purchase, notified agricultural produce is weighed or delivered in the said area to the purchaser or to some other persons on behalf of the purchase, the agricultural produce shall be deemed to have been brought and sold in the notified area.

40. We have already quoted herein above the Explanation 1 appended to Section 21 of the Act. A bare perusal of the said provision of law would clearly indicate that the statutory presumption regarding sale and purchase is raised in respect of notified agricultural produce, if they are taken out or presumed to be taken out of a notified market area. It is to be presumed that such notified agricultural produce is either sold or purchased within the notified market area, as soon as the said notified agricultural produce is taken out or proposed to be taken out of a market area. Basing on such presumption, the committee can act to levy and collect cess on such transaction. It is important to note that under these provision, the presumption is limited only to the movement of notified agricultural produce. Explanation 1 appended to section 21 has not allowed any other or additional factors to be considered to raise such presumption. Hence, this statutory presumption is of a limited character. I has to be strictly construed since it relates to levy and collect or cess which is fiscal in nature. It is a settled position of law that fiscal statute has to be strictly construed and on this point, the Apex Court and this Court have already opined in Goodyear''s case (supra) and Bonomali''s case (supra) case respectively. Taxing statute is to be construed in such a manner that any circumstances, situation, factor or conditions which are not stipulated by the Act cannot be taken into consideration to raise presumption regarding sale or purchase of the notified agricultural produce.

41. The State Government u/s 49 of the Act is empowered to frame rules. Accordingly Rule 21(7) of the Rules, already extracted, has been framed u/s 21 and 49(2)(v) of the Act.

Section 49(2)(v) reads as follows: -

"49(2). In particular and without prejudice to the generality of the foregoing provision, such rules may provide for or regulate ,

(v) the management of the market, minimum and maximum cess which may be levied and collected by the Market Committee, the method, manner and mode of collection of such cess in respect of agricultural produce regulated under the act and sold and resold in the market area."

42. Rule 21(7) extracted above, provides for deeming propositions relating to sale and purchase of a notified agricultural produce. A careful reading of Rule 21 (7) of the Rules would manifestly indicate that while Explanation 1 to the Section 21 limited the presumption only to one factor i.e. taking or proposing to be taken the agricultural produce out of the market area, Rule 21(7) has contained that such presumption would also be raised if any agreement of sale or purchase thereof is entered into in the said area or if the agricultural produce is weighed or delivered. The expression ''agreement of sale'' or ''purchased'', or ''weighed'', or ''delivered'' are additional factors which are not mentioned in explanation appended tb Section 21 of the Act. Thus, it is clearly seen that Rule 21(7) has widened the scope the Explanation 1 of Section 21.

43. Rule 21(7) of the Rules is a piece of delegated legislation. It is settled law that the authority exercising its delegated power cannot travel beyond the legislative policy what is not within its domain. Applying maxim of ''delegates non protest delegate''. It is well accepted that delegate cannot further delegate its power. The delegate authorised to make rules has to work within the scope of its authority and cannot either enlarge or constrict the scope of the Act. In the instant case, when the State Government empowered to frame rules u/s 49(2) (v) of the Rules of the Act, has no authority to expand the horizon of the legal fiction enunciated in ''Explanation'' 1 to Section 21 of the Act. Such action of widening or expanding could only be effected by the legislature itself and not by the delegate i.e. the State Government in exercise of its rule making power. Such creation of legal fiction is beyond the legislative policy.

44. Taking into account of this legal situation arising out of this case, we are of the considered opinion that the principle of law laid down in Shalimar''s case (supra) where the factual matrix is similarly situated with the present case, is squarely applicable in the present case and, we therefore safely accept the decision of this Court passed by the learned Single Judge on 29.9.1999 in C.R.No.1453/ 98 declaring the Rule 21(7) as ultra vires. Accordingly, we have no hesitation to declare the Rule 21 (7) of the Rule as ultra vires.

45. As regards the Board''s power to levy and collect cess, Section 21 of the Act is very clear and explicit. Section 21 clearly speaks of vesting power of levy and collection of cess on agricultural produce on the market committee. The Board or its employee has no authority to levy and collect cess on the agricultural produce by erecting check gates on behalf of the market Committee which is established

u/s 7 of the Act as quoted above, on the basis of Resolution of the Board on 30.11.1983. By a simple Resolution a statutory power cannot be taken away from the authority and be vested to another authority. Hence, the Board or its employees are not permitted under the said provisions of law to takeover the function of the Market Committee which itself is a body corporate in terms of Section 13 of the Act. Accordingly, we answer the question to the effect that the Board or its employees has no power to levy or collect cess in the agricultural produce in terms of Section 21 of the Act.

46. Now let us consider the next question relating to levy and collection of cess either by Board of the Market Committee at the check gates erected on various places on the National High Way during transportation of the agricultural produce into Assam purchasing it from outside Assam. We have meticulously perused the decision of the Division Bench in the case of Anjali Trading''s case (supra) and with due respect, we are unable to agree with the same. In the instant case, admittedly, the agricultural produce are purchased from different places outside Assam by paying market cess the respective Market Committee of those places and thereafter the said notified agricultural produce are transported to Assam by road and rail at the risk of the Appellants/Writ petitioners consignee. The agricultural produce are insured in the name of consignee i.e. appellants/writ petitioners and the same is brought to the State of Assam at the risk and costs of consignee. These agricultural produce are ascertained goods and are in deliverable state. Therefore, the sale on agricultural goods in complete in outside State wherefrom purchases are being made. When these agricultural produce are imported to Assam, no sale or purchase takes place either at Srirampur check gates or at any other check gates erected on the National High Way. If they are exposed to further realization of cess on those check gates at the time of passing through, they would be subjected to double taxation which is not permitted under the law. After purchase of the agricultural produce, those are loaded in the Truck or railways and sellers of outside Assam shall have no liability at all with regard to any further damages for which agricultural produce are insured and transported at the risk and cost of the appellants/writ petitioners. As such, neither the Board nor the Market Committee has the authority to levy and collect cess at the check gates erected in various places in the State of Assam though area was declared as market area. The question is answered accordingly.

47. On perusal of the materials available on record, it is affirmed that no sale or purchase takes place in any market area wherein the check gates are erected for the purpose of levying and collecting of cess on agricultural produce. The statutory presumption regarding sale or purchase if the agricultural produce are taken out or proposed to be taken out of the notified market area cannot be applicable in the present case.

48. Further in Shalimar''s case (supra), the Apex Court held in paragraph 42 and 43 as follows:-

"42. In the instant case, the goods which were the subject-matter of sale were ascertained goods. They were also in a deliverable state. On the order being placed by the respondent, the seller in the State of Kerala, loaded the goods on the lorry and despatched the same to Hyderabad. It is at this stage that the conduct of the parties becomes extremely relevant. It was one of the terms of the contract between the parties that the seller would not be liable for any future loss of goods and that the goods were being despatched at the risk of the respondent. The respondent has also obtained insurance of the goods and had paid the policy premium. He, therefore, intended the goods to be treated as his own so that if there was nay loss of goods in transit, he could validly claim the insurance money. The weighment of the goods at Hyderabad or the collection of documents from the bank or payment of price through the bank at Hyderabad were immaterial, inasmuch as the property in the goods had already passed at Kerala and it was not dependent upon the payment of price or the delivery of goods to the respondent.

43. We are in full agreement with the view expressed by the High Court and also the opinion that having regard to the evidence on record which indicated that on the order placed by the respondent, the stocks were loaded into the trucks for despatch to Hyderabad with the clear stipulation that the despatch was at the risk of the purchaser and that the seller had no liability with regard to any furniture losses and that the stock was insured and the insurance premium was paid by the respondent, the sale took place in the State of Kerala and not at Hyderabad.".

49. Applying ratio of these paragraphs in the present case, we hold that no cess can be levied and collected at the check gates where no sale or purchase takes place during the course of transportation of agricultural goods to different places in the State of Assam.

50. Seemingly, tow Judgments of this Court (Anjali Trading Company (supra) reported in (1995) 3 GLR 62 and 1998 (1) GLR 111, referred to above, in so far as they permit the realization of cess on the agricultural produce at the check gates as legal and valid, cannot be treated as good law after the decision of the Apex Court on Shalimar''s case (supra) as well as Ram Chander Kailash''s case (supra).

51. As regards to refund of the cess already collected we would like to say that since cess has already been realized by the authorities, the same need not be refunded. But further realization of the cess on the different check gates on the National High Way erected for such as per notification dated 29.7.1993 as mentioned hereinabove or any other notification in this regard, be stopped forthwith.

52. In view of the above discussion, we are inclined to agree with the decision of the Assam Roller Flour mills v. Assam Agricultural Marketing Board in Civil Rule No. 1453/98 disposed of on 29.9,1999) which is under challenge in the present set of writ appeals to the extent of declaring Rule 21 (7) of the Rules as ultra

vires in the light of Shalimar case (supra). Accordingly, we do hereby declare the Rule 21(7) of the Rules as ultra vires.

53. For the reasons and discussions indicated above, we answer the question referred to us in this reference including other subsequent questions raised as follows :-

(1) Consignment of notified agricultural produce which are transported in the declared market area in the State of Assam are not liable to cess u/s 21 of the Act in view of the decision of the Apex Court in Ram Chandra Kailash''s Case and Company (supra) and Shalimar''s case (Supra)

(2) The Board has no power and authority to levy and collect cess on the agricultural produce on behalf of the Market Committee as per Section 21 of the Act.

(3) Either Board or the Market Committee is not permitted to realise cess on the agricultural produce transported into Assam by Truck at the different check gates erected for the purpose of levy and collection of cess since no sale or purchase takes place at such places.

(4) Refund of the cess already realized is refused.

54. This reference is answered accordingly. Now, the case would be listed before the Appropriate Bench for final disposal in accordance with law.

55. Reference answered accordingly.

