

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

P R E S E N T

Hon'ble Justice Ashoke Kumar Dasadhikari, J.

W.P. NO. 9466 (W) OF 2007

Aurangadabad Biri Merchants' Association & Ors.

Vs.

The State of West Bengal & Ors.

For the Petitioner : Mr. Saktinath Mukherjee, Sr. Adv.
Mr. Bikash Ranjan Bhattacharya, Sr. Adv.
Mr. Saptangshu Basu, Adv.
Mr. P. C. Motilal, Adv.
Mr. P. S. Debbarman, Adv.
Mr. R. P. Motilal, Adv.

For the Respondent/ : Mr. Pradip Kr. Roy, Adv.
Jangipur Regulated : Mr. Joydeep Roy, Adv.
Market Committee : Mr. Kush Agarwal, Adv.

Heard On : 12.09.2013, 17.09.2013, 20.09.2013, 11.02.2014, 18.02.2014
28.03.2014.

Judgement on : 06.05.2014.

ASHOKE KUMAR DASADHIKARI, J.: Being aggrieved by and dissatisfied with impugned order dated 25th April, 2007 passed by Chairman, West Bengal State Marketing Board holding the petitioners liable to pay

market fee in relation to the transaction of Tobacco and Kendu Leaves in the notified market area for manufacturing 'Biri', the writ petitioners moved this writ petition.

FACTS:-

The petitioners are claiming that they are engaged in manufacturing 'Biri'. They purchase raw materials i.e. Kendu Leaves and Tobacco from outside the State and utilise the same for manufacture of 'Biri' in their own manufacturing unit. They are neither storing for sale nor processing for sale nor they are engaged in purchase and sale of Kendu Leaves or Tobacco in the notified market area. These two items are agricultural produce under West Bengal Agricultural Produce Marketing (Regulation) Act, 1972 hereinafter referred to as "the Act". Since the petitioners are not engaged in sale transaction of Tobacco and Kendu Leaves in the notified market area, they claim, they are neither required to take license in terms of Section 13 (1) nor they are liable to pay fees in terms of Section 17 of the Act of 1972. It was alleged by the petitioners that although they are not engaged in selling Kendu Leaves or Tobacco within the notified market area the concerned marketing committee by coercion compel them to pay fees. According to petitioners Kendu Leaves and Tobacco are produced outside the State of West Bengal and petitioners purchase the materials from Orissa and other States for manufacturing 'Biri' through their manufacturing unit situated at different places in the district where they transfer the items by truck

what is called "stock transfer". In the manufacturing units kendu leaves are cut into pieces and these pieces are wind up with tobacco for manufacturing a totally different product i.e. 'Biri' which is admittedly not agricultural produce. Thereafter raw 'Biri' is baked and in this way a new product is manufactured. Since 'Biri' is not scheduled as agricultural produce the concerned respondents are not authorised to claim any fee on it. However, the respondent market committee compelled the petitioners to take license under the Act knowing fully well that those items are used as raw materials for manufacture of 'Biri'. Moreover the trucks bearing raw materials are stopped on checking point and fees were recovered without taking note of the fact that the items are sent for manufacturing 'Biri' through stock transfer. Previously writ petitioners moved this Court raising a question as to whether for the purpose of manufacturing 'Biri' from agricultural produce the manufacturers i.e. the petitioners would be liable to obtain license and to pay fees under the Act of 1972 and this Hon'ble Court considering the controversy raised in that petition directed the Chairperson, West Bengal State marketing Board to hear the writ petitioners within a period of two weeks from the date of the order on the issue of the applicability of the provisions of the aforementioned Act to the petitioners. The concerned Chairperson was directed to pass a reasoned order and to communicate the same to the petitioners within a week from the date of the passing the order. The learned Single Judge desired that no coercive steps shall

be taken against the petitioners by the Jangipur Regulated market Committee, if the petitioner confining their activities only to manufacture of 'Biri' from Kendu Leaves or Tobacco procured from outside the State. It was also directed if any fee is levied by the said Market Committee on the petitioners, which they are forced to pay the same shall be without prejudice and shall be kept in a separate account and such action of the Market Committee shall abide by the result of the decision given by the Chairperson. It was also made clear that in case it is found that the petitioners or any of their agents have been indulging in sale of Kendu Leaves and/or Tobacco within the jurisdiction of the said Regulated market Committee, it shall be entitled to take action according to law. As directed by this Court the concerned Chairperson gave an opportunity of hearing to the petitioners as well as the Market Committee. Submissions made on behalf of the writ petitioners as noted by the Chairperson reads as follows:-

“No market fee can be levied on “Kendu Leaves” and “Tobacco” since “Kendu Leaves” and “Tobacco” are grown/produced outside the State of West Bengal. The writ petitioners relied upon the waybills for transport of consignment of goods dispatched from outside West Bengal to any place inside West Bengal dated 29.12.2006. Original Bill of Orissa Forest Development Corporation dated 30.12.2006, Challan of Orissa Forest Development Corporation dated 09.01.2007, Road permit for Orissa Kendu Leaf dated 09.01.2007. Auction Lot List (Two), Way Bill dated 11.01.2007, Delivery Memo dated 12.07.2007.

As the writ petitioners are merely manufacturing beedi within the notified market area, they are not falling within any of the categories as mentioned in Section 13 (1) of the said Act, 1972.

The application for licence under Section 13 (1) of the said Act, 1972 for the purpose of setting up, establishing or continuing a

storage/bazaar/mela etc. in the prescribed Form 2 under Rule 4 of the West Bengal Agricultural Produce Marketing (Regulation) Rules, 1982 (hereinafter referred to as the said Rules 1982) and the Licence for setting up, establishing or continuing a “storage/hat/bazaar/mela or any other place for sale or purchase of agricultural produce in the prescribed Form No.5 under Rule 6 (2) of the said Rules, 1982 clearly indicate that the “Storage” means an establishment of storing business. Therefore, the storage of Kendu Leaves and Tobacco by the writ petitioners within the notified market area for manufacture of Beedi would not attract the provisions of Licence under Section 13 of the said Act, 1972.

The writ petitioners are manufacturing Beedi from the raw materials namely “Kendu Leaves” and “Tobacco” and so, they are the “Producers” within the encompass of the proviso of Section 13 (1) of the said Act, 1972. The writ petitioners, therefore, being the producers are liable to be exempted from obtaining the Licence as provided under Section 13 (1) of the said Act, 1972.

The writ petitioners are not liable to pay market fees under Section 17 (1) of the said Act, 1972 since they are not selling or purchasing “Kendu Leaves” and “Tobacco” within the notified market area for manufacture of Beedi.

While “Kendu Leaves” and “Tobacco” loaded in the trucks/vehicles, are being taken out of the notified market area, the concerned employees and the staff of Jangipur Regulated Market Committee have no authority to stop the said trucks/vehicles and inspect the records relating to “Kendu Leaves” and “Tobacco” carried in the said trucks/vehicles at the checking points on the National Highway/State Highway for collection of levy of fees.

As the authorities of Jangipur Regulated Market Committee are not discharging their obligations and duties in the manner as provided under Section 12 of the said Act, 1972, the employees and the staff are not justified to collect the levy of market fees on the agricultural produce, that is, “Kendu Leaves” and “Tobacco”.”

Submissions made by the Secretary, Jangipur Regulated Market Committee reads as follows:-

“On a preliminary enquiry, it is found that there are about 30 Beedi Manufacturing Units within the notified market area under Suti Police Station. Similarly, there are about 36 Biri Manufacturing Units within the notified market area under Dbulian Police Station. There are

several traders and commission agents who are also involved in the said trade. The Secretary submits the list of the Beedi Manufacturing Units.

Kendu Leaves and Tobacco are being taken out of the notified market area in the names of the new consignees.

Kendu Leaves and Tobacco were being taken out by the Beedi Manufacturing Units particularly Pataka Industries (P) Ltd. under the guise of "stock transfer", but on a closed scrutiny of the records, they could not satisfy the officers/employees of the market committee in the checking point that Kendu Leaves and Tobacco were not bought or sold within the notified market area.

Since "Beedi" has not been included as an item of agricultural produce in the schedule of the said Act, 1972, the market committee is not collecting levy of fees on "Beedi". But, "Beedi" must fall within the expression "any related product" of the definition of agricultural produce in view of the following grounds:

- i) Admittedly Beedi is comprised of Kendu Leaves and Tobacco.*
- ii) Kendu Leaves and Tobacco can be aggregated from Beedi even after its so called processing and its physical appearance remains intact.*
- iii) Physical appearance or chemical combination of Kendu Leaves and Tobacco has not been changed and even though Beedi may commercially be a different item still comprises of "Kendu Leaves and Tobacco".*

The officers and the employees of the market committee are duly empowered under Section 17B and 17C of the said Act, 1972 to search and seizure the vehicles and inspect the records relating to the agricultural produce i.e. Kendu Leaves and Tobacco loaded in the vehicles to stop evasion of payment of market fees, but the drivers of the vehicles loaded with Kendu Leaves and Tobacco, off and on, fled away by breaking the gate of the checking points of National Highway in order to evade payment of fees.

The writ petitioners are liable to obtain the licence under Section 13 (1) of the said Act, 1972 in any circumstances whatsoever. The writ petitioners are also liable to submit the Returns under Section 17A of the said Act, 1972 being the licenced traders."

Considering the submissions made for and on behalf of the petitioners as well as Market Committee the Chairman held that the petitioners are engaged in processing of agricultural produce viz. Kendu Leaves and Tobacco for manufacturing of 'Biri' and they are also storing agricultural produce viz. Kendu Leaves and Tobacco in places within the notified marketing area for manufacturing of 'Biri', therefore, the members of the petitioners' association, the other Biri manufacturers and traders are liable to pay market fees in relation to the sale transaction of Tobacco and Kendu Leaves in the notified market area for manufacturing of 'Biri'. Accordingly the officers and employees of Market Committee are at liberty to collect levy of fees from the Commission agents/directors if they purchase Kendu Leaves and Tobacco in the notified marketing area and use them for manufacturing of 'Biri'. It was also held that the Market Committee have authority to collect fees in aid of Explanation-I to Section 17 (1) of the aforementioned Act. The officers of the Market Committee are also authorised to stop the vehicles loaded with agricultural produce for inspecting all records relating to agricultural produce including Kendu Leaves and Tobacco at the checking point on the National Highway for prevention of evasion of payment of market fees. Petitioners and other Biri manufacturing units located in the marketing area are also liable to obtain the licence under Section 13 (1) of the aforementioned Act at once for carrying on business in the manner indicated. In case of failure, the authorities are at liberty

to take penal action against the members of the writ petitioners' associations and the other Biri manufacturing units located within the notified market area under Section 34 of the said Act.

Submissions made on behalf of the petitioners:-

Mr. Sakti Nath Mukherjee, learned Senior Counsel appearing for the writ petitioners submitted that the writ petitioners are engaged in manufacturing 'Biri' and they are not 'traders' as defined under the Act. Neither they are liable to take licence nor they are liable to pay fees specially when they do not purchase or sale the raw materials i.e. Kendu Leaves and Tobacco in the market area. Mr. Mukherjee, submitted that the writ petitioners are not at all covered under the provisions of Section 13 (1) and Section 17 of the Act. Mr. Mukherjee submitted that the concerned respondents could not disclose one single instance showing sale and purchase of the raw materials in the market area. He submitted trucks loaded with the raw materials are stopped on checking point and fees are collected by force illegally. He also submitted that the truck drivers are unsafe on road. Fees were imposed and collected on the consignment by coercion. It was also submitted that the petitioners are not engaged in business of processing or preservation nor they are storing raw materials within the market area for sale or purchase. Therefore, they are not liable to take licence in terms of Section 13 (1) of the aforementioned Act.

Mr. Mukherjee submitted that the Chairperson himself found the petitioners are engaged in processing and storing of Kendu Leaves and Tobacco for manufacturing of 'Biri', therefore, there is no question of taking license or paying fees. According to Mr. Mukherjee writ petitioners are manufactures of 'Biri' which is not a scheduled item and as such not attracted for levy of fees under Section 17 of the Act. According to him the provisions under Section 13 (1) do not include manufacture nor the definition clause of "Agricultural Produce" include the word "manufactured" and for this reason the writ petitioners who are admittedly manufacturers of Biri is not required to take licence in terms of the said section. According to him manufacturing of 'Biri' requires cutting of Kendu Leaves into pieces and winding up with Tobacco cannot be a processing either for getting the end product (Biri) which is not agricultural produce. Mr. Mukherjee submitted had the word "manufacturing" being used or added in Section 13 (1) of the said Act, in that event he would have no argument to get rid of the obligation under provisions of Section 13 (1) of the said Act. Mr. Mukherjee also submitted that this point was raised and decided by the Hon'ble Apex Court in case of (Orient Paper & Industries Ltd. Vs. State of M. P. & Ors.) reported in 2006 (12) SCC 468. In that case the Hon'ble Apex Court held if the agricultural produce brought inside the marketing area and not used for processing, market fee cannot be levied. It was further held whenever a commodity undergoes a change as a result of some operation

performing it or in regard to it, such operation would amount to processing of the commodity in relation to manufacture. Therefore, each step towards such production would be a process in relation to manufacture of the end product which do not attract levy of fees.

Similarly in the instant case Kendu Leaves and Tobacco used as raw materials brought from outside State within the market area for manufacturing 'Biri' which is totally a different and new product do not attract levy of market fee. Mr. Mukherjee submitted that in "Orient Paper" case similar provision contained in the M. P. Krishi Upaj Mandi Adhiniyam, 1972, was applied and the Market Committee imposed market fee but the Hon'ble Apex Court rejecting the plea of the Market Committee held that the notified agricultural produce brought within market area where the end-user is manufacture do not attract levy of market fee.

Mr. Mukherjee cited another decision reported in 2009 (9) SCC 68 (Britania Industries Ltd. Vs. T. N. Pollution Control Board and Anr.). The Hon'ble Apex Court while considering the imposition of Cess on vegetable products held wheat flour used for manufacture of biscuits, bread, cake is not processing of wheat flour. It is utilised as ingredient for manufacture of biscuits, cake and bread, altogether a different product not covered under the Water (Prevention and Control of Pollution) Cess Act, 1977. He also submits in the instant case also there is no processing.

Mr. Mukherjee also cited another decision reported in 2001 Vol. 7 SCC 525 (Aspinwall & Co. Ltd. Vs. Commissioner of Income Tax, Ernakulam) wherein the Hon'ble Apex Court rejecting revenue's contention held that assessee involved in activity of process of curing coffee is not involved in manufacturing or production activity, therefore, conversion of raw berries into coffee beans which is a commercially different commodity would be manufacturing activity and, therefore, assessee is entitled to get investment allowance.

Mr. Mukherjee also cited one decision reported in AIR 1987 SC 447 (M/s. P. M. Patel & Sons and Ors. etc. Vs. Union of India, & Ors.) wherein the Hon'ble Apex Court decided that the terms of definition of 'Employee' are wide. They include not only persons employed directly by the employer but also persons employed through a contractor. Moreover, they include not only persons employed in the factory but also persons employed in connection with the work of the factory. A home worker, by virtue of the fact that he rolls biries, is involved in an activity connected with the factory engaged in the works of rolling biries. The definition of "employee" cannot be confined to work performed in the factory itself as a part of the total process of the manufacture but also the home workers who receiving of raw materials from the factory, rolling the biries at home and delivering them to the manufacturer subject to the right or rejection of the manufacturer which is sufficient evidence of the requisite degree or control and supervision for establishing the relationship of master and

servant between the manufacturer and the home worker. Mr. Mukherjee emphasised that similarly in the instant case also the goods are supplied through stock transfer for manufacturing Biri by the workers of the petitioners who rolls biri which is the end product and as such the concerned respondents cannot impose any fee by intercepting loaded trucks on the National Highway.

Mr. Mukherjee submitted that the word “storing” used in the provisions of Sub-section (1) of Section 13 is for the purpose of sale of agricultural product but here no sale transaction takes place. He refers form 5 prescribed under the rules of 1982 which specifies that license is required for storage hat/bazaar/mela of agricultural produce for sale or purchase. Since the petitioners do not store for sale or purchase of agricultural produce, they are not required to pay fees. Mr. Mukherjee submitted all actions are taken for proper utilisation of the raw materials i.e. Kendu Leaves and Tobacco for manufacturing ‘Biri’ do not attract any of the provisions of the Act. Therefore, petitioners are not required to take license as per Rule 6 (2) nor they are required to pay fees.

Mr. Mukherjee then submitted since Biri and Tobacco being excisable items records for purchase, transporting, storage, movements, manufacture and sale relating to those goods, as per provisions of Central Excise Act, 1944, Central Excise Rules 2002, Central Excise tariff Act, 1985 and VAT Credit Rules 2004, are required to be maintained. Under Rule 10 of Central Excise Rules, 2002 every assessee

is required to maintain proper records on a daily basis, in a legible manner indicating the particulars regarding description of the goods produced or manufactured, inventory of goods, quantity removed, assessable value, the amount of duty payable and actually paid, etc. and as per Rule 11 no excisable goods shall be removed from a factory or a warehouse except under an invoice signed by the owner of the factory or his agent. Rule 12A stipulates filing of monthly return. Rule 20 is provision of warehousing. Rule 22 provides all assesseees are required to maintain accounting of transactions in regard to receipt, purchase, manufacture, storage, sales or delivery of the goods including inputs and capital goods etc. Cenvat Credit Rules, 2004 requires all the Biri manufacturers to file Returns mentioning detail particulars of their manufacturing activities. According to West Bengal VAT Act, 2003 under Serial No. 37B, it is specific that no tax is payable for Biri. Mr. Mukherjee submits since Biri manufacturers are not selling Kendu Leaves but they are utilising the entire quantity of Kendu Leaves purchased for manufacturing Biri, the Biri Manufacturers need not required to pay 5% sales tax/VAT of Kendu Leaves. But under the provisions of the VAT Act, 2003 and its rules Biri manufacturers are required to furnish return and various declarations and informations to the Authority concerned, and to maintain accounts for the goods purchased. It was submitted by Mr. Mukherjee that under Section 206C of Income Tax Act, the petitioners are to give an explanation in writing in

prescribed form as per Rule 37C to the effect that the goods referred to in the Column (2) of the aforesaid Table are to be utilised for the purpose of manufacturing, processing articles or things and not for trading purpose. According to him petitioners are to give such declaration that they are not selling of Kendu Leaves for which they are given exemption.

Mr. Mukherjee also submitted that statutory papers, documents, declarations required for the trucks carrying Kendu Leaves and/or Tobacco at the entry point are always available with the truck. He submits declaration in Form C under the Central Sales Tax (Registration and Turnover) Rules 1957, original Bill of Odisha Forest Development Corporation Limited showing purchase of Kendu Leaves, way bill issued under West Bengal Value Added Tax Act and Rules for transport of consignment of goods dispatched from outside West Bengal, forest permit by Division Forest Officer, Odisha, Challan issued of manufacturer the names consignee and consignor and all details particulars of the consignment, declaration of manufacturer as per prescribed form of Sales Tax department and Government of West Bengal road challan mentioning "Stock Transfer for manufacture of Biri not for sale", a declaration by Officer-in-Charge of Head Manufacturing Centre stating that the consignments were not purchased or sold within regulated market area and the same are sent to branch manufacturing Unit for manufacturing Biri are kept.

All these records are available but the concerned respondents do not give credence to those documents. The respondents authorities arbitrarily impose levy of market fee as per Section 17 (1) of the Act of 1972. Mr. Mukherjee submitted that the impugned orders should be set aside the respondents be directed not to compel the petitioners to take license and pay fees since they are engaged in manufacturing Biri and further since the provision of the Act of 1972 is not applicable in case of the petitioners.

Mr. Mukherjee also submitted although respondent Market Committee is collecting fees by coercion but they are not performing their duties as stipulated under Sections 12, 19 and 20 of the Act of 1972. Mr. Mukherjee drew attention of this Court as regards the statements made in the opposition of the market committee wherein it was stated that the extent of service/amenities although cannot have co-relation with market fee levied, market committee already installed about 70 hand pumps in different places within the notified marketing area. The market committee developed and constructed the link roads within the market area. Some budgetary allocations for the year 2007-08 for several development work including the construction of principle of market area, auction platform and for stalls were made and market committee is taking steps in that regard.

Mr. Mukherjee also cited a decision reported in AIR 1980 Supreme Court 1008 (Kewal krishnan Puri & Anr. Vs State of Punjab & Ors.). He

submits that there should be sufficient compliance of quid-pro-quo for the levies and they must satisfy the “test of fee” as laid down in the aforementioned case. Mr. Mukherjee also submitted that the Hon’ble Apex Court deduced seven principles which are required to be followed for a levy of market fee on the agricultural produce brought or sold by the licensee in a notified market area. According to Mr. Mukherjee these principles are not followed by the Market Committee sinking some tubewells or making provisions for construction of link road is not at all sufficient to meet the requirements of quid-pro-quo. According to him fees charged by the Market Committee should co-relate to their services as provided under Sections 12, 19 and 20 of the Act.

Submissions made on behalf of the respondent Market Committee:-

Mr. Pradip Kumar Roy, learned Counsel for the Market Committee submitted that petitioners No.5, 10, 11, 12 and 14 who were not parties to the previous writ petition could not have any reason to be aggrieved against the order passed by the Chairman. According to him they were not prejudiced and the proceedings is vitiated for misjoinder of the parties. He submitted on that score the writ petition must fail. Mr. Roy also submitted that the concerned Chairman, West Bengal Marketing Board by his order dated 25th April, 2007 have decided the applicability of the Act upon the petitioners who are parties to the previous proceedings. Mr. Roy submitted that provisions of under Section 13 of

the Act are quite clear and specific to the effect that parties carrying on business/trade and involved in transaction of sale and purchase, processing of the agricultural produce i.e. Kendu Leaves and Tobacco are obliged to take license. The writ petitioners have also taken license under Section 13 (1) and in due course renewing from 2005-06 which they did not disclose before this Court.

Mr. Roy submitted Market Committee have some obligations to perform under Sections 19 and 20 of the Act and the Market Committee is also serious about their duties and obligations and they are taking several measures and steps for it. Mr. Roy submitted since the petitioners are carrying on trade/business and dealing with transaction of agricultural produce, they are obliged to pay fees under Section 17 of the said Act. According to Mr. Roy whoever he deals with the agricultural produce within the Market Area, like the petitioners, would require to take license and pay fees. Mr. Roy submitted that petitioners are traders as defined under the Act. They are not producers as defined. According to Mr. Roy it is only State authorities who can exclude and exempt agricultural produce from the levy of fee. He submits Director of marketing is the appropriate authority under Section 2 (2) of the Act to decide the matter. He submitted that provisions under Sub-section (3) stipulates the power of exemption. He also submitted duties and functions of Market Committee is specified under Section 12 of the said Act.

Mr. Roy submitted although petitioners are claiming that they are purchasing the products for their own consumption but own consumption means individual consumption not any other consumption. In the instant case petitioners are purchasing and utilising the products for sale, engaged in processing, preservation and storing in the market area. Therefore, they are liable to pay fees under the Act. Mr. Roy submitted that explanation (I) of Sub-section (1) under Section 17 provide that all agricultural produce taken out of a Market area shall unless contrary is proved, be presumed to have been sold in such area. According to him the writ petitioners failed to prove contrary, therefore, the presumption is against them. Thus removal of goods from the Market Area amounts to sale and as such petitioners are liable to pay market fee. Mr. Roy submitted there is provision for search and seizure which empowers officers and employees of the Market Committee to carry out search and seizure as per provisions under Section 17B of the Act. The officers and/or employees of the Market Committee are also authorised to inspect vehicles or other conveyance at any time, therefore, the purported allegations of stopping the vehicles on National Highway at checking point is of no substance. He submitted that the petitioners are obliged to submit return under Section 17A. Any persons aggrieved by any order made under Sections 17A, 17B or 17C may prefer appeal to officer the State Government not below rank of the Superintendent of Agricultural Marketing Committee as may be specified by the State

Government by any order issued in this respect, having jurisdiction of the area and decisions of such officer shall be final.

Mr. Roy also submitted whether the petitioners are engaged in buying and selling of the products are definitely questions of facts which cannot be decided by this Court. He also submitted that there are provisions to prove that the petitioners are not engaged in the process of buying and selling or processing or preservation or storing. He submitted under the Act the petitioners have adequate relief, therefore, the petitioners cannot come before this Court and there is no necessity of interference by this Hon'ble Court. Mr. Roy wanted to show some documents in support of his contention that there is sufficient provision to meet the requirement "quid-pro-quo" as required under Sections 19 and 20 of the Act. He also submitted that there is no co-relation between service and levy which has already been decided by the Hon'ble Supreme Court in several judgments. According to him simply processing of the product also attract Section 13 (1) of the said Act. He also contended that the provisions under Central Excise and other Acts shown by Mr. Mukherjee are all separate Acts and the provisions of those Acts have no manner of application. According to him the order passed by the Chairman do not suffer any illegality or irregularity but it is strictly in accordance with the provisions of the said Act. Therefore, this order is valid.

Mr. Roy cited the Hon'ble Apex Court judgment reported in 2012 (5) SCC 443 (Heinz India Private Limited & Anr. Vs. State of Uttar Pradesh & Ors.) in support of his contention that removal of agricultural produce from the market area could be presumed, the goods left pursuant to a sale unless contrary is proved by the petitioners. According to him persons involved in removing or persons to whom such goods are despatched have entire relevant evidence to the transaction. Therefore, they are to establish that the fact presumed is not real one. Similar provision is available in the Act and petitioners are required to produce the rebuttal evidence to show the stock transfer not sale. In this regard two other decisions were cited, one reported in 2012 (4) SCC 496 (Krishi Utpadan Mandi Samiti & Anr. Vs. Ved Ram) and the other unreported judgment of the Hon'ble Apex Court delivered in Civil Appeal No. 4824 of 2000 (Krishi Utpadan Mandi Parishad & Anr. Vs. I.T.C. Ltd.).

Mr. Roy then cited another decision reported in AIR 2001 Supreme Court 1363 (Riridhar Prabhu & Ors. Vs. Agricultural Produce Market Committee) in support of his contention that licenses to be taken by a person for the purpose of sale, storage, processing of agricultural produce and market fee is also payable. According to Mr. Roy a trader is also a person who buys notified agricultural produce for the purpose of selling or processing or manufacturing or for any other purpose except for the purpose of domestic consumption. According to him the

definition of term 'trader' is not a restrictive definition. It is only when a person buys for the purpose of selling or processing or manufacturing, he would become a trader.

Mr. Roy also cited one Single Bench decision of this Court delivered in case of (M/s. Annapurna Timber Company & Ors. Vs. State of West Bengal & Ors.) W.P. No.19187 (W) of 2001 in which a question was raised whether manufacturing seized timber from imported timber logs are new products and do not fall within the definition of "agricultural produce". This Court held that matter involves enquiring into facts and no interference is called for by this Court. Mr. Roy submitted this matter also involves disputed question of facts. Therefore, no interference is called for.

Mr. Roy then cited another decision reported in 1999 (9) SCC 620 (Belsund Sugar Co. Ltd. Vs. State of Bihar & Ors.). Where question was raised whether the basic agricultural produce i.e. "tea leaves" which is subjected to manufacturing process outside the Bihar State and imported and sold in manufactured condition as packed tea within Bihar State in the market areas concerned, attracts the provisions of the Market Act, would get excluded for regulating the transactions of sale and whether there is adequate quid-pro-quo supporting the levy of market fee on such transactions of sale or manufactured and packed blended tea in markets governed by the Market Act. It was held in the wide sweep of definition of 'agricultural produce' if a agricultural produce

initially is not grown in the market area and brought in a manufacture form within the market area for sale such transaction in connection with such a produce would be covered by the sweep of the market Act.

Mr. Roy also cited another judgement reported in 1997 (2) SCC 496 (Himachal Pradesh Marketing Board & Ors. Vs. Shankar Trading Co. Pvt. Ltd. & Ors.). In that case the non-grower of agricultural produce viz. khairwood, purchasing and processing the same by subjecting it to various physical and chemical processes and converting into katha for sale into market area held attracted under the provisions of Himachal Pradesh Agricultural Produce Markets Act, 1969. Mr. Roy submitted the petitioners involved in processing for manufacture are also liable pay market fee under the Act of 1972. Mr. Roy then cited another judgment reported in AIR 1993 Patna 43 (M/s. Swagat Stores & Ors. Vs. The State of Bihar & Ors.) and submitted as per definition of agricultural produce it is not only confined to agricultural produce but also industrial product by processing of agricultural produce and accordingly levy of market fee is justified.

Mr. Roy then cited another reported in AIR 1993 Patna 43 (Delhi Cloth and General Mills Co. Ltd. & Ors. Vs. The Agricultural Produce Market Committee & Ors.) to support of his contention that for adequate quid-pro-quo there is no necessity to render service to individual payers of fees nor can the co-relation between payment fees and the services rendered, be established with mathematical exactitude. Accordingly Mr.

Roy submitted that the writ petition should be dismissed since the writ petitioner are not entitled to get any relief in the facts and circumstances of this case.

In the light of the aforementioned contentions, the points formulated by this Court in the previous writ petition requires consideration whether Biri manufacturers procuring raw materials i.e. “Kendu Leaves” and “Tobacco” form outside the State are liable to obtain license in terms of Section 13 of the Act and consequently they are liable to pay the fees in terms of Section 17 of the Act?

At the outset I shall refer to relevant provisions of the Act of 1972 and some of the rules framed thereunder.

In Clause (a) of Section 2 of the Act “agricultural produce” is defined to mean any produce of agriculture, horticulture, pisciculture, (sericulture) forestry or animal husbandry (and includes any related product) specified in the Schedule to this Act;

In Clause (b) of Section 2 of the Act ‘agriculturist’ has been defined to mean a person who ordinarily by himself or by his tenant or hired labourer or otherwise, is engaged in the production and growth of agricultural produce, but does not include a trader or broker in agricultural produce notwithstanding that such trader or broker is also engaged in the production or growth of agricultural produce;

In Clause (g) of Section 2 “market” is defined to mean a market established or declared as such under this Act for a market area and includes (a principal market yard and a sub-market yard) if any;

Clause (t) under Section 2 is defined ‘trader’ mean a person ordinarily engaged in the business of purchasing and selling agricultural produce as a principal or as a duly authorised agent of one or more principals and includes a person ordinarily engaged in the business or processing or preservation of agricultural produce;

Clause (k) of Section 1 of the ‘Biri and Cigar’ workers (conditions and employment) Act, 1966 ‘manufacturing process’ means any process for or incidental to, making, finishing or packing or otherwise treating any article or substance with a view to its use, sale, transport, delivery or disposal as beedi or cigar or both;

The title of the Act indicates it is an Act to provide for regulation of marketing of ‘agricultural produce’ and for establishment, administration, maintenance and management of the principle market yard including the sub-market yard or yards and to control, regulate and run the market and for calculation of fees on transactions of agricultural produce in the market area which is in effect regulating the sale and purchase of ‘agricultural produce’ in the State. Under Section 3 of the Act the State Government has got the power to declare by notification, any area as a market area within which purchase and sale of such agricultural produce, as area be specified in the notification, shall be

regulated. State Government has also got the power to alter the market area and modify the list of 'agricultural produce'. Section 4 provides for declaration of principle market yard and sub-market yard or yards for a market area. Section 5 deals with establishment, incorporation and constitution of the market committee. Section 12 of the Act prescribe the duties and functions of the market committee. Section 12A provides for the powers of the market committee. One of the most important sections is Section 13 which authorised a committee to issue or renew license under the Act in accordance with the prescribed terms and conditions of the license. Section 13 (1) of the Act reads as follows:-

“After six months from the declaration of any area as a market area, no person shall, within the (market area), carry on business or act as a trader, commission agent, broker, weighman, measurer, warehouseman or surveyor or sell or purchase agricultural produce, or engage in (processing or preservation) of agricultural produce, or set up, establish or continue a (place) for storage, sale or purchase of any agricultural produce, except, under and in accordance with the prescribed terms and conditions of a licence issued in this behalf by the market committee (notwithstanding anything contained in any other law for the time being in force and) (irrespective of any licence required and issued under any law for the time being in force):

(Provided that nothing in this sub-section shall apply to any sale by a producer of his own produce, to retail sale and to purchase by an individual for his own consumption).”

In terms of Section 17 (1) the market committee have the power to levy of any agricultural produce sold in the market area at a rate which shall not more than 2 Rs. Per 100 Rs. Of the amount for which agricultural produce is sold whether for cash or for defer payment or for other valuable consideration, irrespective of the fact that the buyer of the produce is the Central Government or the State Government or an agent

or undertaking or either of them or a corporation constituted under any law for the time being enforced. Section 17 which authorises the committee to levy and collect fees on any agricultural produce sold in the market area in its Explanation (I) contain a provision for presumption of sale, in case agricultural produce taken out or proposed to be taken out of a market area unless contrary is proved. Explanation (III) of Section 17 contain a provision for presumption of storage for sale in the event agricultural produce stored in cold storages within the market area unless contrary is proved. Rule 6 (1) prescribes the procedure for grant or renewal of license. Form 4 prescribes the format of application for obtaining license for operating as a trader/commissionagent/broker/weighman/measurer/warehouseman/surveyor/seller or producer or for processing and preservation of agricultural produce. Form 4 provides that license is required for marketing of agricultural produce in the premises/places specified in the licence. Form 5 under Rule 6 (2) prescribes for application of license for setting up establishing or continuing a storage/hat/bazaar/mela or any other place for sale or purchase of agricultural produce.

The West Bengal State legislature vested with the power by the relevant entries of the Seventh Schedule of the Constitution enacted the Act and framed the regulation and also prescribed the forms for application to obtain license. The main object and purpose of this Act is to provide for the regulation of marketing of agricultural produce in West

Bengal i.e. to regulate buying and selling of agricultural produce by establishing markets, etc. Section 2 (a) defined 'agricultural produce'. There is no dispute that as scheduled items, "Kendu Leaves" and "Tobacco" are agricultural produce. The persons engaged in the trade and business i.e. for the purpose of sale and purchase and also processing, preservation, storage as a business itself of agricultural produce is 'trader' as defined under Section 2 (f) of the Act. According to definition of 'trader' if any person is ordinarily engaged in the business of processing or preservation of agricultural produce then he would come under the sweep of definition of 'trader'. The Act do not define "manufacturing" or "manufacturing process" but the Biri and Cigar Workers (Conditions of Employment) Act, 1966 which relates to the workers connected with Biri and Cigar manufacturing define the word 'manufacturing process' which means any process for or incidental to, making finishing or packing or otherwise treating any article or substance with a view to its use, sale transport, delivery or disposal as Biri or Cigar or both. Therefore, manufacturing process also includes processing of raw materials which is incidental to manufacturing the end product. Like many other market acts the definition of "agricultural produce" do not include "manufacture" or "processing for manufacture". Accordingly neither "manufacture" nor "processing for manufacture" do come under the purview of "agricultural produce". Therefore, the manufactures of "Biri" i.e. the end product do not require to take license

under Section 13 of the Act. Moreover, so long there would be no trade or business the question of taking license under Section 13 of the Act, or the necessity of payment of fee under Section 17 of the Act would not arise. Similarly “storage” for manufacturing or incidental to manufacturing do not also attract either Section 13 or Section 17 of the Act. When “storage” or “processing” is an independent business the provisions under Sections 13 and 17 would apply. The intention of the legislature is quite clear which can easily be ascertained when the prescribed ‘Forms’ under the regulation i.e. Form 2 and 5 are looked at. Therefore, reading of the provisions of the Act by the Chairman of West Bengal Marketing Board as reflected in his decision is not in consonance with the object of the legislation. The Chairman of West Bengal Marketing Board clearly held, which is of course a factual finding, that the writ petitioners are engaged in processing and storing of agricultural produce viz. ‘Kendu Leaves’ and ‘Tobacco’ for manufacturing ‘Biri’. Therefore, processing and storing is incidental to manufacturing ‘Biri’ which is the end product and not an agricultural produce.

In Orient Paper and Industries Ltd. (Supra) the appellant Company which had a paper manufacturing plant within the area of Mandi Samiti brought bamboo and wood as raw materials for production of paper. Manufacturing process consisted of crushing bamboo and wood pieces into pulp to which chemicals were added at a subsequent stage. Bamboo as well as wood were admittedly notified ‘agricultural

produce' within the meaning of M.P. Krishi Upaj Mandi Adhiniyam, 1972. The question arose whether the said 'agricultural produce' brought by the appellant within the market area for being used as one of the raw materials for manufacturing of paper attracted provisions of the Adhiniyam for levy of the market fee. The High Court answered in the affirmative. The Hon'ble Apex court after threadbare discussion held notified 'agricultural produce' brought by the Company inside the market area was not used for the purpose of processing and the end user was manufacture, therefore, the decision of the High Court was nor correct and the Hon'ble Supreme Court found that the appellants contention is correct in his stand that levy on the notified 'agricultural produce' brought within the market area where the end user is manufacture do not attract levy of the market fee. While coming to such conclusion the Supreme Court also found process in manufacture or in relation to manufacture implies not only the production but also various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes to which the raw material is subjected to that the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture. Where any particular process is so integrally connected with the ultimate production of goods that but for that process processing of goods would be impossible or commercially inexpedient that process is one in relation to the manufacture.

Manufacture is transformation of an article which is commercially different from the one which is converted and accordingly it was held that levy on the notified agricultural produce being brought within the market area where the end user is manufactured does not attract levy of market fee. Therefore, it can safely be concluded that under the present Act levy is permissible under three circumstances (i) on buying and selling of notified agricultural produce within the market area (ii) processing or preservation of agricultural produce without manufacture being a business/trade and (iii) storing for the purpose of sale, as a business. It is correct that if any sale or purchase takes place within the market area, the transaction would definitely come under the sweep of "Trader" and the provisions of Sections 13 and 17 would attract. It is specific in terms of the provisions of Section 17 (1) that the market committee shall levy fees on any agricultural produce sold in the market area. Unless agricultural produces which are brought from outside the State, are sold in the market area there is no scope to cover the petitioners under Sections 13 (1) and 17(1) of the Act. However, the other Acts viz. Excise Acts, Rules, etc. as referred by Mr. Mukherjee where the petitioners are required to maintain books and accounts and are regularly required to submit return, as manufacturers of Biri to get exemption of excise duty is also very relevant for consideration. If the petitioners were engaged in buying and selling of agricultural produce they would be liable to pay excise duty. However, not a single instance of

sale was cited or records produced wherefrom it could be conclusively proved that there is sale transaction. It is undisputed that the petitioners purchase the raw materials i.e. Kendu Leaves and Tobacco from outside the State and the raw materials so purchased and brought within the market area are utilised for the purpose of manufacture of Biri.

Mr. Roy learned Counsel for Market Committee placed much reliance upon the Hon'ble Apex Court judgment of Belsund Sugar Company Ltd. (Supra) to impress upon this Court that processing for manufacture and storing also comes within the sweep of the word 'business', therefore, the petitioners are liable to pay fees as per Section 17. Let me consider this aspect of the matter once again. The definition of 'agricultural produce' under Section 2 (1) (a) of Bihar Agricultural Produce Markets Act, 1960 which is very relevant define under Section "2 (1) (a) *'agricultural produce' means all produce, whether processed or non-processed, manufactured or not, of agriculture, horticulture, plantation, animal husbandry, forest, sericulture, pisciculture, and includes livestock or poultry as specified in the Schedule.*" The word "manufacture" used in the definition has extended the scope of the definition and in the wide sweep of the definition every thing which is incidental to manufacture were treated as agricultural produce and, therefore, subjected levy of market fee. Thus, in the wide sweep of definition of agricultural produce the Hon'ble Apex Court was of the view that even if processing and/or treating the raw materials is

required for the purpose of manufacture the processing as well as the manufactured product would come within the wide sweep of definition of 'Agricultural Produce' and market fee would be livable. Therefore, this judgment is distinguishable and in effect no application in this case.

The other judgment rendered by the Hon'ble Apex Court in case of Himachal Pradesh Marketing Board & Ors (Supra) which was also relied upon by Mr. Roy to show, even after various manufacturing process 'katha' is prepared from khairwood but the product so manufactured is liable to levy of market fee. It is relevant to point out that the produce so manufactured 'katha' is admittedly an agricultural produce under Himachal Pradesh Act, therefore, the Hon'ble Apex Court allowed such imposition but in the present case "Biri" is not an agricultural produce, therefore, the ratio of this judgment also do not support market committees contention, thus this judgment also do not justify the levy. The other Act Uttar Pradesh Krishi Utpadan Mandi Adhiniam, 1964 is also different form the Bengal Act. Therefore, those judgments do not have any application in the present case.

It was strenuously argued by Mr. Roy that the goods taken out from the market area in the name of stock transfer should be presumed as sale since petitioners could not prove to the contrary by producing convincing evidence. In support of his contention he relied upon the Hon'ble Apex Court judgment rendered in case of Heinz India (P) Ltd. (Supra). Let me consider this aspect of the matter. In that case the

goods were admittedly produced within the market area and not consumed within such area, but those goods left market area which was presumed to be sale since nothing contrary was proved. But in this case it is admitted that the goods were brought from outside the State were processed and stored for manufacture of 'Biri' which was factually found by the Chairman of the Marketing Board. Therefore, the facts involved in that case and the present one are totally different and as such the ratio of that judgment is not at all applicable in the instant case. Thus there is no factual basis for such presumption. Unless there are factual basis no presumption could be drawn. In the instant case the petitioners are engaged in 'Biri' Manufacturing which was factually found to be correct, therefore, no such presumption could be drawn. Accordingly the point urged on behalf of the petitioners is well founded and must be accepted as correct. On the very wording of Section 17 market fee is payable on transaction of sale of specific 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. If agricultural produces are merely brought in the market area and are despatched outside the market area without any transactions of sale taking place therein then no market fee can be charged. Accordingly so long the writ petitioners would be engaged in Biri manufacturing they would not require to take license under Section 13 of the Act and consequently they are also not liable to pay fees in terms of Section 17 of the Act.

Now the point of implementation of quid-pro-quo as raised by petitioners to be considered. The question of rendering service and its co-relation to the charging of fee has been elaborately discussed in the Constitution Bench judgment of Supreme Court in case of (Kewal Krishan Puri Vs. State of Punjab) (Supra). It was pointed out that fees realised from the payer of the fee has, by and large, to be spent for his special benefit and the benefit of the other persons connected with transaction of purchase and sale. However, after elaborate discussion the following principles have been culled out:

- “1. That the amount of fee realised must be earmarked for rendering services to the licensees in the notified market area and a good and substantial portion of it must be shown to be expended for this purpose.*
- 2. That the services rendered to the licensee must be in relation to the transaction of purchase or sale of the agricultural produce.*
- 3. That while rendering services in the market area for the purpose of facilitating the transactions of purchase and sale with a view to achieve the objects of the marketing legislation it is not necessary to confer the whole of the benefit on the licensees but some special benefits must be conferred on them which have a direct, close and reasonable correlation between the licensees and the transactions.*
- 4. That while conferring some special benefits on the licensee it is permissible to render such service in the market which may be in the general interest of all concerned with the transactions taking place in the market.*
- 5. That spending the amount of market fees for the purpose of augmenting the agricultural produce, its facility of transport in villages and to provide other facilities meant mainly or exclusively for the benefit of the agriculturists is not permissible on the ground that such services in the long run go to increase the volume of transactions in the market ultimately benefiting the*

traders also. Such an indirect and remote benefit to the traders is in no sense a special benefit to them.

6. *That the element of quid pro quo may not be possible, or even necessary to be established with arithmetical exactitude but even broadly and reasonably it must be established by the authorities who charge the fees that the amount is being spent for rendering services to those on whom falls the burden of the fee.*
7. *At least a good and substantial portion of the amount collected on account of fees, may be in the neighbourhood of two-thirds or three-fourths, must be with reasonable certainty as being spent for rendering services of the kind mentioned above.”*

In this case it was stated in the affidavit of market committee that the committee sunk some tube wells and started construction of approach road which cannot be said proper implementation of aforementioned principles nor fulfillment of duties and obligations put upon it under the Act.

Lastly the point of misjoinder of parties raised by Mr. Roy has no substance in law since the office bears of the firms carrying manufacture of Biri were added as petitioners and as such this plea is also rejected by this Court.

However, in view of Appeal Court orders petitioners paid the fees on condition that in case the writ petitioners ultimately become successful, in that event the respondent would refund the market fees collected with 18% interest. Accordingly the respondents are directed to return market fees collected with 18% simple interest. The writ petition is, thus, allowed.

There would be no order as to costs.

Let urgent Xerox certified copy of this judgment, if applied for, be given to the learned Advocates of the parties on usual undertaking.

(ASHOKE KUMAR DASADHIKARI, J.)

Later on :

Mr. Roy, learned Counsel appearing for the Market Committee prays for stay of operation of this order.

Mr. Bhattacharya, learned Senior Counsel appearing for the petitioner opposed such prayer.

Considering the prayers made by the learned Counsel appearing for the respective parties this Court is not inclined to pass any order of stay.

Therefore, prayer for stay is rejected.

(ASHOKE KUMAR DASADHIKARI, J)