

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.726 of 2010

IN

Civil Writ Jurisdiction Case No. 6044 of 2009

- =====
1. The Food Corporation of India having its office situated at Regional Office, Exhibition Road, Patna through its General Manager (Bihar)
 2. The General Manager (Bihar) Food Corporation of India, Regional Office, Exhibition Road, Patna
 3. The Dy. General Manager (R-11) Food Corporation of India, Regional Office, Exhibition Road, Patna
 4. The Manager Depot, Food Corporation of India, Food Storage Depot Phulwari Sharif, Patna

.... Appellants

Versus

M/S Ambe Agro Industries Pvt. Ltd., a Company incorporated under the provisions of the Companies Act, 1956 having its place of business at Patliputra, P.S.- Patliputra, Distt.- Patna, through one of its Directors, Amit Agrawal, S/O Shri Satyanarain Agrawal, R/O 237, Patliputra, P.S. Patliputra, Distt.- Patna.

.... Respondent

With

=====

Letters Patent Appeal No. 729 of 2010

IN

Civil Writ Jurisdiction Case No. 6069 of 2009

- =====
1. The Food Corporation of India having its office situated at Regional Office Exhibition Road, Patna Through Its General Manager (Bihar)
 2. The General Manager (Bihar) Food Corporation of India, Regional

- 2 -

Office, Exhibition Road, Patna

3. The Dy. General Manager (R-11) Food Corporation of India, Regional Office, Exhibition Road, Patna

4. The Manager Depot Food Corporation of India, Food Storage Depot Phulwari Sharif, Patna.

.... Appellants

Versus

M/S Danapur Flour Mills Ltd., a Company incorporated under the provisions of the Companies Act, 1956 having its place of business at Nasriganj, P.S. Danapur, Distt.- Patna through one of its Directors, Sameer Gupta, S/O Late Surendra Gupta, R/O 14, Kaveri Apartment, Bandar Bagicha, P.S.- Kotwali, Town & Distt.- Patna.

.... Respondent

With

=====

Letters Patent Appeal No. 768 of 2010

IN

Civil Writ Jurisdiction Case No. 6086 of 2009

=====

1. The Food Corporation of India having its office situated at Regional Office, Exhibition Road, Patna through its General Manager (Bihar)

2. The General Manager (Bihar) Food Corporation of India, Regional Office, Exhibition Road, Patna

3. The Dy. General Manager (R-11) Food Corporation of India, Regional Office, Exhibition Road, Patna

4. The Manager Depot, Food Corporation of India, Food Storage Depot Phulwari Sharif, Patna.

.... Appellants

Versus

M/S Gupta Nutrition Pvt. Ltd., a Company incorporated under the provision of the Companies Act, 1956 having its place of business at Nasriganj, P.S.-

- 3 -

Danapur, Distt.- Patna through one of its Directors, Sanjeev Kumar Munka, S/O Shri Basudeo Prasad Munka, R/O 1-D, Durga Vihar Apartment, S.P.Verma Road, P.S.- Gandhi Maidan, Distt.- Patna.

.... Respondent

With

=====

Letters Patent Appeal No. 769 of 2010

IN

Civil Writ Jurisdiction Case No. 6027 of 2009

=====

1. The Food Corporation of India having its office situated at Regional Office,Exhibition Road,Patna through its General Manager (Bihar).
2. The General Manager (Bihar) Food Corporation of India, Regional Office, Exhibition Road,Patna.
3. The Dy. General Manager (R-11) Food Corporation of India, Regional Office, Exhibition Road,Patna.
4. The Manager Depot, Food Corporation of India, Food Storage Depot Phulwari Sharif,Patna.

.... Appellants

Versus

M/S Banke Behari Food Pvt.Ltd, a Company incorporated under the provision of the Companies Act,1956 having its place of business at Digha,P.S.- Digha, District- Patna, through one of its Directors, Gaurav Sah S/O Sri Om Prakash Sah, R/O Maalsalami, P.S.- Maalsalami,Patna City, District- Patna.

.... Respondent

With

=====

Letters Patent Appeal No. 683 of 2010

IN

Civil Writ Jurisdiction Case No. 5916 of 2009

- 4 -

- =====
1. The Food Corporation of India having its office situated at Regional Office, Exhibition Road, Patna through its General Manager (Bihar)
 2. The General Manager (Bihar) Food Corporation of India, Regional Office, Exhibition Road, Patna
 3. The Dy. General Manager (R-11) Food Corporation of India, Regional Office, Exhibition Road, Patna
 4. The Manager Depot, Food Corporation of India, Food Storage Depot Phulwari Sharif, Patna.

.... Appellants

Versus

M/S Vaishali Flour Mills, a partnership firms having its place of Business at Bataganj, P.S. Danapur, Distt.- Patna. through one of its partner, Sanjay Bansal, S/O Shri Shiv Shankar Bansal, R/O 201, Santosh Complex, Bandar Bagicha, P.S. Kotwali Town and Distt.- Patna.

.... Respondent

=====

Appearance :

For the Appellants : Mr. S.K.P.Sinha, Advocate

For the Respondents : Mr. S.D. Sanjay, Sr. Advocate

For the Bank : Mr. Alok Kumar Agrawal, Advocate

Mr. Ajay Kumar Sinha, Advocate

Mrs. Manju Jha, Advocate

=====

CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

And

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 06-11-2015

- 5 -

All these five Letters Patent Appeals have been preferred by the Food Corporation of India (in short "F.C.I.") and its officers, who are respondents in the writ proceedings instituted by the sole respondent, who were the writ petitioners.

2. F.C.I. is aggrieved by the judgment and order dated 05.03.2010 passed in C.W.J.C. No. 6044 of 2009 (M/s Ambe Agro Industries Private Limited and analogous cases Vs. F.C.I. and others), by which while allowing the writ petition, the demand of entry tax at the rate of 4% as made by the F.C.I., from the writ petitioners was held to be illegal and consequently orders for refund thereof was passed.

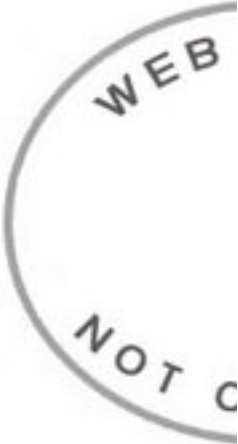
3. In all these appeals, facts are same except for variation in figure. The sole respondent, pursuant to tender issued by F.C.I., had filed tender for purchase of wheat, but when the stage of delivery of wheat came, F.C.I. demanded entry tax on the wheat that they had imported in the State of Bihar from other places in the country, which was protested by the respondent but without paying any heed, on the threat of forfeiture of substantial earnest money, respondents were forced to take delivery after payment of entry tax. The

question is whether F.C.I., in law, was entitled to charge the respondent entry tax, as envisaged under the provisions of the Bihar Entry Tax Act, 1993? The learned Single Judge has held that F.C.I. in law or on the terms of the tender, was not entitled to do so.

4. Before proceeding further, we may notice the facts of the case, as illustrative from the first appeal which arises from C.W.J.C. No. 6044 of 2009, and as agreed by the parties, the factual pleadings are fully available in the writ proceedings.

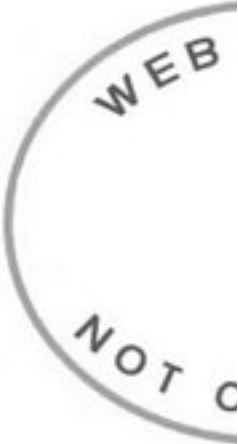
5. Food Corporation of India is a statutory Corporation of Government of India established under Section 3 of the Food Corporations Act, 1964, with the object, *inter alia*, for purchasing food-grains and making it available to the public including flour mills, which functions are enumerated in Section 13 of the Said Act. The Food Corporation of India has an regional office for the State of Bihar at Patna, where it has a General Manager (Bihar) posted. On or about 26.12.2008, a tender notice was published on behalf of the F.C.I., Patna, notifying, that there was available substantial quantities of wheat at the Food Storage Depot (FSD), Digha

- 7 -



Ghat, Fulwarisharif, Mokama, Buxar, Gaya and Bhagalpur, which was intended to be sold by open sale through tender to bulk consumers of wheat like flour mills, biscuit manufacturers etc. under their Open Market Sale Scheme (domestic). In the tender notice, which is Annexure 1 to the writ petition, it was, *inter alia*, stated that the reserve price of stocks of wheat would be Rs. 1096.21 per quintal. A person could tender for minimum 100 MT and maximum 1000 MT. While tendering, the parties were required to deposit 10% of the cost of stocks intended to be purchased as earnest money. Stocks available at various FSDs were indicated therein totaling to 40,000 MT. The EMD was to be deposited through demand draft along with tender filed, bids unaccompanied by earnest money would be rejected.

6. The tender document is Annexure 2 to the writ petition. Clause 2 of the tender document again stipulated that tender shall be accompanied by EMD. Clause 5 further stipulated that on acceptance of the offer, tenderers would be required furnish security deposit, being 25% of the cost of stocks, intended to be purchased within 5 days of the communication of acceptance. The earnest money would be adjusted towards security deposit, on receipt of request from



the successful tenderer. It further stipulated that in case the successful tenderer rescind from his offer or violated the terms of contract, security deposit would be forfeited, and loss in subsequent liquidation of stocks, after adjustment from security, would be recovered from the tenderers. It further provided, that on failure to deposit the security money within the 5 day period, the earnest money would be forfeited.

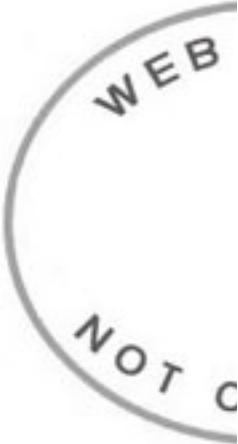
7. With regard to the payment/delivery schedule, Clause H(i), (iii), (vii) and (viii) provided as under:

(H) Payment Delivery Schedule:

(i) Price of foodgrains will be payable on the net weight basis. All taxes and other levies, fees and charges of any nature what so ever leviable by any authority shall be payable by the buyer in addition to the price offered.

(iii) If the tenderer fails to deposit the balance 75% cost of the stocks within the stipulated period, then he would be given additional time period of seven (7) days to deposit the balance cost with payment of penal interest of 2% over and above the Bank rate at which the FCI is borrowing.

(vii) The total price calculated on the

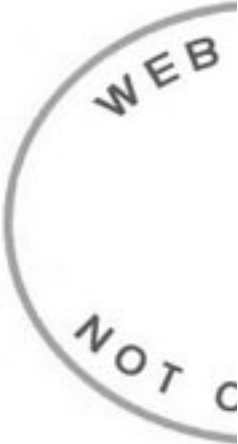


declared quantity in each lot on the basis of accepted rates shall be paid together with **local taxes/sales tax**, if any, within the stipulated date in the communication of acceptance of tender issued by the General Manager, Food Corporation of India Patna. The amount will be paid by the buyer in the form of Bank Draft/PayOrder/Banker's Cheque issued in favour of the Area Manager/General Manager, Food Corporation of India, Patna within the stipulated date only after which necessary delivery order will be issued by the General Manager (Region) or an officer acting on his behalf.

(viii) In the event of failure to deposit the cost/lifting of stocks within the specified time, Food Corporation may dispose off the stocks at the buyer's risk & cost in a manner deemed fit and shall recover all losses suffered by the Corporation from the Security Deposit and other dues available with the Corporation. In case, this amount falls short of the recoverable amount, the tenderer shall deposit the balance amount on receipt of notice from the Corporation.

8. The writ petitioner, tendered for purchase of 1000 MT of wheat under the said tender, as such deposited

- 10 -



about Rs. 11,40,880/- as earnest money. The writ petitioner was then communicated by F.C.I. vide their communication dated 24.01.2009 that its tender had been accepted and it was required to deposit 25% of the cost as security money within 5 days. The writ petitioner being desirous of purchasing, deposited the balance amount and, thus the total security deposit as made by the writ petitioner was Rs. 28,52,200/-.

9. Thus, F.C.I. having received substantial amount of money as security deposit now communicated to all the flour mills including the writ petitioner the acceptance and delivery allocations vide their communication dated 11.02.2009. The writ petitioner was allotted 1000 MT of wheat to be lifted from FSD Digha, but what came as a surprise, there were four clauses in this letter, which has become the bone of contention, which reads as such:

1. The Miller concern have to deposit full cost and tax (1% VAT, 3% additional tax & 4% entry tax) (4% entry tax may be obtained on acquisition cost of wheat after adjusting 1% VAT).
2. The Millers are required to deposit full cost and tax etc. within 7 days failing which they may be given only one time extension of another

- 11 -

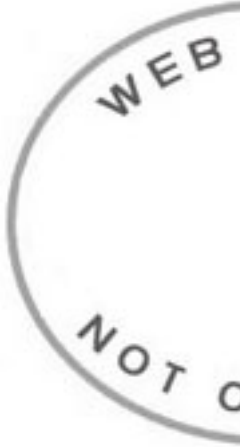
7 days for payment along with penal interest (2% over and above normal interest).

4. Delivery has to be completed by the party within 7 days from the date of issuance of RO. In case of failure, they may be given only one time extension of next 7 days, with recovery of storage rent.

6. The validity period of this scheme is upto 28.02.2009 only.

10. The writ petitioner and others, being taken by surprise, of charging of 4% entry tax which, according to them, was not payable immediately on 13.02.2009, protested in writing. They went to the extent of saying, that if payment of entry tax was insisted, they would not be able to take deliveries. It annexed legal opinion of advocate in this regard as well, but notwithstanding the aforesaid and ignoring the protest, they were issued with release orders (RO) on 17.02.2009 quantifying the total cost of wheat which they had to lift, including Rs, 4,38,484/- on account of the entry tax. This release order also stipulated that deliveries/lifting on payment of full price must be completed by 20.02.2009.

11. Faced with the situation, that if the writ petitioners, who had already protested, failed to lift the wheat



- 12 -

they would have to forfeit the substantial security deposit of over Rs. 28 Lacs, they were left with no other option but to take deliveries on payment of the entire amount, that was demanded, including disputed component of entry tax and, immediately thereafter, they filed the writ petitions challenging the demand of entry tax.

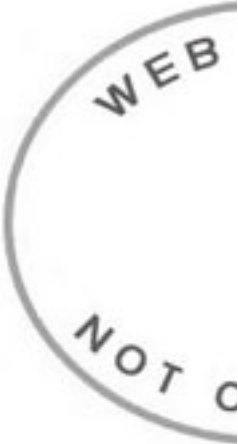
12. In the writ proceeding, a counter affidavit was filed by F.C.I. stating that the writ petitioners had lifted the entire allotted quantity of wheat and sought to justify the right to recover entry tax, in addition to the cost of wheat, the VAT payable thereon and the additional tax under the Value Added Tax (in short the “VAT”) Act. As apparent from counter affidavit filed by F.C.I., their stand is that the entry tax, which was the liability of F.C.I., could be passed on by F.C.I. and charged from the writ petitioner along with other taxes. On the other hand, the stand of the writ petitioner is that the price of wheat having been indicated and agreed as per their tender what could be charged in addition thereto was, any tax liability only on these sales by F.C.I. to the writ petitioners.

13. The writ court held that the liability to entry tax was not a liability on the sale made by F.C.I. to the writ

petitioners and, as such could not be levied, recovered or charged on the said transaction and, as such the demand and recovery was not in accordance with law. We agree.

14. The reason is simple. Under the provisions of Bihar Entry Tax Act, 1983, the liability to entry tax is upon the person who first imports taxable goods from outside the State of Bihar, into the State of Bihar, for sale therein. This liability was squarely upon the F.C.I., when they first brought the stocks in the State of Bihar, from outside the State, for sale to consumers, in the State of Bihar. It is the liability of F.C.I. incurred prior to the stocks reaching their Food Storage Depots for storage and onward sale in Bihar. There is no provision for passing of this liability or charging this as a liability on and to the subsequent purchaser, for the simple reason, that this liability is absorbed and becomes part of the cost price of goods, that are then, to be sold in the State of Bihar.

15. We would find that when F.C.I. issued the tender and stipulated the cost of wheat and all other taxes as leviable, to be the sale price, it could mean only taxes that were legitimately leviable, as a consequence of sale, by F.C.I.

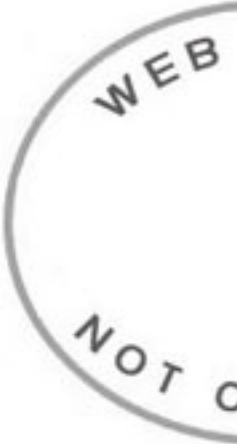


to the flour mills. In other words, any tax that was leviable under any enactment on the transaction of sale as between F.C.I. and the writ petitioner flour mill and only this was chargeable. It is not disputed and it cannot be disputed and there being no liability of entry tax on the transaction of sale as between F.C.I. and the writ petitioner. The F.C.I. acted illegally and contrary to the statutory provisions to charge the same from the writ petitioner.

16. The writ petitioners could do so little. They immediately, rightly protested, but had no option but to go ahead and pay the full amount as demanded and take the delivery because the consequences were grave. If, they did not take delivery, being forced to pay unauthorized amount, they take the risk of forfeiting security money of over Rs. 28 Lacs, in case the writ petitioners alone. If they delayed, again, they were faced with substantial penal clauses. They were left with no other option but to pay and take the delivery, already having registered their protest.

17. It is under the aforesaid circumstances, we are in agreement with the learned Single Judge. In fairness to Sri S.K.P. Sinha, learned Senior Counsel appearing for the F.C.I.,

- 15 -



we must notice his argument, though only to be rejected, that it would be unjust enrichment on the part of flour mills, if the entry tax, as wrongly charged by them (FCI) is directed to be refunded. We reject this because of what the Apex Court has held in the case of **Bhadrachalam Paperboards Ltd. Vs. Government of A.P. and others** since reported in **1998 (6) SCC 250**.

18. To take any other view of the matter, it would be permitting the State instrumentality, using its dominant power, in realizing money unauthorizedly and contrary to statute. It must be remembered that no State instrumentality can act arbitrarily. Arbitrariness includes illegality or actions not authorized by statute. The terms of contract permitted charging of taxes and duties as leviable on the transaction of sale as between F.C.I. and the flour mills, the writ petitioners, and surely entry tax had no place in respect of the said transaction.

19. On behalf of the F.C.I., a desperate attempt has been made to place reliance on Section 8 of the Bihar Entry Tax Act, 1993, which is quoted hereunder:

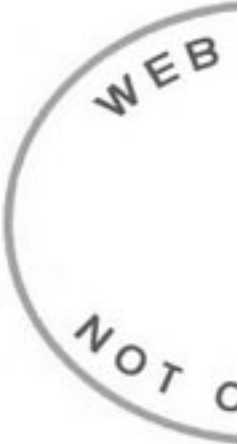
“8. Applicability of the provisions of the Bihar Finance Act, 1981 (Bihar Act 5,

1981) and Rules made thereunder –

Subject to other provisions of this Act and the Rules framed thereunder the authority empowered to assess, reassess, collect and enforce payment of tax and penalty payable by a dealer under the Bihar Finance Act, 1981 (Bihar Act 5, 1981) shall assess, reassess, collect and enforce payment of tax and penalty payable under this Act and for this purpose they may exercise all or any of the powers assigned to them under the said Act and Rules made thereunder for the time being in force including the provisions relating to returns, assessment, reassessment, escaped assessment, recovery of tax, special mode of recovery, maintenance of accounts, inspection, search and seizure, liability in representative character, refund, appeal revision and reviews, statement of cases to the High Court, compounding of offences and other miscellaneous matter and the provisions of the said Act shall *mutatis mutandis* apply accordingly.”

20. Let it be noted that the reference to Bihar Finance Act, 1981, in Section 8 was to the equivalent provisions of the Bihar Sales Tax Act, which has now been

repealed and replaced by Bihar Value Added Tax Act, 2005.



21. What is sought to be conveyed is that Section 8 of the Entry Tax Act adopts the provisions of Bihar Finance Act (now the Bihar Value Added Tax Act, 2005), and hence as the Bihar Value Added Tax permits passing of liability, the same would apply to entry tax. We are afraid, his argument is totally misconceived, inasmuch as Section 8 of the Entry Tax Act, *inter alia*, confers power on the statutory authority to assess, reassess, collect and enforce payment of tax and penalty. It deals with statutory authorities exercising powers and functions for enforcement of the Act. It does not include the rights of dealer. Even if it be assumed the entry tax could be passed on, by nature of things, entry tax is a tax on entry of goods in the State of Bihar for sale therein, and the liability is squarely and solely on the importing dealer. Once the goods are brought in the State then when it offered for sale, the entry tax paid, is already absorbed in the cost price and the selling price by the dealer becomes inclusive of the absorbed entry tax component. It cannot subsequently be separately charged from the purchaser in the State as this subsequent transaction in the State is not exigible or liable to entry tax.

22. For the reason aforesaid, we find no merit in these appeals, they are, accordingly, dismissed.

(Navaniti Prasad Singh, J.)

I agree.

(Rajendra Kumar Mishra, J.)

Rajeev/A.F.R.

(Rajendra Kumar Mishra, J.)

U			
---	--	--	--