

(2011) 02 CAL CK 0074

Calcutta High Court

Case No: W.P.T.T. 631 of 2007 with W.P.T.T. 4 of 2009 with W.P.T.T. 5 of 2009

Board of Trustees for the Port of
Calcutta

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: Feb. 11, 2011

Acts Referred:

- Major Port Trusts Act, 1963 - Section 3, 35, 5
- West Bengal Finance (Sales Tax) Act, 1941 - Section 2, 2(C), 2(D), 6(D)

Citation: (2011) 3 CALLT 194 : (2011) 4 CHN 421

Hon'ble Judges: Kanchan Chakraborty, J; Kalyan Jyoti Sengupta, J

Bench: Division Bench

Advocate: R.N. Bajoria W.P.T.T. 631 of 2007, Mr. Somenath Bose and Mr. Prithu Dudhoria W.P.T.T. 4 and 5, for the Appellant; Lakshmi Gupta and Mrs. Seba Roy, for the Respondent

Judgement

K.J. Sengupta, J.

The instant application has been filed against the judgment and order of the learned Tribunal dated 13th September, 2007, by which applicant's writ petition was partly dismissed. Before the learned Tribunal the challenge was against the action of the respondent-State, of attempting to levy tax on sale by the appellant herein treating the appellant being a dealer within the definition of the West Bengal Finance (Sales Tax) Act, 1941, (hereinafter referred to as the said Act).

2. The fact for which the said action was taken to the learned Tribunal and ultimately brought this matter to this Court are shortly put hereunder:

The appellant is a statutory body constituted u/s 3 of the Major Port Trust Act, 1963, (hereinafter referred to as the said 1963 Act). By virtue of this Act the Administration Control and Management of the Calcutta Port vests on the appellant. The trustees are appointed from the persons having varied public interest. u/s 5 such Board of Trustees is a body corporate. Section 35 of the said Act empowers the Board to

execute work within or without the limits of the port arid to provide appliances as it may deem necessary or expedient. Such works and appliances include wharves, quays, docks, jetties, moorings, cranes, scales, light house, pilot boats, etc. Section 61 provides for sale of goods if rates and rents are not paid. Section 62 provides for disposal of goods not removed from the premises. Section 63 indicates how the sale proceeds are to be dealt with towards payment of liens, claims, charges, demurrage, penalties etc. It would be clear from the aforesaid statutory provision that the port is not involved in any activity of carrying on business of sale of good only unclaimed, unused unserviceable, discarded goods are sold in discharge of statutory functions for recovery of charges etc. In respect of the goods so disposed of in exercise of its lien for rates and further disposal of used obsolete stores, machineries and equipments the petitioner under the erroneous impression that it was liable to tax on such disposal as sales under the provisions of the Bengal Finance (Sales Tax) Act, 1941 got itself registered as a dealer and paid tax for some period. It collected the same from the person to whom such goods has been transferred. On realizing its mistake that it was not liable to pay the tax under 1941 Act in respect of such transfer the petitioner approached the Sale Tax Authorities for cancellation of its registration and contended that it was not liable to pay any tax. Proceedings relating to such controversies were before the authorities under 1941 Act and thereafter, ultimately the West Bengal Commercial Taxes. Tribunal by its two separate orders dated 18th March 1980 and June 4, 1980 passed in respect of four quarters ending March 1966 and four quarters ending March 1968 respectively held that the petitioner was not liable to be treated as a dealer and not liable to pay any tax in respect of the goods disposed of by it.

3. Learned Tribunal after considering the decisions of the Supreme Court on two issues held that going by the definition of the dealer in Bengal Finance (Sales Tax) Act 1941, the appellant being a statutory body is liable to pay tax for the sale held in discharge of its duty. It was also held that the State Government has competence to enact sale tax incorporating the definition of dealer. But learned Tribunal held the said amendment of the definition of dealer cannot be given any retrospective operation.

4. In this matter the petitioner, Board has challenged the said decision of the learned Tribunal to the extent of holding the Board being "Dealer" within the meaning of the said Act as amended and as such it is exigible to tax with regard to the sale undertaken by the Board under the Statute.

5. Mr. Bajoria, learned Senior Advocate appearing for the petitioner submits that apparently on plain reading of the definition of the "Dealer" with explanation, the Board is covered by the said definition as being "Dealer", but if the said definition is read carefully with the definition of business it would appear that the primary object of the said Statute is to impose tax with regard to the sale while carrying on business. According to him the meaning of the word "Dealer" as employed in the

said Act must have co-relation with the term of business as defined. Hence, it has to be understood what is the dominant and primary activity of the Dealer concerned. If the primary object is to carry on business as defined which is expansive one regardless of the fact of accrual of profit, such sale undertaken by it has to be brought within the purview of the said definition of "Dealer" in order to impose tax. Therefore, the amended definition intending to give retrospective effect even does not eliminate the concept of business. It has been accepted by the learned Tribunal in its impugned judgment and also by several other judicial pronouncements that Board of Trustees for the Port is not carrying out any business activity and is discharging statutory function.

6. The petitioner herein has been entrusted with various duties and conferred with power as mentioned in the 1963 Act, to render services to the exporter and importer on realization of various charges as stipulated under the Statute and Rules. The port authority has lien over the goods brought to port area, in the event realizable port charges are not paid. In some cases if the goods are not removed from the port premises within the time permissible under the law and if the customs duties are not paid the Boards are authorized under the law to sell such goods.

7. Thus the primary object of the Board is not for selling the goods for business. He has drawn our attention to the definition of "Dealer" in section 2(g) of the Tamil Nadu General Sales Tax Act, 1959 and that of Andhra Pradesh General Sales Tax Act, 1957. In the Andhra Pradesh Act the specific mention of the Port Trust as being "Dealer" has been incorporated. In spite of that Andhra Pradesh High Court did not accept the contention that Visakhapatnam Port Authority is dealer.

8. He submits with the support of the decision of the Supreme Court in case of State of Tamil Nadu v. Board of Trustees of the Port of Madras reported in 1999 114 STC 520 that the primary and dominant nature of the business has to be understood in order to hold a particular concern being dealer. If the primary object is not in carrying on business for sale of goods and sale of goods is undertaken in connection with or incidental activity cannot be said to be business.

9. He submits that it is true the definition of the "Dealer" as mentioned in the corresponding Sales Tax Act of Tamil Nadu is not similar to that of the Act of this State, but underlying meaning of "Dealer" as mentioned in both the Cases are same. According to him the said judgment of the Supreme Court has got full application in this case.

10. He submits that Andhra Pradesh High Court in case of Visakhapatnam Port Trust v. Commercial Tax Officers" and Ors. reported in 2002 2 STC 393 while following the ratio of the Supreme Court Judgment in the case of Sate of Tamil Nadu (Supra) has held after considering the definition of the Andhra Pradesh Act which is almost similar to that of this Act that the Port authority cannot be held to be a "Dealer" so as to impose Sales Tax. Mr. Bajoria has also cited the decision of the Supreme Court

in the case of Commissioner of Sales Tax v. Sai Publication reported in 2002 126 STC 288 to strengthen his submission that the Primary and dominant part of the business activity has to be understood to hold a particular person being a "Dealer". If the element of business activity for sale is not be found in the dealings and transaction of the dealer as being primary and dominant part such person cannot be held to be a "Dealer".

11. He, therefore, contends that the decision of the learned Tribunal has not accepted correct legal proposition. According to him going by the language of the definition and having regard to the activity being conducted the Board under no circumstances it can be termed to be carrying on business for sale.

12. He then submits that the meaning and expression of the word "Sale" must be understood with reference to the definition of Sales Tax Act which means transfer of movable property or goods by one person to another. The above authority does not transfer any property or goods in carrying on its activities. The Sale under the statute and the rule framed thereunder has to be undertaken by the Board to complete and fulfil the activity as an incidental measure. He would then urge relying on decisions of the Supreme Court in case of Builders" Association of India and Ors. v. Union of India & Ors. reported in 1973 STC 370 (SC) and in the case reported in Vrajlal Manilal and Co. and Another Vs. State of M.P. and Another, hat unless this element of transfer of property in the goods is satisfied the activity carried on by the Board cannot be said to be a "sale".

13. Mr. Prosenjit Basu learned Advocate appearing for the State supports the reasoning and finding of the learned Tribunal.

14. He submits more briefly and in view of the definition of "Dealer" employed in the said Act with the explanation it leaves no room for doubt that irrespective of the nature of the activity if there is an incident of sale such a person has to be held a "dealer" within the meaning of the said Act. The State Legislature is empowered within the appropriate entry to bring any person within the coverage of the Tax Statute and such authority cannot be questioned once the State Legislature has chosen a particular organization or person to treat as "Dealer" the Court has no jurisdiction to strike it down on any ground whatsoever.

15. After considering the arguments of learned counsel for the parties it appears the controversy involved herein is whether the definition of "Dealer" as mentioned in the Sales Tax Act does cover the present petitioner or not. We, therefore, usefully set out the definition mentioned in section 2(c) to Bengal Finance Sales Tax Act, 1941 as amended:

2(C) "dealer" means any person, firm or Hindu joint family, engaged in the business of selling or supplying goods in Bengal; and where the main place of business of any such person, firm or Hindu joint family is not in Bengal, "dealer" means the manager or other agent of such person, firm or Hindu joint family in Bengal;

Explanation - A co-operative society or a club or any association which sells or supplies goods to its members is a dealer within the meaning of this clause;

16. Going by the language of the explanation to definition as above it appears that apparently the petitioner, Board being a statutory body is also covered by the said definition. In our opinion as rightly contended by Mr. Bajoria it would be unfair if the definition of "Dealer" is to be understood in the context of section 2(C) alone as the said definition of "Dealer" starts with the words:

.....Who carries on business of selling goods in West Bengal (emphasis supplied) or purchasing goods in West Bengal or any person making a sale u/s 6 (D)....

17. Section 2(D) defines the business which is inclusive in nature and the same is as follows:

.....any trade or commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any profit accrues from such trade, commerce, manufacture, adventure or concern

(ii) any transaction in connection with, or incidental or ancillary to, such trade commerce, manufacture, adventure or concern.

18. It is thus clear the profit or gain is the criteria, nor motive of the actual account thereof, in the business of sale u/s 35 of 1963 Act what -the Board undisputedly is to do is to execute work within the Statute and may execute such works within or without the limits of the port and provide such appliances as it may deem necessary or expedient which may include moorings and cranes, scales and all other necessary means and appliances for loading and unloading of vessels.

19. It will appear from the preamble of the said Act the primary and dominant nature of activity is to render services for loading and unloading and further storing for temporary period the goods brought to the Port Premises for the purpose of import and export not for purchase or sale. In the case of State of Tamil Nadu v. Board of Trustees for the Port of Madras (Supra). The Supreme Court has recognized that activities carried on by the Port authorities is not the business but the services rendered. We have no difficulty to accept reality having regard to the nature of the duty entrusted by the said Act of 1963 that the Port authority is merely statutory service provider and is not carrying out any business as per definition of section 2(D) of the Act. It thus appears the petitioner Board is not doing trade nor conducting commerce and not manufacturing in any sense whatsoever.

20. In the case of State of Tamil Nadu and Anr. reported in STC 99 114 520 the Supreme Court while dealing definition of "Dealer" slightly different though, in the Tamil Nadu General Sales Tax Act, 1959 has laid down purchase of the element of business for sale and purchase before bringing a particular person within the definition of "Dealer" or imposition of Sales Tax. The Supreme Court considering

large number of decisions in that case in paragraph 26 of the report laid down the legal proposition as follows:

26. It will thus be noticed that in all these cases the main activity of the person or body was undoubtedly "business" even though the motive of profit was excluded by statute and even though the connected, incidental or ancillary sales were statutorily included in the definition of business. The question in issue before us is whether the Port Trust was established by statute to "carry on business".

21. Again in paragraphs 27 and 28 of the report of same judgment the Apex Court came to the conclusion as follows:

27. We now come to the second category of cases cited for the respondent, Port Trust where the main activity of the person or body does not amount to "carrying on business". If that be the case the activities will stand far removed from any business. Let us assume that such "non-business" activities might result (say) in some scrap or unwanted material which should be cleared so that accommodation could be saved. If the sales were then made with an intention to reduce the congestion and not with the intention of running an independent business in the scrap or unwanted material, then would they be liable to sales tax? If in such situations, the activities of sale of the scrap or unwanted material were only a very infinitesimal part of the activities when compared with the main "non-business" activity, could they be brought under the tax net?

28. In our view, if the main activity was not "business", then the connected, incidental or ancillary activities of sales would not normally amount to "business" unless an independent intention to conduct "business" in these connected, incidental or ancillary activities is established by the Revenue. It will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities. In other words, the presumption will be that these connected, incidental or ancillary activities of sales are not "business" and the onus of proof of an independent intention to do "business" in these connected, incidental and ancillary sales will rest on the department. If, for example, these connected, incidental or ancillary transactions are so large as to render the main activity infinitesimal or very small, then of course the case would fall under the first category referred to earlier.

22. The Andhra Pradesh High Court in case of Visakhapatnam Port Trust v. Commercial Tax Officers and Ors. reported in 2002 127 STC 393 while considering almost identical language of the definition of "Dealer" to that of the present Act came to the same conclusion having followed the ratio decided in the case of State of Tamil Nadu case (Supra). In paragraph 27 it has been held by Their Lordships of Andhra Pradesh High Court as follows:

27. The issue whether the Port Trust is a "dealer" and its activity is a "business activity" has been settled in various decisions as discussed by us and therefore, any

efforts made by the Commercial Tax authorities to give a new meaning to the settled issue is impermissible. Merely because an amendment is introduced to section 2(e) of the Act through explanation IV bringing to the fold of section 2(e), 11 persons and bodies, as long as the activity of the Port Trust is not a "business activity", the Port Trust cannot be treated as a "dealer" within the ambit of section 2(e) of the Act and it can never be subjected to tax liability u/s 5 of the Act. In the decision in State of Tamil Nadu and Another Vs. Board of Trustee of the Port of Madras, it is noticed that somewhat similar amendment was also introduced in the year 1992 to the Tamil Nadu General Sales Tax Act giving added meaning to the expression "dealer" and the honourable Supreme Court, in the said case, considered the effect of such amendment and categorically held that the main activity of the Port Trust is not a "business activity" and therefore, it cannot be treated as a "dealer" for the purpose of determining tax liability under the Tamil Nadu General Sales Tax Act. It is needless to repeat again and again this concluded finding given by various courts about the status of the Port Trust. The Visakhapatnam Port Trust, being one of the major ports, falls on the same analogy with the Madras Port Trust and the activity undertaken by the Visakhapatnam Port Trust is also similar to that of the Madras Port Trust and therefore, there cannot be two separate statute one for the Madras Port Trust and the other for the Visakhapatnam Port Trust, which are governed under the Major Port Trusts Act, 1963. We may say that for all the queries raised before us on the basis of the so-called amendment brought to section 2(e), the decision of the honourable Supreme Court in [1999] 114 STC 520 [State of Tamil Nadu v. Board of Trustees of the Port of Madras] is the complete answer and therefore, the submissions made before us by the learned Special Government Pleader for Taxes require no further discussion, as the main activity of the Port Trust is held to be a "non-business activity" in all the decisions cited supra. Therefore, when the said activity is not a "business activity" as defined u/s 2(1)(bbb) and in the absence of the respondents showing to the court that the activity undertaken is a "business activity" and that the Port Trust has to be treated as a "dealer" and is liable to be assessed u/s 5 of the Act, it is difficult for us to take a contra view. When the main activity of the Port Trust is service activity, the ancillary or incidental activity undertaken by it cannot be brought under the net of A.P. General Sales Tax Act.

23. In this connection it is useful to set out the definition of dealers as appeared in section 2(e) of the Andhra Predesh Act.

Section 2(e): "Dealer" means any person who carries on the business of buying, selling, supplying or distributing goods or delivering goods on hire purchase or on any system of payment by instalments, or carries on or executes any works contract involving supply or use of material directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes.....

24. Thereafter the Supreme Court in case of Commissioner of Sales Tax v. Sai Publication Fund reported in 2002 126 288 after having made survey of various Sales Tax statutes and considering the judgment rendered by various Courts including the Apex Court held in paragraph 11 of the report as follows:

Thus, if the main activity of a person is not trade, commerce, etc., ordinarily incidental or ancillary activity may not come within the meaning of "business". To put it differently, the inclusion of incidental or ancillary activity in the definition of "business" pre-supposes the existence of trade, commercial etc. The definition of "dealer" contained in section 2(11) of the Act clearly indicates that in order to hold a person to be a "dealer", he must "carry on business" and then only he may also be deemed to be carrying on business in respect of transaction incidental or ancillary thereto. We have stated above that the main and dominant activity of the Trust in furtherance of its object is to spread message. Hence, such activity does not amount to "business". Publication for the purpose of spreading message is incidental to the main activity which the Trust does not carry as business. In this view, the activity of the Trust in bringing out publications and selling them at cost price to spread message of Sai baba does not make it a dealer u/s 2(11) of the Act.

25. In this case the Supreme Court was dealing with the provision of dealer as mentioned in Bombay Sales Tax Act, 1959. The definition of "Dealer" in Bombay Sales Tax Act u/s 2(11) is reproduced hereunder:

Section 2(11): "dealer" means any person who whether for commission, remuneration or other wise carried on the business of buying or selling goods in the State, and includes the Central Government, or any State Government which carries on such business, and also any society, club or other association or persons which buys goods from or sells goods to its members.

26. In this case factual aspect was that the respondent Sai Publication Fund was trust created fundamentally to achieve the object of Sai baba of Shridi and to achieve the object of releasing message of Sai baba of Shridi to common masses. In furtherance and to fulfil the object the Trust published books, pamphlets and other literature containing message of Sai baba which were made available to the devotees of Sai baba all over the world with a nominal cost, of course the sale proceeds of such publication went to the Trust and formed part of the property of Trust. The Revenue authorities wanted to bring the said Trust within the definition of "Dealer" for imposition of Tax. In the context as above it was held by the Supreme Court that the said Sai Publication Fund being the Trust body does not carry on any business for sale of the said publication. It was held the primary and dominant activity of the Trust was to spread the message of Sai Baba and the publication and sale of the books was for the purpose of spreading such message.

27. It seems to us that the learned Tribunal while rejecting this plea of the petitioner was completely swayed by language of the definition of dealers as mentioned in

section 2(C) of the said Act. It appears that learned Tribunal has distinguished the judgment of the Supreme Court in case of Madras Port Trust on the reasoning that the definition of the dealer in the Tamil Nadu General Sales Tax Act, 1969 is different from the language mentioned in the Act of this State. It is true that there is slight difference in language of the definition of dealer in the two Acts namely Tamil Nadu General Sales Tax Act and Act of this State, but we think that the learned Tribunal has missed important ratio decided by the Supreme Court in the case of State of Tamil Nadu that element of business activity is determinative factor to hold a particular" person or concern being dealer. Both the port authorities are creatures of same statutes and discharging similar statutory duty, so ratio of the said judgment is applicable in this case. These findings of the Hon"ble Supreme Court has not been considered at all. We, therefore, hold that the said Supreme Court judgment in case of State of Tamil Nadu on the question of business activity, being primary pre-condition for the purpose of imposing Sales Tax, squarely applies in this case also. This apart the learned Tribunal did not consider the Division Bench judgment of the Andhra Pradesh High Court wherein following the judgment of the judgment of Supreme Court in the case of State of Tamil Nadu v. Board of Trustees for the Port of Madras has held that the business activity is the fundamental and primary element to hold a particular person being a dealer. It is pertinent to mention that the definition of dealer in the Andhra Pradesh General Sales Tax Act, 1957 is not only similar to that of this State but the said definition has specifically covered the Port Trust, though in this State Act there is no specific mention of Port Trust but it encompasses the Port Trust also by the words "Statutory Authorities".

28. The learned Tribunal did not consider the Supreme Court judgment in the case of Commissioner of Sales Tax v. Sai Publication Fund [2002 126 (STC) 288]. In this judgment as we have already discussed in order to impose sales tax on any sale made by any person the real business activity not the incidental thereto is sine qua non.

29. We have noticed from the language of the definition of business which has connection with the definition of dealer, motive to make gain or profit in such transaction must be a factor. In common parlance gain or profit is always difference between sale price and cost price. Under the statutes or Rules when sale is undertaken by the port authority there is no motive to make profit or gain, for the port authority is hardly bothered about or knows cost price of the goods, they are concerned with sale price and that too to realize all its dues enforcing statutory lien.

30. In view of the aforesaid discussion we hold that the decision of the learned Tribunal is not sustainable.

31. We, however, do not declare that the definition mentioned in the amended provision of dealer is ultra vires of the Constitution but we read down the same holding it does not apply in case of any sale made by any person which do not have any business activity.

32. We, therefore, set aside the judgment and order of the learned Tribunal. In view of this judgment prospective or retrospective operation has now become academic, though the learned Tribunal held in favour of the applicant.

33. Accordingly, action taken by the respondent-authority pursuant to the said amended provision of the said Act is also ultra vires and same is invalid. However, we direct that this judgment will have prospective operation namely from the date of making original application of the Tribunal. If any payment of tax has already been made prior to making the application made by the applicant challenging the vires of the definition "dealer" shall not be refunded. More so no such prayer has been made for refund of all the taxes paid earlier.

34. We make it clear that for a period of eight weeks this judgment should not be made applicable to other cases and it will confine to this case only.

Urgent xerox certified copy of this order be supplied to the applicants.

Kanchan Chakraborty, J.

35. I agree.