Commissioner Of Sales Tax vs Sai Publication Fund on 22 March, 2002

Equivalent citations: AIR 2002 SUPREME COURT 1582, 2002 (4) SCC 57, 2002 AIR SCW 1482, (2002) 122 TAXMAN 437, 2002 (3) SCALE 100, (2002) 3 JT 295 (SC), 2002 (2) SLT 679, 2002 (1) LRI 614, 2002 (1) UJ (SC) 604, 2002 (5) SRJ 41, (2002) 3 GUJ LH 149, (2002) 258 ITR 70, (2002) 126 STC 288, (2002) 1 KANTLJ(TRIB) 242, (2002) 2 SUPREME 529, (2002) 3 SCALE 100, (2002) 177 CURTAXREP 1

Author: Shivaraj V. Patil

Bench: Shivaraj V. Patil, Bisheshwar Prasad Singh

CASE NO.:
Appeal (civil) 9445 of 1996

PETITIONER:
COMMISSIONER OF SALES TAX

Vs.

RESPONDENT:
SAI PUBLICATION FUND

DATE OF JUDGMENT: 22/03/2002

BENCH:
Shivaraj V. Patil & Bisheshwar Prasad Singh

JUDGMENT:

With Civil Appeal No. 1716 of 1999 J U D G M E N T Shivaraj V. Patil,J.

CIVIL APPEAL NO. 9445 OF 1996 In the light of the contentions raised and submissions made on behalf of the parties, the issue that arises for consideration and decision in this appeal is whether the Trust - Sai Publication Fund, which has been set up by some devotees of Saibaba of Shridi for spreading his message, can be held to be a "dealer" in respect of sale of books, booklets, pamphlets, photos, stickers and other publications containing message of Saibaba and the turnover of such publication can be assessed to sales tax under the Bombay Sales Tax Act, 1959 (for short `the Act').

The relevant and material facts, leading to filing of this appeal in brief, are that the assessee (the respondent herein) is a Trust created by four devotees of Saibaba of Shridi under a trust deed dated 6.8.1984. The object of the Trust is to spread message of Saibaba of Shridi. In furtherance of and to accomplish the said object, the assessee publishes books, pamphlets and other literature containing the message of Saibaba under the aegis of "Sai Publications" which are available to the devotees of Saibaba on nominal charge to meet the cost. The sale proceeds of such publication goes to the Trust and forms part of the property of the Trust, which can be utilized only for advancement of the objects of the Trust. There is a specific provision in the trust deed that in the event of failure of the Trust to carry on its aims and objects, the remaining fund in its hands would be handed over to Sansthanam of Shridi.

In order to avoid any controversy relating to leviability of sales tax on the amount received on sale of such publications, an application was made by the Trust under Section 52(1)(a) of the Act seeking determination of the questions whether the Trust could be said to be carrying on "business' as defined in Section 2(5A) of the Act and whether it could be considered as a "dealer" within the meaning of Section 2(11) of the Act. The Deputy Commissioner of Sales Tax by his order dated 28.9.1989 held that the activity of publication and sale of books etc. amounted to business falling within the ambit of Section 2(5A) and the Trust was a "dealer" coming within the meaning of Section 2(11) of the Act. Consequently, he held that the Trust was liable to pay sales tax on the value of publications sold by it. What weighed with the Deputy Commissioner in passing the said order was the amendment of the definition of "business" in Section 2(5A) of the Act by the Maharashtra Tax Laws (Levy, Amendment & Repeal) Act, 1989 with retrospective effect from 16.8.1985 to provide that even without profit motive, it can still be "business".

In the appeal filed before the Maharashtra Sales Tax Tribunal against the said order of the Deputy Commissioner, it was contended on behalf of the Trust that it was not a "dealer" within the meaning of Section 2(11) of the Act as it was not engaged in any activity which amounted to "business" in view of the object and activities of the Trust. The Revenue supported the order of the Deputy Commissioner relying on the amendment of the definition of "business" as a result of which profit motive was immaterial. The Tribunal, after due consideration of rival submissions looking to the object of the Trust and the nature of its activities, concluded that the assessee could not be held to be a "dealer" and as such no tax could be levied on the amount received by it from the sale of its publications.

At the instance of the Revenue, reference was made under Section 61(1) of the Act by the Tribunal to the High Court for its opinion on the following question:-

> "Whether on the facts and circumstances of the case and correct interpretation of the provisions of the Bombay Sales Tax Act, 1959, as amended by Maharashtra Act No. 9 of 1989, dispensing with the `profit motive' from the concept of the 'business' was the Tribunal justified in holding that the respondent is not a 'dealer qua its activities' of publication and sale of books, booklets and allied publications including photos and stickers?"

The High Court on consideration of the relevant provisions of the Act, facts of the case and keeping in view the decisions cited, answered the aforementioned question referred by the Tribunal in the affirmative and in favour of the assessee. Hence, the present appeal by the Revenue.

Shri S.K. Dholakia, learned Senior Counsel for the appellant contended that the definition of "business" is wide and inclusive definition. Despite the same, the High Court committed a serious error of law in taking a view that business/activity must still be one which in ordinary connotation is regarded as business; this is clearly against the legislative intent. According to him, on the facts that the Trust purchases necessary material and brings some publications and sells the same when profit motive is immaterial having regard to the amended definition of Section 2(5A) of the Act. The learned Senior Counsel emphasized that the activity of the Trust in bringing out publications and selling them is regular, frequent, of sizeable volume and continuous. Hence, the assessee was liable to pay sales tax on the amount realized by such sale of its publications. Citing the decision of this Court in Board of Revenue & Ors. Vs. A.M. Ansari & Ors. ((1976) 3 SCC

512) he submitted that all ingredients of "business" are satisfied in the present case. He submitted that New Delhi Municipal Council vs. State of Punjab & Ors. ((1997) 7 SCC 339) and State of T.N. & Anr. Vs. Board of Trustees of the Port of Madras ((1999) 4 SCC 630) also come to his aid to support his contention.

Shri Joseph Vellapally, learned Senior Counsel appearing for the respondent in the connected Civil Appeal No. 1716/1999 argued supporting the impugned judgment while adding that the controversy raised in this appeal is fully covered by the recent judgment of this Court in State of T.N. & Anr. vs. Board of Trustees of the Port of Madras (supra), the very decision cited by the learned Senior Counsel for the appellant. The learned counsel for the respondent in this appeal, while adopting the arguments of Shri Vellapally, made submissions supporting the impugned judgment.

At the outset, it is useful to notice few provisions of the Act to the extent they are relevant in order to appreciate the respective contentions relating to the controversy that has arisen.

> "S.2(5A)- "Business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make gain or profit and whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure or concern and any transaction in connection with, or incidental or ancillary to, the commencement or closure of such trade, commerce, manufacture, adventure or concern;..... ...."
>
> "S.2(11):- "Dealer" means any person who whether for commission, remuneration or otherwise carries 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 of persons which buys goods from or sells goods to its members;..... .....

....."

"S.2(19): "Person" includes any company or association or body of individual whether incorporated or not, and also a Hindu undivided family, a firm and a local authority."

S.3 :"Incidence of tax (1) Every dealer whose turnover either of all sales or of all purchases, made during

(i) the year ending on the 31st day of March 1991 or,

(ii) the year commencing on the 1st day of April 1981, has exceeded or exceeds the relevant limit specified in sub-section (4) shall until such liability ceases under sub-section (3), be liable to pay tax under this Act on his turnover of sales, and on his turnover of purchases, made on or after the notified day;..... ....."

The contention that the Trust in question is "dealer" within the meaning of Section 2(11) read with Section 2(5A) requires careful scrutiny. As is evident from Section 2(11), every person is not "dealer" but only those persons "who carry on the business" by buying or selling goods are regarded as "dealers". From the very definition of dealer, it follows that a person would not be a dealer in respect of the goods sold or purchased by him unless he carries on the business of buying and selling such goods. "Dealer" and "person" are separately defined in Section 2(11) and Section 2(19) of the Act respectively. "Person" means not only natural person but includes any company or association or body of individuals whether incorporated or not and also a Hindu Undivided Family, a firm or a local authority; whereas "dealer" on the other hand means only such persons who carry on the business of buying and selling of goods in the State including those who are deemed to be dealers by virtue of definition of "dealer" contained in Section 2(11) of the Act. As rightly noticed by the High Court, it is clear from charging Section 3 that every dealer, whose turnover of sale or purchase during any year exceeds the limits specified therein, is liable to payment of tax under the Act on his turnover of sales or purchases. Although the Act provides for levy of tax on the sales or purchases of certain goods in the State of Maharashtra, the levy is restricted only to sales or purchases made by dealers. As is manifest from Section 3 itself, the liability to pay sales tax is only on the dealers. From the combined reading of Section 3, 2(5A) and 2(11) of the Act, it follows that the tax under the Act is leviable on the sales or purchases of taxable goods by a dealer and not by every person. From the facts of the present case, the sole object of the assessee Trust is to spread the message of Siababa of Shridi. It is also not disputed that the books and literature etc. containing the message of Saibaba were distributed by the Trust to the devotees of Saibaba at cost price. There is no dispute that the primary and dominant activity of the Trust is to spread the message of Saibaba. This main activity does not amount to "business". The activity of publishing and selling literature, books and other literature is obviously incidental or ancillary to the main activity of spreading message of Saibaba and not to any business as such even without profit motive and it is in a way a means to achieve the object of the Trust through which message of Saibaba is spread. It is clear from the Trust Deed and objects contained therein that it was not established with an intention of carrying on the business/occupation of selling or supplying goods. This being the position, it cannot be said that the Trust carries on the business of selling and supplying goods so as to fall within the meaning of

"dealer" under Section 2(11) of the Act.

No doubt, the definition of "business" given in Section 2(5A) of the Act even without profit motive is wide enough to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture and any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern. If the main activity is not business, then any transaction incidental or ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on "business" connected with or incidental or ancillary sales will rest on the Department. 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, commerce 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 Saibaba does not make it a dealer under Section 2(11) of the Act. This Court in State of T.N. & Anr. vs. Board of Trustees of the Port of Madras (supra), after referring to various decisions in regard to "business" and "carrying on business" in paras 15 and 16 has stated thus:-

> "15. Now the definition of "business"

in Section 2(d) and in most of the sales tax statutes is an inclusive definition and includes "trade or business or manufacture etc." This itself shows that the legislature has recognized that the word "business" is wider that the words "trade, commerce or manufacture etc." The word business though extensively used is a word of indefinite import. In taxing statutes, it is normally used in the sense of an occupation, a profession which occupies time, attention and labour of a person, normally with a profit motive and there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive and not for sport or pleasure (State of A.P. v. H.Abdul Bakhi & Bros. (AIR 1965 SC

531). Even if such profit motive is statutory excluded from the definition of "business", yet the person could be doing "business".

16. The words "carrying on business" require something more than merely selling or buying etc. Whether a person "carries a business" in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive (Board of Revenue v. A.M. Ansari (1976) 3 SCC 512).

Such profit motive may, however, be statutorily excluded from the definition of "business" but still the person may be "carrying on business."

Further in para 30 of the same judgment, it is stated thus:-

> "30. 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 sale 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."

(Emphasis supplied) In the case on hand, the Revenue neither contended nor proved that in sale of publications the Trust had an independent intention to do business as incidental or as an ancillary activity.

This Court in the aforementioned judgment further examined the cases to find out if the main activity was not "business". In para 32, reference is made to the case of Bombay High Court in State of Bombay Vs. Ahmedabad Education Society [1956 7 STC 497 (Bom)]. In that case, the educational society was entrusted with the task of founding a college and for that purpose it was to construct buildings therefor. It was held that it could not be said to be "carrying on business" merely because for the above purposes, it established a brick kiln and sold surplus bricks and scrap at cost price without intending to make profit or gain. Having regard to main activities and its objects, it was held that the educational society was not established "to carry on business" and the sale of bricks was held not excisable to sales tax. Chagla C.J. pointed out that it was not merely the act of selling or buying etc. that constituted a person a "dealer" but the "object" of the person who carried on the activities was important. It was further stated that it was not every activity or any repeated activity resulting in sale or supply of goods that would attract sales tax. If legislature intended to tax every sale or purchase irrespective of the object of the activities out of which the transaction arose, then it was unnecessary to state that the person must "carry on business" of selling, buying etc. In para 33 of the same judgment, this Court has referred to various decisions to consider whether one is a "dealer" or carries on "business" and the nature and object of activity. The said para reads thus:-

> "In Girdharilal Jiwanlal vs. CST [(1957) 8 STC 732 (Bom)], the Bombay High Court held that an agriculturist did not necessarily fall within the definition of a "dealer" under Section 2(c) of the C.P. & Berar Sales Tax Act (Act 21 of 1967), merely because he sold or supplied commodities. It must be shown that he was carrying on a business. It was held that it must be established that his primary intention in

> engaging himself in such activities must be to carry on the business of sale or supply of agricultural produce. This High Court held that there was "nothing to show that the petitioner acquired these lands with a view to doing 'the business of selling or supplying' agricultural produce. According to [the assessee] he [was] principally an agriculturist who also deals in cotton, coal, oilseeds and groundnuts".

(emphasis supplied).

He was having agriculture for the purpose of earning income from the fields but there was nothing to show that he acquired the lands with the primary intention of doing business of selling or buying agricultural produce. This decision was approved by this Court in Dy.

Commissioner of Agricultural Income Tax & Sales Tax v. Travancore Rubber & Tea Co. [(1967) 20 STC 520 (SC)] and it was held that where the only facts established were that the assessee converted latex tapped from rubber trees into sheets and effected a sale of those sheets to its customers, the conversion of latex into sheets being a process essential for transport and marketing of the produce, the Department had failed to prove that "the assessee was formed"

> with a commercial purpose. The Allahabad High in Swadeshi Cotton Mills Co. Ltd. V. STO [(1964) 15 STC 505 (All)] was dealing with a batch of cases where different bodies were running canteens. One of the cases concerned Aligarh Muslim University which was maintaining dining halls where it was serving food and refreshments to its resident-students. It was held, referring to observations of this Court in University of Delhi v. Ram Nath [AIR 1963 SC 1873] that it was incongruous to call educational activities of the University as amounting to "carrying on business". The activity of serving food in the dining hall was a minor part of the overall activity of the university. Education was more a mission and avocation rather than a profession or trade or business. The aim of education was the creation of a well-educated, healthy, young generation imbued with a rational and progressive outlook of life. On this reasoning, it was held that Aligarh University was not "carrying on business" and the sale of food at the dining halls was not liable to tax. Likewise after the amendment of the definition of "business' question arose in Indian Institute of Technology v. State of U.P. [(1976) 38 STC 428 (All)] with respect to the visitors' hostel maintained by the Indian Institute of Technology where lodging and boarding facilities were provided to persons who would come to the Institute in connection with education and the academic activities of the Institute. It was observed that the statutory obligation of maintenance of the hostel which involved supply and sale of food was an integral part of the objects of the Institute. Nor could the running of the hostel be treated as the principal activity of the Institute. The Institute could not be held to be doing business. Similarly, in the case of a research organization, in Dy. Commissioner (C.T.) v. South India Textile Research Assn. [(1978) 41 STC 197 (Mad)] which was purchasing cotton and selling the cotton yarn/cotton waste resulting from the research activities, it was held that the Institute was solely and exclusively constituted for the purposes of research and was not carrying on "business"

and these sales and purchases above-mentioned could not be subjected to sales tax. Likewise, in State of T.N. v. Cement Research Institute of India [(1992) 86 STC 124 (Mad)] it was held that the Institute was an organistion the objects of which were to promote research and other scientific work that the laboratories and workshops were maintained by the organization for conducting experiments and that though the cement manufactured as a result of research was sold, it could not be considered to be a trading activity within Section 2(d) of the Tamil Nadu General Sales Tax Act, 1959. Again in Tirumala Tirupati Devasthanam v. State of Madras [(1972) 29 STC 266 (Mad)] the disputes arose with regard to the sales of silverware etc. which are customarily deposited in the hundis by devotees. It was held by the Madras High Court that the Devasthanam's main activities were religious in nature and these sales were not liable to tax. (No doubt, the case related to a period where the profit motive was not excluded by statute). We are of the view that all these decisions involve the general principle that the main activity must be "business" and these rulings do support the case of the respondent-Port Trust."

(Emphasis supplied) This decision is directly on the point supporting the case of the respondent after noticing number of decisions on the point including the decisions cited by the learned counsel before us. It may be stated that the question of profit motive or no profit move would be relevant only where person carries on trade, commerce, manufacture or adventure in the nature of trade, commerce etc. On the facts and in the circumstances of the present case irrespective of the profit motive, it could not be said that the Trust either was "dealer" or was carrying on trade, commerce etc. The Trust is not carrying on trade, commerce etc., in the sense of occupation to be a "dealer" as its main object is to spread message of Saibaba of Shridi as already noticed above. Having regard to all aspects of the matter, the High Court was right in answering the question referred by the Tribunal in the affirmative and in favour of the respondent-assessee. We must however add here that whether a particular person is a "dealer" and whether he carries on "business", are the matters to be decided on facts and in the circumstances of each case. For what is stated above, we answer the question set out in the beginning in the negative and in favour of the respondent- assessee and dismiss the appeal finding no merit in it but with no order as to costs.

The impugned order was passed by the Tribunal relying on the judgment of the Bombay High Court in the case of Sai Publication Fund impugned in abovementioned C.A. No. 9445/96. The learned counsel also submitted that the result of this appeal depended on the decision in said C.A. No. 9445/96 as the facts and circumstances of both the cases are similar. Consequently, in view of the dismissal of the C.A. No. 9445/96, this appeal is also dismissed. No costs.

.....J (SHIVRAJ V. PATIL) .....J (BISHESHWAR PRASAD SINGH) March 22, 2002.