

BOMBAY HIGH COURT

The Mahabaleshwar Club

Vs

The State of Maharashtra

(N Abhyankar, C.J. Vimadalal, J.)

15.01.1968

JUDGMENT

Vimadalal, J.

1. This is a reference under section 61 of the Bombay Sales Tax Act, 1959, in respect of a club situated in Mahabaleshwar, and the questions which have been referred to us are as follows :

"(1) Whether, on the facts and circumstances of the case, the Tribunal is justified in coming to the conclusion that the Mahabaleshwar Club is a dealer within the meaning of section 2(11) of the Bombay Sales Tax Act, 1959, and (2) Whether there was any evidence to justify the finding of the Tribunal that the motive of the Club was earning profit."

2. The facts of the case are that the Mahabaleshwar Club made an application under section 52 of the Bombay Sales Tax Act, 1959, to the Deputy Commissioner of Sales Tax, Central Division, Poona, to determine whether it was a dealer within the meaning of that term in section 2(11) of the Act. The Deputy Commissioner of Sales Tax decided that the applicant was not a dealer, but the Commissioner of Sales Tax, acting under his powers of revision under section 57 of the said Act, held that the applicant-Club was a dealer. The applicant-Club then applied in revision to the Sales Tax Tribunal which dismissed the revision application and confirmed the view taken by the Commissioner of Sales Tax. At the instance of the Club, the two questions set out above have thereafter been referred to us under the Act.

3. The first question that arises for the purpose of determining whether or not the applicant-Club is a dealer is one which turns entirely on a construction of the definition of the term "dealer" in section 2(11) of the Bombay Sales Tax Act, 1959. In construing the provisions of the definition contained therein, it is necessary, first and foremost, to bear in mind that the Mahabaleshwar Club is an unincorporated body, and, indeed, that is what distinguishes the case on the present

reference from the reference in the case of Versova Koli Sahakari Vahatuk Sangh Ltd. in Sales Tax Reference No. 27 of 1964 which was determined by us on 12th January, 1968 (Since reported at page 116 supra), in which the applicants were a registered society and were, therefore, a body corporate and were held by us to fall within the substantive opening portion of the definition of "dealer" in section 2(11) of the Act.

4. The definition of "dealer" in section 2(11) is as follows :

"(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."

5. An analysis of that definition shows that it is in three parts. The first part relates to a person who carries on the business of buying or selling; the second part includes within the first part the Central Government or any State Government which carries on such business; and the third part states that any society, club or other association of persons which buys goods from, or sells goods to, its members, also falls within the definition of "dealer", and it is this part of the definition that falls for our consideration in the present case. As observed by us in the Versova Koli Vahatuk Sangh's case (Since reported at page 116 supra), this part of the definition applies to unregistered bodies which buy goods from, or sell goods to, their members, and the question which arises in the present case is whether such unregistered bodies would fall within the definition of "dealer" merely by reason of their buying goods from, or selling goods to, their members, or whether it is further necessary that the activities of buying or selling must have been carried on as and by way of a business, as laid down in the substantive opening portion of the definition in section 2(11) of the Act. It is quite clear that, in construing the last part of that definition relating to "any society, club or other association of persons", the construction that should be placed should be such as would apply not only to the case of a club, but would apply to a society or other association of persons as well. Since these three categories occur together in the last part of that definition, there must be uniformity in the construction of that part so that the same construction would be equally applicable to societies, clubs as well as other associations of persons.

6. We will first proceed to consider the question of construction of section 2(11), apart from authority. There are two ways in which the last part of the definition in section 2(11) commencing with the words "and also" can be read. One way of reading that part would be to read it as being governed by the verb "means" in the opening portion of that definition. So read, section 2(11), omitting irrelevant words, would read as follows :

"Dealer' means any person who whether for commission, remuneration or otherwise carries on the business of buying or selling goods in the State, and also any society, club or other association of persons which buys goods from, or sells goods to, its members."

7. If section 2(11) is read in that manner, it may well be contended that the requirement of the activity of buying or selling being in the nature of a business is not necessary in order to constitute a person a dealer. The other way of reading the definition is to read the last part commencing with the words "and also" as governed by the verb "includes", or as if the verb "includes" were present between the words "and" and "also". Section 2(11) would then read as follows :

"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 includes also any society, club or other association of persons which buys goods from, or sells goods to, its members."

8. In view of the fact that the term "person" in the opening part of the definition in section 2(11) includes, by virtue of its definition in section 2(19), bodies "whether incorporated or not", societies, clubs and other unincorporated bodies fall within the opening part of section 2(11), and it is not possible to read the concluding part of section 2(11) as an independent clause governed by the verb "means". The first of the above two constructions must, therefore, be rejected. In our opinion, the Legislature has inserted the last part of the definition in section 2(11) ex majore cautela and it must be read as governed by the verb "includes". It has done so because, in the case of unregistered bodies buying goods from, or selling goods to, their members, it may have been contended that such unregistered bodies not being juristic or legal entities, but being merely a collection of individuals described by a common name, cannot be said to be within the term "dealer", and a purchase or sale by such a body from or to its members cannot be a "sale", but is merely a release by the other members, who had joint property in the goods in question, to one of themselves, or to be merely in the nature of distribution of joint property amongst the members (vide *Young Men's Indian Association (Regd.)*, Madras, and *Another v. Joint Commercial Tax Officer, Harbour Division II, Madras, and Another*¹ It is for that reason that the Legislature has, by way of abundant caution, inserted an express reference to unregistered societies, clubs or associations, both in the definition of "dealer" in section 2(11), as well as in the definition of "sale" in section 2(28) of the Bombay Sales Tax Act, 1959, though they are included in the opening clause of section 2(11). It must follow that the inclusive portion with which section 2(11) concludes must partake of the nature and characteristics of the main part of the definition in which it is sought to be included. In our opinion, the fact that, in the first inclusive clause relating

to the Central and State Governments, there is a specific reference to the carrying on of business, so that the clause may not be abrupt or incomplete in sense, cannot lead to the conclusion that the Legislature did not intend the requirement of business to be necessary for the second inclusive clause which follows it, and which relates to societies, clubs and other associations. In that view of the matter, unregistered societies, clubs or other associations of persons which buy goods from or sell goods to their members, would fall within the definition of "dealer" in section 2(11) and be liable to sales tax, only if such sales or purchases have been effected by way of "business".

9. Mr. Banaji has sought to contend that we should not place such a construction upon the definition in section 2(11), and he has urged upon us that the construction which should be placed upon the definition in section 2(11) should be that an unregistered club or association which effects sales or purchases by way of business would fall with the substantive opening portion of section 2(11) since such a club or association is included within the definition of the term "person" in section 2(19) of the Act, and that the last part of section 2(11) was necessary and was enacted expressly to rope in unregistered clubs or associations in those cases in which the sales or purchases which they effected to or from their members were not effected by way of business. This construction which Mr. Banaji urges upon us must be rejected in view of the fact that, in our opinion, the substantive opening part of the definition of "dealer" in section 2(11) applies to all unincorporated bodies and, for the reasons stated above, the concluding part of section 2(11) has been inserted only by way of abundant caution. Moreover, the whole object of the legislation in regard to sales tax is to tax transactions which partake of a commercial character, or have been effected as and by way of trade or commerce. That is obvious from the fact that section 22 of the Act lays down that no dealer shall, while being liable to pay tax under the Act, carry on "business" as a dealer unless he is registered under the Act. It has been the contention of Mr. Banaji that since liability to tax under the Act is not dependent upon registration, section 22 must be regarded as merely laying down the machinery for the better collection of revenue, and cannot be an aid to the construction of the definition of "dealer" under the Act. It is true that the liability to sales tax exists even though a dealer may not get himself registered under the Act, but that provision is to be found in the charging sections of the Act in order that a dealer who fails to get himself registered may not derive a benefit from his own default and escape taxation. It is, in our opinion, quite clear from the various provisions of the Act, particularly the provisions of sections 33(6) and 63(1)(a), that the Legislature contemplates that every dealer who is liable to sales tax should get himself registered under the Act. As every dealer who is liable to tax is required to be registered under the Act, and section 22 of the Act refers specifically to the characteristic of carrying on "business", it is quite clear that the commercial character of the activities of the dealer is essential before he can be taxed under the Act. This conclusion of ours is fortified by the statutory form, being Form I of the application for registration under the said section 22, which is to be found in the Bombay Sales Tax Rules, 1959,

and which also refers to the carrying on of the business by the intended applicant at more than one place. Moreover, there is no rational ground why a purchase by an unregistered club or association from, or a sale by it to, its members should be liable to taxation and a similar transaction should not be liable to taxation, if it takes place between it and a non-member, if, in either case, the transaction is a stray transaction of a value exceeding the taxable turnover. To take an illustration, if a club were to purchase a motor car worth Rs. 35,000 from a non-member, and that transaction were a stray transaction, it is quite clear that the club would not fall within the definition of a "dealer" by virtue of that transaction, since it has not been effected by way of business so as to fall within the opening clause of section 2(11). If, however, a club were to purchase a motor car worth Rs. 35,000 from one of its members, then, according to Mr. Banaji, such a transaction, though not by way of business, would be taxable because the club would be a dealer within the last part of the definition of that term in section 2(11) of the Act. There is no reason why the law relating to sales tax should make that distinction in respect of an identical transaction between a club and its member, and between a club and a non-member, nor do we see any reason why the law on this point should be different in regard to incorporated bodies and unincorporated bodies. There is, indeed, no rational basis for making such distinctions, and if at all a distinction had to be made, there is no reason why it should be one which places a member in a worse position as compared to a non-member. To read the definition of "dealer" in section 2(11) in the manner suggested by Mr. Banaji would, therefore, lead to irrational results, and we see no reason why we should do so.

10. Having considered the question apart from authority, we must now turn to some of the authorities that were discussed in the course of the arguments before us. Mr. Banaji has strongly relied upon the observations of Chagla, C.J., in the judgment of a Division Bench of this Court in the case of *The State of Bombay v. The Ahmedabad Education Society*² but, we are afraid, we cannot decide this case on the basis of these observations. In considering the definition of "dealer" in section 2(c) of the Bombay Sales Tax Act, 1946, the learned Chief Justice observed that the said Act had a very narrow object, and that was to tax sales effected by persons carrying on the business of selling or supplying goods, and for the purpose of emphasising the requirement that the activity in question should be by way of business, the learned Chief Justice referred to the last part of the definition in the said section 2(c) relating to societies, clubs or other associations which sell or supply goods to their members, and observed (at page 501) :

"The Legislature realised that a club or society does not carry on the business of supplying goods to its members; its business is to give amenities, to provide a place where people can spend their leisure hours, and realising that a society, club or association would not come within the definition, the Legislature had to extend the definition of a dealer and include in that definition a society, club or association."

11. It is, therefore, clear that the observation was made by the learned Chief Justice merely as a passing observation which cannot be regarded as an authority for the proposition stated therein.

12. It has not been stated by the learned Chief Justice in the course of his judgment, nor does it appear in the report of the case, whether the Ahmedabad Education Society was or was not a body corporate. Mr. Banaji has conceded that the observations of Chagla, C.J., mentioned above, on which he has relied, are obiter dicta. It may, however, be pertinent to point out that the learned Chief Justice has, in the course of his judgment, enunciated what, according to him, is the object of the Sales Tax Act. He has observed (at pages 500-501) that the object was a very narrow object, that it was not to tax every sale and every supply, but was only to tax such of them as are effected by persons carrying on the "business" of selling or supplying. A Division Bench of the Madras High Court has, in the case of *The Deputy Commissioner of Commercial Taxes, Coimbatore v. Sri Thirumagal Mills Ltd*³, stressed that, in order to be liable to tax, the activity must be of a commercial character, and in the course of trade or commerce. It is, however, not necessary for us to deal with the judgment in that case in detail because it deals with the corresponding enactment in Madras, and also because it was a case in which the main business of the assessee-company was something totally different, viz., of manufacturing cotton, from the activity which was sought to be taxed. The Supreme Court has, in the case of *Director of Supplies and Disposals v. Member, Board of Revenue*⁴ laid down (at pages 405-406) that to regard an activity as business the characteristics of volume, frequency, continuity and a system indicating an intention to continue the activity of carrying on the transaction for a profit should exist, but that no single test or group of tests was decisive of the intention to carry on business. Applying these tests, it was held that the Director of Supplies and Disposals of the Government of India was not carrying on the business of buying or selling goods within the meaning of section 2(c) of the Bengal Finance (Sales Tax) Act, 1941. There are two decisions of the Nagpur Bench of this Court, both relating to the Gondwana Club, Nagpur, to which we must now refer. In the first of them, which is reported in *Gondwana Club, Nagpur v. Sales Tax Officer, No. II, Nagpur*⁵ it was held that the words "selling or supplying goods" in the latter part of the definition of the word "dealer" in section 2(c) of the C.P. and Berar Sales Tax Act, 1947, which speaks of a society, club or association, must also be construed to mean selling or supplying goods in the course of business. The judgment was actually delivered on a petition under Article 226 of the Constitution, but the question which arose was the precise question that arises before us in the present reference. It was observed in the judgment in the said case (at page 453) that unless the selling or supplying of goods by the club to its members was done as a business, the club could not be a dealer within the meaning of that Act. The learned Judges then proceeded to consider the question whether the Gondwana Club did sell or supply goods to its members as a business, but having regard to the fact that the club had not pursued its remedies and placed the necessary material before them, they left that question open, and dismissed the petition of the club. Though

the observations in the said judgment have a direct bearing on the point which we are considering, they do not really assist us in deciding the present case, because the definition of the term "dealer" in section 2(c) of the C.P. and Berar Sales Tax Act, 1947, which is quoted in the judgment (at page 452) is different from the definition in the present case, in that the last clause starts with the express words "and includes" which are absent in the definition in section 2(11) in the Act before us. The presence of those words would, in our opinion, make all the difference, in so far as it would make it perfectly clear that the last clause is merely of an inclusive nature, in which case what is sought to be included therein must necessarily partake of the commercial character which is expressly stated to be necessary in the substantive part of the definition of "dealer". On the other hand, the very question before us is whether the word "includes" which does not occur in the concluding part of section 2(11) should be read into it. The second decision, which is an unreported decision, relating to the Gondwana Club, Nagpur, was also given on a writ petition. In that case, the question having arisen under the C.P. and Berar Sales Tax Act, 1947, the presence of the words "and includes" in the last clause of the definition of "dealer" in section 2(c) of the said Act made it unnecessary for the learned Judges to consider, and they did not, in fact, consider the question whether the requirement of business was necessary in the case of a club which is an unincorporated body. Moreover, the learned Judges took the view that, having regard to the stand taken by the Government in an earlier proceeding relating to the said club, which was inter parties, it was not open to the Government to contend that it was not necessary that the activities in question should have been undertaken by the club with the object of earning profit. The learned Judges, therefore, proceeded to consider the question solely from the point of view as to whether there was a profit motive in the activities of the club, and came to the conclusion that there was no material on record which would warrant an inference that the said activities were undertaken with a profit-making motive and were, therefore, carried on as a business. The rule was, therefore, made absolute, quashing the orders of the Sales Tax Authorities and cancelling the registration of the club under the Sales Tax Act. In view of the difference in the definition of the term "dealer" mentioned above, and in view of the fact that the learned Judges took the view that it was not open to the Government Pleader to take the stand that the profit-making motive was unnecessary in order to constitute business, the question that we have to decide on this reference was not decided in the said case, and the said case is, therefore, also of no assistance to us for the purpose of this reference. It is also unnecessary for us to deal with the Madras High Court case of Young Men's Indian Association, *Madras v. Joint Commercial Tax Officer*⁶ which was cited before us, as that was a case of a registered society (vide page 1034). It may, however, be mentioned that, in the course of the judgment in the said case, the nature of the transactions between an unincorporated body and its members has been discussed at some length as being a mere mode of distributing common property which involves a release by all the members of their rights in that property in favour of one of the joint owners

thereof, and not a sale of that property (at pages 1051 and 1052). The object of our referring to this discussion in the judgment of the Madras High Court in the Young Men's Indian Association's case ([1963] 14 S.T.C. 1030) is that the peculiar nature of the dealings between an unincorporated body and its members, is the very reason why the Legislature thought it necessary to insert the last clause in the definition of "dealer" in section 2(11) ex majore cautela, as observed earlier in this judgment. The nature of the dealings between an unincorporated body and its own members has also been discussed in similar terms in the unreported decision of the Supreme Court dated 23rd November, 1967, in the case of the *Deputy Commercial Tax Officer v. Enfield India Ltd. Co-operative Canteen Ltd.* (Since reported at [1968] 21 S.T.C. 317), but the question which we are considering was not decided in that case, and, therefore, it is unnecessary for us to deal with the said decision in detail. It may be mentioned that both the cases last referred to by us in this judgment arose under the Madras General Sales Tax Act in which the position is clarified by the words "whether or not in the course of business" which occur in the explanation to the definition of "dealer" in section 2(g) thereof.

13. The result of this discussion of the authorities is that there is no decided case in which the question of construction that we have to determine has directly arisen, or has been considered and decided. Some of those authorities do, however, support the construction that we have placed upon section 2(11), namely, that the commercial character of the activity in question is essential even in regard to unincorporated bodies which fall within the last clause of the definition in section 2(11). On the other hand, there is nothing, either by way of principle, or by way of authority, except a passing observation which is obiter, of Chagla, C.J., in the case of *The Ahmedabad Education Society* ([1956] 7 S.T.C. 497) cited above, to commend to us the construction for which Mr. Banaji has contended.

14. Having considered the question on principle as well as on authority, and come to the conclusion that even in the case of unincorporated bodies, it is necessary that the activity in question should have been carried on as a business, we must turn to the facts of the case in order to determine whether the Club while supplying articles like food, refreshments, cigarettes etc., is effecting a sale of those articles to its members by way of business and, therefore, is a dealer within section 2(11) of the Act. The Club being an unincorporated body, we are told, there is nothing like a memorandum or constitution in which its objects appear in black and white. The objects of the Club can, however, be spelt out from its activities, and particularly from rule 41 of its Rules which provides for five sub-committees, each intended to deal with one or the other activity of the Club. From these activities, it is clear that the object of the Club is to provide recreation for its members, and that the Club does not intend to carry on the business of selling cigarettes or food or drinks to its members. In fact, the Club has invariably made a loss in its catering activities since the year 1944. Even in the case of clubs which keep some margin over

the cost price in regard to their supplies to members, such a margin is usually kept for the purpose of covering overhead charges and wastage, but it would not, by itself, lead to the conclusion that the activity of making such supplies is carried on by way of business. It is true that what we have said in regard to the assessee-Club would apply to almost all clubs, in so far as the effecting of supplies by them to their members would not be by way of business, but it must not be forgotten that the last clause of section 2(11) does not deal with clubs alone, but deals with all unincorporated bodies and associations, and the construction that should be placed upon it should be such as would be applicable equally to all unincorporated clubs, societies and associations. Societies like consumers' societies which carry on activities of buying and selling by way of business are not unknown, and under those circumstances it cannot be said, the view which we have taken would render the last part of section 2(11) superfluous. We hold that the applicant-Club does not effect supplies to its members by way of business and is, therefore, not a dealer within the terms of section 2(11) of the Bombay Sales Tax Act, 1959.

15. In the result, we answer the questions referred to us as follows :-

Question No. (1) : In the negative.

Question No. (2) : The object of the Club in effecting supplies to its members was not one of earning profits.

16. The word "motive" in question No. (2) is obviously a mistake for the word "object", and we, therefore, answer this question as above.

17. The respondent must pay the costs of this reference fixed at Rs. 250.

18. We direct that the deposit of Rs. 100 made by the applicant-Club be refunded to it.

19. Reference answered accordingly.

Cases Referred.

1([1963] 14 S.T.C. 1030 at pp. 1051 and 1052)

2([1956] 7 S.T.C. 497 at p. 501)

3([1967] 20 S.T.C. 287 at pp. 289 and 290)

4([1967] 20 S.T.C. 398)

5([1958] 9 S.T.C. 450)

6([1963] 14 S.T.C. 1030)

