(1998) 04 GUJ CK 0012

In the Gujarat High Court

Case No : Special Civil Application No. 2261 of 1987

Arman Cinema and Another — APPELLANT

Vs

State of Gujarat and Others — RESPONDENT

Date of Decision : 02-04-1998

Acts Referred:

Gujarat Entertainment Tax Act, 1977 — Section 29, 6

Citation : AIR 1999 Guj 21 : (1998) 3 GLR 1836

Hon'ble Judges : K.G. Balakrishnan, J;J.M. Panchal, J

Bench : Division Bench

Advocate : S.R. Shah, for the Appellant; U.A. Trivedi, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

K.G. Balakrishnan, J.—All these petitions based on identical facts involve common question of law, and, therefore, they are heard together and disposed of by this common judgment.

The petitioners in these Special Civil Applications are owners of Cinema Theatres. The petitioners allege that their Cinema Theatres are situated in village area having total population of less than ten thousand and these theatres are licensed under the Bombay Cinema (Regulations) Act, 1953 and Janta Cinema Licence is given to each of these theatres. The Gujarat Entertainments Tax Act, 1977 ("Act" for short) is applicable to these cinema theatres. u/s 3 of the Act, the petitioners are liable to pay entertainment tax. u/s 6 of the Act, the proprietor of the cinema theatre is given the benefit of consolidation of tax subject to the procedure laid down therein provided cinema theatre is in the designated area or specified area. As per Section 6 of the Act the proprietor of a cinema has an option to pay consolidated entertainment tax at the rates specified in Sub-section (5) of Section 6 of the Act. The proprietor of the cinema theatre shall make an application in the prescribed form within 90 days from the date of commencement of the Gujarat Entertainments Tax (Amendment) Act, 1982 and any person who becomes proprietor thereafter shall submit an application within

60 days from the date of starting the theatre. The proprietor is permitted to pay tax weekly at the rates prescribed under Subsection (5) of Section 6 of the Act. Some conditions have also been prescribed therein. The proprietor shall be deemed to have held more than seven shows in a week. The amount of tax shall be paid irrespective of the fact that actual number of shows in a week held are less than the declaration made in this behalf. It is also specified that even if film, exempted from payment of entertainment tax has been shown, no concession shall be granted on that count. The proprietor shall intimate to the prescribed officer in advance at least before seven days of every proposed change or variation in the gross tax collection capacity of the cinema by virtue of any modification or revision of the rates of admission or any change in the accommodation or classes of accommodation.

2. The petitioners in these cases had exercised their option u/s 6 of the Act and agreed to pay entertainment tax in the consolidated form. Thereby they are paying tax at lesser rate. In the case of Cinema in designated area other than touring Cinema, proprietor need only pay 15% of the gross collection of Show multiplied by 12 irrespective of the number of Shows held in a week. Section 29 of the Act empowers the State Government to exempt either wholly or partly an entertainment or class of entertainments from any payment of tax subject to such condition as may be specified. Section 29 reads as follows:--

"29. Exemption--(1) The State Government may, by notification in the Official Gazette, exempt either wholly or partly, any entertain-ment? or class of entertainment from payment of tax, subject to such conditions as may be specified therein--

(a) where such entertainment is provided for any educational, medical, charitable, philanthropic or such other purpose; or

(b) where the State Government considers it necessary so to do in the public interest.

(2) Every notification issued under Sub-section (i) shall be laid for not less than thirty days before the State Legislature as soon as possible after it is issued and shall he subject to rescission by the State Legislature or to such modification as the State Legislature may make during the session in which it is so laid or the session immediately following.

(3) Any rescission or modification so made by the State Legislature shall be published in the Official Gazette and shal! thereupon take effect."

3. The petitioners in this Special Civil Applications are given separate exemption order by the Government. In Special Civil Application No. 2764/87 Annexure-C order was passed on 25-3-1984 and granted exemption to the petitioners therein. The petitioners'' theatre being Janta Cinema Theatre, exemption is granted from payment of entertainment tax. As per Annexure-C order, for the 1st year there is total exemption, for the 2nd year there is 75% exemption, for the

3rd year there is 50% exemption and for the 4th year there is 25% exemption and from 5th year, there will not be any exemption from payment of entertainment tax. In the case of petitioners in Special Civil Application No. 2764/87, Annexure-A permission was granted for payment of entertainment tax by way of consolidated tax, and weekly amount payable by them was Rs. 1,522/-. Similar permission for the consolidation has been granted to other petitioners in various Special Civil Applications. The contention raised by the petitioners'' Counsel is that these petitioners have opted to pay consolidated amount of tax and they are also entitled to get the benefit of exemption granted u/s 29(1)(b) of the Act. Therefore, according to these petitioners, they are not liable to pay the full consolidated amount of tax, but they are liable to pay that amount subject to exemption granted u/s 29 of the Act. These petitioners allege that they have paid consolidated amount of tax payable by them subject to the exemption. They received a communication from the Entertainment Tax Commissioner of the Gujarat State wherein it is clarified that Janta Cinema Theatre cannot be granted benefits u/s 29 as well as Section 6 of the Act. It was further directed that if it was found that Janta cinema theatre situated in various districts had been paying entertainment tax at the rate of 15% or 16% in the alternative of Section 6, the recovery proceedings shall be started immediately u/s 3 of the Act and if the notification dated 11-12-1979 was applicable, the amount shall accordingly be recovered from such persons. It was stated that the owners of Janta Cinema Theatres are not entitled to get two benefits.

4. In these Special Civil Applications, the petitioners seek a writ of mandamus or any other writ or direction to set aside the order passed by the Entertainment Tax Commissioner. It is also prayed that the respondents shall be directed to determine the amount of entertainment tax payable by the petitioners by way of consolidated tax.

5. Though the Special Civil Application was filed as early as in 1987 and notice was served on the respondents in 1987, no affidavit-in-reply has been filed in any of these Special Civil Applications.

6. We heard the petitioners'' learned Counsel and the learned Assistant Government Pleader.

7. The Counsel for the petitioners contended that as per Section 6 of the Act, the proprietor of Janta Cinema Theatre is entitled to consolidate tax and is entitled to pay the amount of tax at a lesser rate subject to the conditions laid down therein and that all these petitioners are entitled to the general exemption granted u/s 29 of the Act as they are proprietors of Janta Cinema Theatre. As per Section 6 of the Act, certain special benefits are conferred on the proprietor of the Cinema Theatre and they are paying tax at the rate of 15% or 16%, as the case may be, as against the usual rate of 20% or 21 %. The consolidated tax is not fixed on the actual number of shows and the proprietor is also not entitled to change or vary the capacity of the cinema theatre, except under advance notice. The advantage of consolidation of tax is that he is liable to pay tax at a lesser rate

and the amount is payable as tax on every week. The benefit of general exemption granted u/s 29 for JantaCinema Theatre, is also subject to certain conditions and one of the conditions is that there shall not be permanent cinema theatre or Janta cinema theatre in the same town or village or within the radius of 3 Kms. of such town or village. As per general exemption, as stated earlier, proprietor is not bound to pay any tax for the 1 st year and the tax is gradually increased and from the 5th year, he is bound to pay full tax. Therefore, the contention of the petitioners is that all these petitioners are entitled to the benefit of consolidation of tax u/s 6 of the Act as well as general exemption granted u/s 29 of the Act.

8. The learned A.G.P. contended that the exemption granted u/s 29 of the Act is in respect of any particular cinema and the petitioners are not entitled to general exemption. His argument is based on the definition of "Entertainment Tax" mentioned in Section 3 of the Act. It is argued that the tax is paid for admission to entertainments and that the payment of admission has been defined in Section 2(g) of the Act. It is pointed out that the payment of admission mentioned in Section 2(g) consists of several components, such as payment made by a person who having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof for admission to which a payment involving tax or more tax is required or any payment for seats or other accommodation in a place of entertainment, or any payment for a programme or synopsis of an entertainment.

9. Therefore, it is contended that the general exemption granted u/s 29 should be construed only applicable to the particular cinema which is exempted from the tax by the Government. It was further contended by the learned A.G.P. that if the petitioners avail of general exemption u/s 29, they are not entitled to get the benefit of consolidation as per Section 6 of the Act.

10. We do not find much force in the above contention, however, it is pertinent to note that one of the important conditions agreed to by the proprietor at the time of availing of the benefit of payment of consolidated tax is that if any film is exempted from payment of entertainment tax, no concession shall be granted on that account. It is specifically stated in Clause 4 of the permission, which is to the following terms :--

"4. The amount of tax mentioned in para 2 above shall have to be paid irrespective of the tax that actual number of shows in a week held are less than the declaration made in this behalf. Even if film exempted from payment of enter tainment tax has been shown, no concession shall be granted on that account." (Emphasis sup plied).

The above statement shows that if other exemptions are available to the proprietor, benefit of consolidation cannot be granted. On perusal of two exemptions u/s 6 as well as Section 29 of the Act, it appears that there are two separate modes of payment of entertainment lax. If general exemption is granted u/s 29 for the Janta Cinema, the proprietor is not entitled to pay any tax at all for the first year, then there does not arise any question of consolidation and for the second year also the proprietor is liable to pay only 25% of the tax. For that year also, the question of consolidation may not arise for the reason that under the scheme of consolidation, the proprietor has to pay tax as if he is running shows for all the days in a week and it is deemed that cinema house is running with full capacity and the petitioners would be liable to pay higher amount by way of tax. In the case of petitioners of Special Civil Application No. 2264/ 87, they opted for consolidation in 1986, whereas the theatre was in existence even before that. Therefore, it is clear that the benefits of Section 6 and Section 29 are of different nature, especially when it is specifically stated as one of the conditions for availing of the benefit of consolidation that even if any film is exempted from payment of entertainment tax, no concession shall be granted on that count so far payment of consolidated tax is concerned.

11. Going by the procedure laid down u/s 6 of the Act, the proprietor is called upon to sign a form prescribed under the Rules and this is in the nature of special contract. By this contract, proprietor agrees to pay consolidated amounl. When such a contract is entered into it, must naturally supersede the other benefits availed by him u/s 29 of the Act. It is not specifically stated in the form executed by the proprietor of the Cinema Theatre that consolidation is subject to the benefits availed by him u/s 29 of the Act. In Special Civil Application No. 2264/87, order of exemption u/s 29 was passed in 1984 and the consolidation was done in 1986. Nothing is mentioned about exemption availed in 1984. It is to be presumed that the petitioners openly agreed to pay the consolidated amount. In that view of the matter, we do not think that the petitioners in these petitions are entitled to the benefit u/s 6 and also general exemption granted u/s 29 of the Act.

12. Counsel for the petitioners drew our attention to an amendment to the notification issued by the Finance Department on 11th December, 1979. The effect of the amendment is that those, who availed the benefit of payment of consolidated tax u/s 6 of the Act, are noi entitled to the benefit of exemption u/s 29 of the Act. Notification granting general exemption to Janta Cinema Theatre was amended as follows :--

"Provided further that the benefit of tax exemption shall not be available for the purpose of compounded tax u/s 6 of the Act".

This amendment came into existence on 4th July, 1989. It is submitted by the petitioners'' Counsel that from the amendment effected on 4th July, 1989, it is clear that till this date the proprietors of cinema theatres were entitled to the benefits of Section 29 as well as Section 6 of the Act. The Counsel also argued that in view of the said amendment, benefit which was accrued to the proprietor, was taken away and the same would only act prospectivcly and not retrospectively. At the outset, we may state that the amendment to the notification is in the form of clarification. It was made clear by the amendment that the benefit of tax exemption will not be available for the purpose of compounded tax u/s 6 of the Act. The said amendment does not alter the procedure laid down under the law. We are not inclined to accept such contention that till the date of said amendment to the notification, the petitioners were entitled to the benefits of Section 6 as well as Section 29 of the Act.

13. A reference was made to the decision reported in Indian Metals and Ferro Alloys Ltd. and Another Vs. State of Orissa and Others, , M/s. Indian Metals and Ferro Alloys Ltd. v. State of Orissa. That was the case where the Government imposed certain restrictions u/s 22-B of the Electricity Act, 1910, but this amendment came in the middle of a water year. The Supreme Court held that the benefit which was enjoyed by the party cannot be taken away with retrospective effect thereby saddling him with heavy financial burden in respect of the past period where he had drawn and consumed power on the faith of the orders extending to him the benefit of clubbing. In the instant case, amendment effected to the notification is not in the form of taking away the benefit enjoyed by the petitioners. It was only by way of clarification of the existing law. Therefore, the said decision has no application.

14. Yet another contention raised by the petitioners is that the benefit enjoyed by them is statutory benefit, which flowed from Section 29 of the Act and such a statutory benefit cannot be taken away by an executive order. It is true that the right enjoyed by the petitioners u/s 6 of the Act is a statutory right, but the benefit of general exemption given to the petitioners is not applicable in view of conditions imposed while permitting the petitioners to pay consolidated tax. The benefit conferred u/s 29 cannot be said to be statutory, but it was based on the special notification issued by the Government. The petitioners sought reliance on the decision1 reported in AIR 1989 SC 1133 : (1989 Lab 1C 1237), State of Maharashtra v. Jagannath Achyut Karandikar. The Government of Maharashtra framed Rules for the conduct of departmental examination. The said Rules expressly provided powers of the Government to grant more chances for passing the examination in any individual case or in class of cases. The Government was given power to dispense with or relax the requirements of any rule regulating the conditions of service of Government servants, or any class thereof. These 1955 Rules were sought to be varied by executive instruction. The Supreme Court held that the executive instruction may supplement, but not supplant statutory rules. In view of the said decision, it was contended by the petitioners'' Counsel that the statutory right enjoyed by the petitioners was taken away by issuing a notification. This contention of the petitioners cannot be accepted, as the petitioners'' statutory rights are not taken away in any manner by the notification issued on 4th July 1989 and the petitioners had no pre-existing rights at the time of issuance of the notification.

15. The second respondent issued Annexure-D directions stating that the entertainment tax of Janta Cinema theatre recovered u/s 6 of the Act is not properly recovered and that the proprietors of such cinema theatres are not

entitled to the benefit u/s 6 as well as Section 29 of the Act. Therefore, steps are being taken to rectify the mistake and the recovery, if any, should be effected. All the petitioners in these Special Civil Applications have opted to avail of the benefit u/s 6 of the Act and compounded the tax and agreed to pay consolidated tax.

For the foregoing reasons, we are of the view that the petitioners are not entitled to the benefit of general exemption, if any, granted to them. We find no reason to interfere with Annexure-C order. The Special Civil Applications are without any merits and, therefore, they are dismissed. Rule in each Special Civil Application is discharged, with no order as to costs. Interim relief granted earlier in each petition is hereby vacated.

16. Upon pronouncement of the judgment, Counsel for the petitioners sought certificate under Article 134A of the Constitution. We do not think that this is a case involving any substantial question of law of general importance relating to interpretation of provisions of the Constitution. The prayer of the petitioners is therefore, refused. For the purpose of enabling the petitioners to file an appeal before the Supreme Court, interim order passed earlier in these Special Civil Applications will continue for a period of six weeks from this date.