(1990) 11 KAR CK 0054

In the Karnataka High Court

Case No : W.P. No. 1624/1985

Drive-in-enterprises APPELLANT

Vs

State of Karnataka and Others RESPONDENT

Date of Decision : 07-11-1990

Acts Referred:

Constitution of India, 1950 — Article 14
Karnataka Entertainments Tax Act, 1958 — Section 2(I)(V)

Citation : (1991) 35 KarLJ 104

Hon'ble Judges : K. B. Navadgi, J;M. P. Chandrakantaraj Urs, J

Judgement

M.P. Chandrakantaraj Urs, J.-This writ petition is before the Division Bench on account of the reference made by a learned single Judge of this Court by his order dated 4-10-1985. The learned single Judge, in the light of the challenge made to sub-clause (v) of clause (i) of Section 2 of the Karnataka Entertainments Tax Act, 1958 (hereinafter referred to as ''the Act''), found that the question raised in the writ petition was of importance which was required to be decided by a Division Bench.

2. Petitioner is a registered partnership firm known as Drive-in-Enterprises and the business is carried on in that name and style and is the owner of a drive-in-theatre. Before we go to the grounds urged challenging the provision, it will be useful to set-out that ''drivc-in-theatre'' is specifically covered by Rule 111-A occurring in Chapter XII, Part VI-A of the Karnataka Cinemas (Regulation) Rules, 1971 (hereinafter referred to as ''the Rules'') framed in exercise of the powers conferred on the State Government under Regulation 22 of the Karnataka Cinemas (Regulation) Act, 1964. ''Drive-in-cinema'' is defined under the Rules. ''Motor car'' is defined under clause (16) of Section 2 of the Motor Vehicles Act, 1939, which was in force at the time of presentation of this writ petition. Even in the Motor Vehicles Act of 1988 ''Motor car'' is defined in the same manner as Motor car at clause (26) of Section 2 of the Motor Vehicles Act, 1988. They read thus:

MOTOR VEHICLES ACT, 1939 MOTOR VEHICLES ACT, 1939

2(16)"Motor car" means any motor vehicle other than a transport vehicle, ominibus, road-roller, tractor, motor cycle or invalid carriage. 2(16)"Motor car" means any motor vehicle other than a transport vehicle, ominibus, road-roller, tractor, motor cycle or invalid carriage.

In that view of the matter, a ''drive-in-cinema'' stands on a totally different fooling or falls totally into a different category than an ordinary place where cinematographic films are exhibited as a source of entertainment.

3. The petitioner, on an earlier occasion in W.P. No. 8332/1978, had challenged the levy of tax on motor cars that enter into the area of a drive-in-theatre on the ground that a motor car was not a person entertained and in the scheme of the Act the levy being on the person entertained, no lax as such could be levied on a motor car. That writ petition came to be allowed by an order made by one of us. That order later came to be confirmed in W.A. No. 1121/1981 by a Division Bench of this Court.

4. In order to over-come the rigour of the decision of this Court, the respondent State of Karnataka chose to amend clause (i) of Section 2 of the Act by Act No. 3 of 1985 called the Karnataka Entertainments Tax (Second Amendment) Act, 1983. By the said amendment, in addition to the sub-clauses that existed prior to the amendment, three other sub-clauses were added resulting in clause (i) of Section 2 reading as follows:

"2(i) "payment for admission" includes-

i) any 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 a tax or a higher tax is required;

ii) any payment for seats or other accommodation in a place of entertainment;

iii) any payment made for the loan or use of any instrument or contrivance which enables a person to get a normal or better view or hearing of the entertainment which, without the aid of such instrument or contrivance, such person would not get;

iv) any payment for any purpose whatsoever connected with an entertainment which a person is required to make as a condition of attending or continuing to attend the entertainment in addition to the payment, if any, for admission to the entertainment;

v) any payment for admission of a motor vehicle into the auditorium of a cinema known as drive-in-theatre.

The effect of the amendment is that payment for admission to a drive-in-theatre attracts tax not only on the persons who are occupants of the motor car but also on the motor vehicle itself, which was held to be impermissible in the earlier writ petition referred to above. In that view of the matter, the petitioner firm, being the owner of the drive-in-threatre at Bangalore, has questioned the competence of the State Legislature to bring about the amendment in question in the purported exercise of its legislative power under Entry 62 of List II of Seventh Schedule of the Constitution, which reads as follows:

"62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling."

It is alleged by the petitioner that there are only 3 drive-in-theatres in the whole Country and its theatre which is situated a little outside the city limits of the city of Bangalore, is one such. These facts are not disputed by the Stale.

5. The petitioner inter-alia questions the competence of the State Legislature to bring about the amendment contending that it affects its Constitutional right to equality guaranteed under Article 14, its right to carry on trade or profession under Article 19 and the levy of tax on motor vehicle is without the authority of law in terms of Article 265 of the Constitution.

6. No return as such has been filed by the State. But the learned Government Pleader argued in support of the Constitutionality of the amendment as at sub-clause (v) of clause (i) of Section 2 of the Act.

7. Before we appreciate the contentions advanced, it will be useful to set-out certain definitions and the scheme of the Act. Under Section 2(a) of the Act "admission" is defined to include admission as a spectator or as one of the audience for the purpose of amusement by taking part in an entertainment."Admission to an entertainment" is defined under Section 2(b) so as to include admission to any place in which an entertainment is held."Cinema Theatre" is so , defined in Section 2(c) to include any place of entertainment in which cinematographic shows arc held to which persons are admitted payment. In clause (e) of Section 2 "entertainment" itself is defined to mean a horse race or cinematographic show including exhibition of video films to which persons are admitted on payment. It is in the light of these definitions that the insertion of subclause (v) of clause (i) of Section 2 of the Act should be examined by us.

8. We have already pointed out that a drive-in-theatre stands on a totally different footing or is classified differently by operation of Rule 111-A of the Rules. To that extent the definition of a "cinema theatre" may not have any special significance except to the extent that even in a drive-in-theatre persons who enter the same with or without motor vehicle are also entertained and are provided accommodation to watch the entertainment that takes place in the drive-in-theatre. In fact, in the earlier writ petition, in the decision rendered by one of us (sec Drive-in-Enterprises v Commercial Taxes & Another, (1981(2) Kar.L.J. 361) a detailed description as to how a drive-in-theatre functions is set-out. Our task is made easier by extracting that portion of the Judgment, which is as follows:

"Drive-in-theatre is an open air theatre encircled by a high wall having a huge open screen which is not enclosed. In front of the screen adequate and suitable place is provided for the parking of cars which drive into the enclosed space within the walls from where the occupants of the cars can view the cinema exhibited, silling in the car if they so chose to do so. He has further pointed out that though it is not necessary to have an enclosed seating space for people in a drive-in-theatre the petitioner-Firm in its drive-in-theatre has also provided in addition to parking space for the cars, an enclosed covered gallery with several scats where persons who have come in the car or persons who have come without a car can sit and watch the cinema exhibited on the same screen. The petitioner-firm charges Rs. 2 for the car to enter the enclosed space and per each occupant therein it charges Rs. 3. If a person comes either on a scooter or motor cycle or cycle or by walk and enters the place, no charge is made to the vehicle but like other persons in the car, they arc also charged Rs. 3 per head."

This is also not disputed by the learned Government Pleader.

9. We are of the view that grievance, if any, founded on Articles 14 and 19 of the Constitution are not really grievances of the petitioner as the petitioner cannot be said to be the aggrieved person. Levy of tax is on the person entertained and the petitioner is not such a person. It is only an entertainer. To the extent Article 19 of the Constitution may be pressed into service, the ground urged in support thereof is founded on the severe competition offered to the drive-in- theatre by the popularity of video films exhibited on television screens in addition to the other ordinary cinema theatres. That, in our opinion, has nothing to do with the admission of a motor car into the enclosure that answers to the description or definition of ''drive-in-theatre''. Therefore, any levy of entertainment tax on the motor vehicle in addition to the persons contained in the motor car would be expropprietory has no relevance to the question which falls for determination before us.

10. In our opinion, in the light of the pleadings of the petitioner, what really falls for determination is the competence of the State Legislature to levy tax on the entry of a motor vehicle into an enclosure which answers to the description of a ''drive-in-theatre'' in terms of Rule 111-A of the rules.

11. In the light of the decision earlier rendered and confirmed by a Division Bench of this Court, the incidence of tax is on the person entertained and such person must be a human cannot be considered to be res integra any longer.

12. Entry 62 of II List to Seventh Schedule of the Constitution enables the State Legislature to levy tax on luxuries, entertainments, amusements, belting and gambling. In terms of the definition "entertainment" under the Act, power to levy tax is confirmed to two events-entertainment obtained by any person on entering a race course where horse races are run and places where cinematographic films or video films are exhibited with the object of entertaining a person or persons on payment. A motor vehicle not being a person, cannot be said to be a person

entertained. Entry of a car into a drive-in- theatre is incidental and part of the scheme of things to seek entertainment in such places. Persons who see cinematographic films in drive-in- theatres do not see a film which is different than the films exhibited in the ordinary cinema theatre. They sec the same or similar films. If they had to pay not only for themselves but also for their cars which arc not entertained, then they can as well chose to see the same cinema in the ordinary theatre without entering the enclosure known as "drive-in-theatre."

13. Therefore, as earlier held in the case of the petitioner by this Court, incidence of tax is on the person entertained just as the incidence of tax on luxuries consumed by a person is on the person enjoying those luxuries, as held by the Supreme Court in Express Hotels Private Ltd. v Slate of Gujarat & Another, 1989 STC 157, the very case on which the learned Government Pleader placed reliance, to which we will make reference later. Therefore, the amendment providing for payment for admission to a car brought-about by the Second Amendment Act of 1983 by insertion of sub-clause (v) to clause (i) of Section 2 of the Act is clearly beyond the competence of the term "entertainment" as defined under the Act even by giving the widest meaning to that expression in Entry 62 of List II in the Seventh Schedule of the Constitution. Therefore, we have no hesitation to strike down the amendment as such.

14. However, Mr. H.L. Dattu, learned Government Pleader, appearing for the Stale of Karnataka has contended that corresponding amendment has been made in Section 6 of the Act by which a provision is made that taxes shall be levied under Section 4-A and 4-B in respect of each payment for admission or on each counter ticket and shall be calculated and paid on the number of admissions and therefore it is the incidence of admission of the cars which is sought to be realised by the amendment effected by insertion of sub-clause (v) to clause (i) of Section 2 of the Act and therefore it is within the competence of the State Legislature.

15. We see that Sections 4 and 4-A under the Act provide for taxes on shows exhibited by the exhibitor of the film and the incidence is not on the entertained but on the entertainer. In any event, Section 4-A specifically excludes the operation of that section or application of that section to drive-in-theatres. Therefore, any support derived by the amendment effected to Sec- tion 6 of the Act cannot support or render the State Legislature competent which is otherwise incompetent to levy tax on motor vehicles on entry into a drive-in-theatre. No doubt, the normal rule is that if there is competence elsewhere, the Court may sustain such levy. But then, that power has been exercised under the Karnataka Motor Vehicles Taxation Act by the respondent State. As held by the Supreme Court in a number of cases, such a tax is a compensatory tax leviable for the use of the roads maintained by the State at the expense of the public exchequer (See Automobile Transport (Rajasthan) Ltd. v State of Rajasthan & Others, AIR 1962 SC 1407).

16. It is now well settled that a vehicle used exclusively within the private

premises of a person cannot be subjected to tax under that entry (See Binaniores Ltd''s case, AIR 1964 SC).

17. In the instant case, the entry of vehicles is into the enclosure belonging to a person other than the State and therefore use of the enclosure by the vehicle within that specified enclosure cannot be taxed even under that entry.

18. Viewed any way, the levy of tax on a motor vehicle, with or without the amendment in question, is incompetent in terms of Entry 62 as well as 57 of List II of the Seventh Schedule of the Constitution. We are, therefore, inclined to allow the petition for the reasons above given reiterating what has been earlier said by this Court in the case of the petitioner.

19. The petition stands allowed. The amendment inserting sub-clause (v) to clause (i) of Section 2 by the Second Amendment Act of 1983 is declared ultra vires and beyond the State Legislature''s competence.

20. Any tax collected from the petitioner in accordance with the interim directions given by this Court or otherwise is liable to be refunded by the respondents in the light of the conclusion reached by us that it was incompetent for the stale to levy tax on the entry of motor vehicles into a drive-in-theatre. There will be no order as to costs. Rule is made absolute.

Order accordingly.

