
(1986) 09 OHC CK 0018
In the Orissa High Court
Case No : O.J.C. No. 1129 of 1978

Durga Cinema

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 23-09-1986

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1), 246, 276
Orissa Entertainment Tax Act, 1946 — Section 3(4), 4, 4A

Citation : (1986) 62 CLT 660

Hon'ble Judges : H.L. Agrawal, C.J.; R.C. Patnaik, J

Bench : Division Bench

Advocate : A. Pasayat, for the Appellant; Stdg. Counsel (C.T.) for Opp. Parties
Nos. 3 and 4, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Agrawal, C.J.—The Petitioner is a partnership firm and carries on the business of exhibition of motion pictures in Jajpur in the district of Cuttack.

2. By the present writ application, the Petitioner challenges the constitutional validity of Section 4-A of the Orissa Entertainments Tax Act, 1946 (Orissa Act V of 1946) (for short, "the Act"). The State Government imposed a new kind of tax "in respect of every show by the proprietor of the cinema house" at the specified rates by introduction of Section 4-A in the Act by a Notification dated 27-4-1976. This section was substituted by Act 4 of 1984 and again amended by Ordinance No. 7 of 1985. At the relevant time, when the writ application was filed, rates of show tax varied from Rs. 10/- to Rs. 25/- per show according to the location of the cinema houses from a town within a municipal area to that in Mofussils and outside places. By the amendment brought about in the year 1985, the show tax was brought down to Rs. 5/- to Rs. 10/-. We are, however, not concerned with all these details.

3. In order to appreciate the submissions made in course of the argument, it is necessary to look to some of the provisions of the Statute. According to the

Preamble, the Act is to impose a "tax" on amusement and other entertainments in the State of Orissa. "Entertainment", has been defined in Section 3(4) of the Act as follows:

Entertainment includes any exhibition, performance, amusement, game or sports to which persons are admitted for payment.

The main charging section is Section 4 which levies a tax on all payments for admission to any entertainment at such rate as the State Government may, by notification fix and different rates may be fixed in respect of different classes of entertainments. The proviso also fixes the inner and outer limits, the inner limit being 30 per cent and the outer limit 75 per cent of the payment for admission to the entertainment.

The purpose and intention of this is to impose a tax on the payments for admission to any entertainment. In other words, the tax is to be passed on to the persons who are entertained in any entertainment and is not directed against the person who actually provides the entertainment, i.e., the person who is an exhibitor or performer of any entertainment or amusement, game or sports etc. to which persons are admitted for payment.

4. Accordingly, it was submitted that the imposition was in the nature of a tax on trade and profession which field was already occupied and covered by Entry No. 60 of List II which provides taxes on professions, trades, callings and employments. Therefore, this imposition was in reality not a tax on entertainment or amusement as per Entry No. 62.

The real bone of a contention on the basis of these two Entries and the scheme of the Act which was strongly canvassed at the bar was that a levy of tax in excess of Rs. 250/- per annum as fixed under Article 276(2) of the Constitution is ultra vires inasmuch as the rates prescribed u/s 4-A as show tax varying from Rs. 10/- to Rs. 25/- per show plus further addition thereto on account of the additional seat capacity exceeded much more than the above limitation prescribed by Article 276. According to the Petitioner's assertion, it had to pay during the financial year of 1977-78 a sum of Rs. 12,874/- as show tax under this new imposition.

It was further submitted that this tax levied u/s 4-A was a direct tax which the Petitioner could not collect from the persons visiting the shows and thus was a tax falling under Entry No. 60 of List II which imposed a heavy burden on the Petitioner's right to carry on the business and thus is a clear infringement of the rights guaranteed under Article 19(1)(g) of the Constitution. The above submissions made in course of the arguments necessitate reference to some of the constitutional provisions also and the relevant entries in List II which enumerate the various subjects that are assigned to State Legislatures under Article 246 of the Constitution.

Entry No. 62 gives exclusive power to the State Legislature to make laws in

regard to taxes on luxuries including those on entertainments, amusements betting and gambling. Two other entries which may be usefully referred to in this connection are Entry Nos. 33 and 60. It was accordingly submitted that the show tax could not be brought within the scope of Entry No. 62. In my opinion, the submission has got no merit. The word "entertainments" appearing in Entry No. 62 has a wide connotation. The scope of entertainment through the process of exhibition of cinema shows contemplates three elements, namely, (i) an exhibitor; (ii) the cinemagoer; and, (iii) a film. In the absence of exhibition of film, there cannot be entertainment of anybody, and in order that a member of the public may be entertained, there must be a show of a film and in order to perform the show, there must be a cinema house. Thus, the word "entertainments" used in Entry No. 62 connotes something in the nature of an organised entertainment.

5. The main submission of the learned Counsel for the Petitioner was that the tax envisaged under the Act is one bearing on those that really received the entertainments and not on the persons that provide it. The exhibitors of films do not derive any entertainment or amusement by the shows. I do not find much merit in this contention as the expression used in Entry No. 62 is "entertainments". To confine it only to the persons who are entertained or who are admitted in a cinema hall to enjoy the cinema shows would amount to imposing a restriction on the expression "entertainments". As already indicated earlier, the entry on the face of it does not draw a distinction between one who derives the entertainments and one who provides. Apparently, therefore, it seems to cover both the classes.

In my opinion, the legislative subject contained in Entry No. 62 is broad enough to take in its scope all persons connected with the entertainment and to confine it to cinema goers only would be to give a narrow interpretation to it. What is contemplated in that entry is entertainment as such and it is not limited to cinema goers only; nor is there any basis for such limitation.

I am not able to accept the theory propounded by the learned Counsel for the Petitioner. The objects of the two entries are altogether different and they operate in distinct fields. The legislative topic embodied in Entry No. 60 relates to the privilege of carrying on profession or trade, whereas Entry No. 62 empowers State Legislatures to levy tax on entertainments as such and not on any individual carrying on trade or profession.... The levy is on each exhibition or show. Nothing could be collected from the exhibitor by way of tax if no show is given by him. It is only the exhibition that is made liable for the tax.

I find ample support for this view from two decisions, namely, Cantonment Board, Poona Vs. Western India Theatres Ltd., and T. Aswathanarayana and Others Vs. The State of Andhra and Another, , although neither of them was cited at the bar.

The Bombay decision has been followed in the above mentioned Andhra Pradesh

decision. In both the cases, imposition of a similar show tax was challenged.

6. It is well settled that it is the substance of the legislation and not the form that has to be taken into account in judging its true character and I may quote an observation from the Andhra Pradesh case.

To ascertain the essential character of the tax, we have to look into the charging section of the statute because the identification of the subject-matter of the tax is only to be found in that Section. In the present case, the charging section (Section 4-A) clearly indicates that it is a tax on each show and not on the calling of the exhibitor who, as we have already stated, does not incur any liability in this behalf so long as he does not give any exhibition.

The argument made on the basis of Article 276 is equally fallacious. Article 276 reads as follows:

276(1). Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of anyone person to the State or to anyone municipality, district board, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed two hundred and fifty rupees per annum.

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It is manifest that the non-obstante clause has reference only to topics within the exclusive domain of the Centre. This is made plain by the words "no law...shall be invalid on the ground that it relates to a tax of income." It has thus no relation to the entries in List II so that it does not touch Entry No. 62. Hence, taxes coming within the purview of Entry No. 60 are not hit at by Article 276. The considerations regarding the adverse effect on income tax etc. will apply only to a levy under Entry No. 60 which attracts Article 276 and Entry No. 62 is outside the restriction envisaged in Article 276(2). It follows that the contention based on Article 276 is devoid of substance.

A similar view was taken by a Bench of Punjab High Court in *Silver Screen Enterprises a firm and Others Vs. The State and Another*, . The profession of exhibiting films which is purported to be taxed u/s 4-A and the person who pays such a tax also follows some calling or profession and for that reason the tax would not become a tax on his profession or calling, because in that event all taxes, such as, sales tax and income tax, also, could be a tax on a profession.

The tax in question is essentially a tax on entertainments.

7. In view of the above discussions, the decision in *Rai Ramkrishna and Ors. v. State of Bihar* AIR 1983 S.C. 1667 cited by Mr. Pasayat has no application as it

cannot be disputed that the taxing statutes are not beyond the pale of the constitutional limitations prescribed by Articles 19 and 14 of the Constitution and the test of reasonableness prescribed by Article 304(b) is justiciable. The scrutiny of Entry Nos. 60 and 62 of the Seventh Schedule clearly shows that there is no overlapping anywhere in the taxing power of the State to legislate with respect to those sources of taxation.

8. The writ application must, therefore, fail and hereby dismissed with costs.

Hearing fee is assessed at Rs. 250/-.

R.C. Patnaik, J.

9. I agree.