

(1970) 05 RAJ CK 0008

In the Rajasthan High Court

Case No : Civil Writ Petition No's. 196 to 198, 222, 223 and 242 to 250 of 1967 and 1116 of 1969

Galbaji and Others

APPELLANT

Vs

C.T.O. Sirohi and Another

RESPONDENT

Date of Decision : 11-05-1970

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)

Rajasthan Entertainments and Advertisements Tax Act, 1957 — Section 10(3), 10(4)

Citation : AIR 1971 Raj 106 : (1971) RLW 112 : (1970) 3 WLN 451

Hon'ble Judges : V.P. Tyagi, J

Bench : Single Bench

Advocate : H.N. Kalla, for Gulabji and Prakashchand, M.L. Joshi and Omprakash, for Jawanmal and N.L. Tibrewal, for Kulwantra, for the Appellant; G.C. Kasliwal, General, for the Respondent

Final Decision : Allowed

Judgement

V.P. Tyagi, J.—The petitioners in, these 15 writ petitions have challenged the vires of Section 10 (3) of the Rajasthan Entertainments Tax Act, 1957 (hereinafter called "the Act") and it has been prayed that the said section may be struck down as being violative of Arts. 14 and 19(1)(f) of the Constitution.

2. The facts giving rise to these writ petitions are, in a nutshell, as follows : The petitioners are the exhibitors of cinema films at different places in Rajasthan. They were duty bound to pay the Entertainment Tax to the Government by adopting any one of the three different modes of payment of the tax as given in the Act. On a surprise checking made by the Commercial Taxation Officer and the Commercial Taxes Officer Survey and Investigation, it was discovered that the petitioners were evading tax by admitting persons to the exhibition of their films without making any payment thereof to the department under the Act. In all these cases proceedings were therefore taken u/s 10 (3) of the Act, and in some cases the Commercial Taxation Officers or in others the Commercial Taxes

Officers Survey and Investigation passed orders imposing penalties as well as fixing the amount of tax payable under the provisions of the Act. These orders have been challenged by the petitioners by filing separate writ petitions praying inter alia that the provisions of Section 10 (3) of the Act be declared ultra vires Articles 14 and 19(1)(f) of the Constitution and the orders passed by the respondents fixing the liability to pay tax and imposing penalty under the Act be quashed. The respondents have filed replies in all these writ applications and have contended that it was within the competence of the Commercial Taxes Officers to fix the liability of the tax evaded by the petitioners and to impose penalty u/s 10 (3) of the Act and that the provisions contained in the said sub-section are intra vires the constitutional provisions. The reply also contained certain facts under which the Commercial Taxes Officers were required to pass impugned orders u/s 10 (3) of the Act, but since all these writ applications can be disposed of by deciding the legal question regarding the validity of Section 10 (3), I need not go into the merits of the facts.

3. The primary question to be determined by the Court in these cases is whether Section 10 (3) of the Act is ultra vires Articles 14 and 19(1)(f) of the Constitution.

4. Section 10 of the Act deals with offences and penalties and it reads as follows:--

"10. Offences and penalties.--(1) Notwithstanding anything contained in any law for the time being in force, a ticket for admission to an entertainment shall not be resold for profit by the holder thereof.

(2) Whoever re-sells any ticket for admission in contravention of the provisions of Sub-section (1) shall, on conviction before a Magistrate be liable to pay fine which may extend to two hundred rupees.

(3) If the proprietor of an entertainment-

(a) admits any person for payment to such entertainment in contravention of the provisions of Sub-section (1) of Section 6, or

(b) admits any person to such entertainment without payment or at concession rates otherwise than in accordance with the prescribed condition, or

(c) fails to pay the tax due from him under this Act within the prescribed time, or

(d) fraudulently evades the payment of any tax due from him under this Act, or

(e) contravenes any of the provisions of this Act, or the rules framed thereunder, the prescribed authority may direct that such proprietor shall pay, by way of penalty, in addition, to the amount to tax payable by him, a sum not exceeding five hundred rupees.

(4) In respect of offences mentioned in Sub-section (3), a proprietor may be prosecuted and he shall, on conviction before a Magistrate, be liable, in respect of each such offence to pay a fine which may extend to five hundred rupees and

shall, in addition, be liable to pay any tax which should have been paid by him:

Provided that no Court shall take cognizance of any offence punishable under this Sub-section except with the previous sanction of the prescribed authority :

Provided further that no proprietor shall be prosecuted on whom a penalty has been imposed under Sub-section (3)." According to Sub-section (3) of this section if the proprietor of an entertainment does any of the acts mentioned in Clauses (a) to (e) of this sub-section then under Sub-section (4) these actions will be taken as offences under the Act. The Act provides two remedies to deal with such offenders"--one under sub-section (3) and the other under sub-section (4). Under Sub-section (3) the prescribed authority may direct that such proprietor shall pay, by way of penalty, in addition to the amount to tax payable by him, a sum not exceeding five hundred rupees. Sub-section (4), however, provides a different mode for dealing with the proprietor of an entertainment who had committed the same offences mentioned in Clauses (a) to (e) of Sub-section (3) by taking him to the Court of law where he shall face a regular trial before a Magistrate and will have ample opportunity to defend himself. Under Sub-section (4) a Magistrate can impose penalty to the extent of Rs. 500 and in addition he can also fix the liability on the offender (the proprietor of an entertainment) to pay any tax which should have been paid by him.

5. From the perusal of these two clauses of Section 10 it is clear that if the proprietor of an entertainment who had committed offences as mentioned in Clauses (a) to (e) of Sub-section (3) of this section, is dealt with by the prescribed authority under Sub-section (3), then the law does not provide any safeguard to such a person to defend himself before the authority, but if he is prosecuted under Sub-section (4) and brought before a Magistrate for trial, then he can claim all those safeguards which are provided by the Code of Criminal Procedure to any accused person who is prosecuted in a regular criminal Court. It may, however, be mentioned that under both the circumstances the quantum of penalty that can be imposed is the same.

6. The contention of learned counsel for the petitioners is that no guideline has been provided by the legislature as to under what circumstances offenders committing the same offence shall be dealt with under Sub-section (3) and it is left to the sweet will of the prescribed authority to deal with the persons in any manner which suits him the best. If the prescribed authority, according to Mr. Joshi learned counsel for the petitioners, wants to decide the matter himself then he will do so without providing any safeguard as is provided under subsection (4) to the accused person and impose the same penalty to which he can be subjected to if he were sent to a court of law for trial.

7. A combined reading of the pro-visions of Sub-sections (3) and (4) of Section 10 of the Act makes it clear that the offences and the penalties mentioned in Sub-sections (3) and (4) of Section 10 of the Act are the same. The only difference which we find is that under Sub-sec. (3) the prescribed authority imposes the

penalty and fixes the liability of the tax without following any set procedure while dealing with the case under Sub-section (4) the proceedings are taken before a Magistrate as is taken in a regular criminal trial.

8. In a trial before a Magistrate the evidence has to be judged according to the rules laid down in the Evidence Act and the proceedings have to be conducted according to the procedure prescribed in the Code of Criminal Procedure; whereas the provisions of subsection (3) do not provide any such procedure to be followed by the prescribed authority while dealing with an offender under that sub-section. Under Sub-section (3) of Section 10 prescribed authority has also to determine the amount of tax alleged to have been evaded by the proprietor of an entertainment but for that also no procedure for assessing the tax is prescribed by law. The entire matter is left to the discretion and the sweet-will of the prescribed authority and he is to act as if he were to pass only an administrative order to deposit the tax payable by the proprietor who has evaded the tax.

9. It is now well settled that when the tax is to be assessed by an authority under any taxing statute he has to act in a quasi-judicial manner, and therefore it is urged by the learned Advocate General that the safeguard available to the offender dealt with under Sub-section (3) of Section 10 is that the proceedings shall be taken in accordance with the rules of natural justice. But this safeguard in my opinion is not sufficient to explain the discrimination that is inherent in subsections (3) and (4) of Section 10. A person facing the proceedings under Sub-section (3) cannot claim that the evidence, if any, recorded by the prescribed authority should be judged on the principles of the Evidence Act and the proceedings should be taken in accordance with the procedure laid down in the Code of Criminal Procedure.

10. Learned Advocate General contended that the prosecution can be made only when "mens rea" is present in the act of the proprietor of an entertainment who evades tax. If the action of the proprietor of an entertainment, in the opinion of the prescribed authority, is only a technical breach of his duties and thus committed an offence as mentioned in Clauses (a) to (e) of Sub-section (3) of Section 10 then in that event no prosecution is necessary and the only way to deal with such persons is to take proceedings against them u/s 10 (3). This argument has a fallacy in it. The prescribed authority, according to Mr. Kasliwal, shall become the Judge to find out whether "mens rea" in a particular action of the proprietor of an entertainment is present or not. In my opinion it is the duty of the Court to find out whether an offence has been committed under a particular law and that whether the presence of "mens rea" was necessary for the commission of a particular offence. It may be mentioned here that it is not necessary in all cases to bring an act of a person within the definition of an offence only when "mens rea" is present. Under some special Acts there are certain offences which do not require the presence of "mens rea" to bring that particular act under the term "offence". As for example, in this Act itself we find that the re-sale of the ticket for admission to an entertainment is an offence and

such a sale does not require the presence of "mens rea" to bring it within the mischief of offence. It is therefore difficult to accept the arguments of learned Advocate General that Sub-section (4) could apply only when "mens rea" is present in a particular act to constitute an offence under the Act and therefore two methods have been provided by the legislature to deal with the offences mentioned in Clauses (a) to (e) of Section 10 (3) of the Act.

11. The law does not provide any criteria as to in what circumstances the offences committed by the proprietor of an entertainment under Clauses (a) to (e) of Sub-section (3) will be sent to the Magistrate for trial under the provisions of Sub-section (4) and what type of cases shall be dealt with under the provision of Sub-section (3). The matter is left entirely to the sweet discretion of the prescribed authority. Learned Advocate General could not point out any reasonable basis for differentiating between persons similarly situated in matters of applications of these two parallel provisions which aim at the same object.

12. Learned Advocate General pointed out to the first proviso to Sub-section (4) which says that no Court shall take cognizance of the offence punishable under this Sub-section except with the previous sanction of the prescribed authority. In this proviso the prescribed authority is not the Commercial Tax Officer but the Deputy Commissioner (Administration) of the Department. According to him it is only with the sanction of the Deputy Commissioner that the proprietor of an entertainment is prosecuted under Sub-section (4) and while according the sanction the Deputy Commissioner considers whether in the particular circumstances of the case prosecution would be a proper remedy or not. It is true that in the case of prosecution under Sub-section (4) the authority is different but the law does not provide any guide line to that authority as to under what circumstances he would sanction prosecution under Sub-section (4) or he would direct the matter to be dealt with under Sub-section (3) of this section.

13. The Supreme Court in *Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another*, had the occasion to consider a similar question while dealing with Section 5 of Punjab Public Premises and Land (Eviction and Rent Recovery) Act (31 of 1959). Section 5 of that Act provided a drastic remedy authorising the Collector to pass an order of reduction and then to recover u/s 7 of that Act rent in arrears and damages which he may assess in respect of such premises as arrears of land revenue. On an objection raised by the petitioner that the Act also provided for a suit against such unauthorised occupations, their Lordships held that Section 5 does not lay down any guiding principle or policy under which the Collector has to decide in which cases he should follow one or the other procedure and, therefore, the choice is entirely left to his arbitrary will. Consequently it was held that Section 5 by conferring such unguided and absolute discretion manifestly violates the right of equality guaranteed by Article 14.

14. Exactly a similar question came up before a Division Bench of the Punjab and Haryana High Court in *Grand Cinema, Mansa v. Entertainment Tax Officer*,

Bhatinda, AIR 1969 Punj 98. In that case Sections 14-A and 15 of Punjab Entertainments Duty Act (16 of 1955), which were analogous to the provisions of Sections 10 (3) and 10 (4) of the Act, were _ challenged by the proprietors of the cinemas and the Court was of opinion that Section 14-A was ultra vires the Article 14 of the Constitution.

15. While dealing with the provisions of Section 48 of the Matsya Customs Ordinance, 1948, which provided two different modes to deal with an offender under that Ordinance without laying down any guide line to the officer to act, this Court in Bahadur Singh and Another Vs. Jaswant Raj Mehta and Others, has held that the discretion vested in the Superintendent of Customs to send the case of any offender to a Court of law and retain another case of the same type to be dealt with departmentally at his discretion was discriminatory and violative of Art. 14.

16. In view of the observations of their Lordships of the Supreme Court in Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another, and the reasoning given by the Punjab and Haryana High Court AIR 1969 Punj 98 , which authority directly applies to the facts and circumstances of this case and the Bench decision of this Court in Bahadur Singh and Another Vs. Jaswant Raj Mehta and Others, I am of the opinion that the power conferred under Sub-section (3) of Section 10 on the prescribed authority gives an unguided and absolute discretion which manifestly violates the guarantee of equality before the law as enshrined in Article 14 of the Constitution.

17. The validity of this Sub-section has also been challenged on the ground that it violates the Article 19(1)(f) of the Constitution and in support of this plea reliance has been placed by the petitioners on a decision of the Supreme Court in Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, and a judgment of a single Judge of this Court in Ratanchand v. Panchayat Samiti, Sojat 1967 Raj LW 463 = (AIR 1967 Rai 142).

18. Sub-section (3) of Section 10 empowers the prescribed authority to fix the liability of tax which is found due from a person who is found guilty of offences mentioned in Clauses (a) to (e). The determination of the tax liability under this Sub-section is in respect of that tax which is alleged to have been evaded by the proprietor of an entertainment and that can according to the petitioners be determined only when the authority takes up the procedure for the assessment of such tax. The term "assessment" means official determination of liability of a person to pay a particular tax. The levy of a tax is generally a legislative function while assessment is a quasi-judicial function of the authority prescribed by law to determine the amount of tax. The collection of the tax is, however, an executive function of the authority empowered to collect the tax. These three terms, viz., the levy, the assessment and the collection are of widest significance and embrace in their broad sweep all the proceedings which can possibly be imagined for raising money by the exercise of the power of taxation from its inception to its conclusion. In view of the judgments of the highest Court of the realm it

cannot be doubted that the procedure for determining the liability of the tax is a quasi judicial function of the authority. In enacting the taxing statute the legislature has to take care to provide for the procedure to be followed while determining the tax liability of a person but in the instant case while enacting Sub-section (3) or Sub-section (4) the legislature did not provide any procedure for making assessments to find out the liability of the tax evaded by a proprietor of an entertainment. While discussing this question how the taxing provisions should be judged by the Court if their validity is challenged, their Lordships of the Supreme Court in *Moopil Nair's case* AIR 1961 SC 52 have observed as follows:--

"Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing any objections to the liability for taxation or as to the extent of the tax proposed to be levied and finally, as to the right to challenge the regularity of assessment made, by recourse to proceedings in a higher Civil Court.....The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the Executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi-judicial character....."

Their Lordships further observed that the Act in that case proposed to impose a liability on land-holders to pay a tax which is not to be levied on a judicial basis, because (1) the procedure to be adopted does not require a notice to be given to the proposed assessee; (2) there is no procedure for rectification of mistakes committed by the Assessing Authority; (3) there is no procedure prescribed for obtaining the opinion of a superior Civil Court on questions of law, as is generally found in all taxing statutes, and (4) no duty is cast upon the Assessing Authority to act judicially in the matter of assessment proceedings; nor is there any right of appeal provided to such assessee as may feel aggrieved by the order of assessment. In these circumstances their Lordships held that the provision of imposing tax without the aforesaid safeguards was violative of Article 19(1)(f) of the Constitution. This Court in *Ratan Chand and Others Vs. Panchayat Samiti and Others*, while following the observations of the Supreme Court declared the provisions of the Panchayat Samitis Taxation Rules, which did not provide any such procedure, ultra vires Article 19(1)(f) of the Constitution.

19. In the present case I find that no procedure has been provided by the legislature to assess the evader of the tax nor does it provide any opportunity to a person on whom the liability is going to be fixed for the amount of the tax payable under the Act to obtain the opinion of a superior Civil Court on questions of law as is generally found in all taxing statutes nor do the provisions of

subsection (3) cast a duty upon the Assessing Authority to act judicially in the matter of assessment proceedings, nor was there any provision in the Act at the time the liability to pay tax was determined by the prescribed authority to file an appeal. In these circumstances I am left with no alternative but to hold that the provisions of Sub-section (3) of Section 10 of the Act cannot be sustained as valid provisions.

20. It is contended that notices were given to the petitioners before they were assessed to their liabilities under Sub-section (3) of Section 10 and now it is also said that the law has been amended and a provision for appeal has been provided therein. But this amendment came much after the liability of the petitioners was fixed u/s 10 (3) of the Act. Simply because a notice was given to the petitioners before their liability under the Act was fixed by the prescribed authority, it is difficult to say that the provisions contained in Sub-section (3) conformed to all these requirements which a taxing statute should ordinarily provide.

21. For the reasons mentioned above the writ applications are accepted and it is declared that Sub-section (3) of Section 10 of the Act is ultra vires the Articles 14 and 19(1)(f) of the Constitution and, therefore, it is declared illegal. Any liability of tax fixed under the provisions of Sub-section (3) of Section 10 of the Act cannot, therefore, be sustained.

22. The result is that the impugned orders in all these cases imposing penalty and fixing tax liability under subsection (3) of Section 10 of the Act are hereby quashed.

23. In the circumstances -of these cases the parties are left to bear their own costs.