

(1985) 03 GUJ CK 0007
In the Gujarat High Court

Gujarat Video Association and Others	APPELLANT
Vs	
State of Gujarat	RESPONDENT

Date of Decision : 04-03-1985

Acts Referred:

Constitution of India, 1950 — Article 133, 14
Gujarat Cinemas (Regulation of Exhibition by Video) Rules, 1984 — Rule 13, 13(1), 13(2), 19
Gujarat Entertainment Tax (Amendment) Act, 1984 — Section 6A
Gujarat Entertainment Tax Act, 1977 — Section 6A

Citation : (1985) 2 GLR 806

Hon'ble Judges : N.H. Bhatt, J;J.P. Desai, J

Bench : Division Bench

Judgement

N.H. Bhatt, J.—These three petitions by three different sets of petitioners can be conveniently taken up together and disposed of by a common judgment and there is concurrence of the learned Advocates appearing for the respective petitioners and the common Government Pleader appearing for the State of Gujarat. In effect, there is a challenge to the vires of Section 6-A introduced by the State Legislature by enacting the Gujarat Entertainment Tax (Amendment) Act, 1984, which inserted Section 6-A into the provisions of Gujarat Entertainment Tax Act, 1977. There is also challenge to Rules 13 and 19 of the Gujarat Cinema (Regulation of Exhibition by Video) Rules, 1984. The span of challenge will be examined by us hereafter.

2. The petitioner No. 1 of the first of the three petitions is an association of video exhibitors, known as Gujarat Video Association. There are four more individual petitioners also, running such video shows either essentially at video centres or at some hotels. In the second of the three petitions, the proprietors of various hotels, three in number, have come forth with similar grievance. In the third petition, one solitary proprietor individually has come forth with the similar complaints. That is why we have stated that common questions of law arose in these three petitions and they can be conveniently dealt with and disposed of by

a joint treatment.

3. The vires of Section 6A is challenged in these petitions. Section 6A is reproduced below:

6A.(1) There shall be levied and paid to the State Government, a tax on an entertainment by video cassette recorder or video cassette player on television or videoscope calculated at the following rates, namely:

(a) in any place of entertainment other than that mentioned in Clause (b)

(I) within the limits of a local area, the population of which as ascertained at the last preceding census and notified by the State Government in the official gazette after such census is more than 1,00,000, two rupees per seat in such place of entertainment;

(II) within the limits of a local area, the population of which as ascertained at the last preceding census and notified by the State Government in the official gazette after such census is more than 50,000 but not more than 1,00,000, one rupee per seat in such place of entertainment;

(III) in any other area, seventy paise per seat in such place of entertainment.

(b) in any omnibus which is used to the State exclusively as contract carriage having provision for entertainment by video cassette recorder or video cassette player on television or videoscope, two rupees per seat in the omnibus.

(2) For the purpose of levy of tax under this section, it shall be presumed that:

(a) in the case of a place of entertainment falling under Clause (a) of Sub-section (1), a proprietor provides at least three entertainments on every day, and

(b) in the case of any omnibus falling under Clause (b) of Sub-section (1), a proprietor provides at least one entertainment on every day;

unless the proprietor otherwise informs the prescribed officer at such time and in such manner as may be prescribed.

(3)(a) Notwithstanding anything contained in Clause (a) of Sub-section (1), every proprietor to whom any of the provisions of that clause apply shall have an option of payment of tax at the rates specified in Clause (d) to be exercised as provided in Clause (b) within ninety days from the date of the commencement of the Gujarat Entertainments Tax (Amendment) Act, 1984 and any person who becomes such proprietor after that date may exercise such option within sixty days from such date.

(b) A proprietor desiring to exercise an option referred to in Clause (a) shall make an option referred to in Clause (a) shall make an application to the prescribed officer in such form as may be prescribed, to permit him to make in lieu of amount of tax payable by him under Clause (a) of Sub-section (1), payment of tax at the rates specified in Clause (d).

(c) On an application under Clause (b), the prescribed officer may grant such permission and thereupon subject to Clause (e) the payment of tax shall be made accordingly.

(d) where a proprietor has been permitted to pay tax under Clause (c) he shall be liable to pay monthly at the following rates, namely:

In the case of a place of entertainment within the local limits of a local area referred to:

(1) in Sub-clause (1) of Clause (a) of Sub-section (1):

(i) five rupees per seat per day where the proprietor has declared that he holds not more than three entertainments per day; and

(ii) six rupees per seat per day where the proprietor has declared that he holds more than three entertainments per day.

(2) in Sub-clause (II) of Clause (a) of Sub-section (1)

(i) three rupees per seat per day where the proprietor has declared that he holds not more than three entertainments per day; and

(ii) four rupees per seat per day where the proprietor has declared that he holds more than three entertainments per day.

(e) A proprietor who has opted for payment of tax under Clause (a), may at any time but not before the expiry of a period of twelve months, by a notice in such form as may be prescribed, addressed to the prescribed officer, revoke his option from the commencement of any month following that in which the notice is given.

(4) For the purpose of levy of tax under Sub-section (1) every proprietor shall furnish such returns to the prescribed officer in such manner or such period and before such date as may be prescribed.

(5) Save as otherwise provided in Sub-sections (1) to (4), the provisions of this Act (except sections 3, 4 and 6) and the rules made thereunder shall, so far as may be, apply in relation to the tax leviable under Sub-section (1) as they apply in relation to the tax leviable under sections 3 and 4.

Rules 13 and 19 of the Gujarat Cinemas (Regulations of Exhibition by Video) Rules, 1984 are also impugned here. They are also reproduced herein below:

13. Power to refuse Licence: (1) "The Licensing authority, shall have absolute discretion to refuse a licence if the video cinema is likely to cause obstruction, inconvenience, annoyance, risk, danger or damage to the residents or passersby in the vicinity of the cinema.

(2) The licensing authority shall refuse a licence if the distance between the existing permanent, semi-permanent or touring cinema and the video cinema is less than 150 metres.

19. Access to inspecting officers. The licensee shall give free access to the video cinema at all hours to:

(i) the licensing authority or any officer nominated by the licensing authority under the Act and the Rules and for checking that the provisions of the Act and the Rules are being complied with.

(ii) any Police Officer who is required by a general or special order of the licensing authority of the District Superintendent of Police or the Commissioner of Police, as the case may be.

4. The first contention of Mr. Vakharia is that entertainment is a tax that could be levied from a person entertained and not from a person who is affording or extending entertainment. This question has been long back clinched by the Supreme Court in the case of *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment*, . In paragraph 7 of the reported judgment, the very argument which was canvassed before us by Mr. Vakharia was pressed into service before the Supreme Court. Before the Supreme Court Entry 50 of List 2 of Schedule VII of the 1935 Act was the subject matter of decision. Here, we have got corresponding Entry 62 of List 2 of the said Schedule VII of the Constitution is the subject matter. The caption text in the 1935 Government of India Act read : "taxes on luxuries including taxes on entertainments, amusements, etc." The entry before us is taxes on luxuries including taxes on entertainments, amusements, betting and gambling". So the taxes on entertainment are the common feature at any rate. The Supreme Court stated that the fact that tax was levied on the giver of the entertainment would not take it out of the ambit of entry 50 (For us, entry 62). Another argument of Mr. Vakharia that it is a tax imposed for the privilege of carrying on any trade or calling also was raised before the Supreme Court in that case and that too was negatived. We, therefore, do not elaborate this point any further, it being covered by the judgment of the Supreme Court on an almost identical matter.

5. The further challenge to Section 6A was based on the presumption that there will be three shows every day, but we find that Section 6A(2) makes it clear that the presumption that has been referred to above is subject to the proprietor informing the prescribed officer at such time and in such manner as may be prescribed that the particular number of shows are to be held. Even the words of taxation referred to in Section 6A(1) also speak of a presumption, but presumptions are always rebuttable unless they are stated to be conclusively proved or conclusively presumed. We, however, hold, though upholding the right of the State Legislature to provide for a consolidated tax, that the provision that the consolidated tax is to be worked out on the basis of the total number of seats available is illegal. The said provision is ultra vires because it does not take care of a possible situation that on some days in some shows, all the seats may not be occupied by the persons entertained. We are not oblivious of a possibility of the Government adopting a reasonable approach of calculation, but in that case it should appear that they were alive to this contingency of some seats remaining

unoccupied in some days in some shows. Had they made any such provision on the reasonable prognosis, the challenge perhaps would have failed, but indiscriminatingly the number of seats available at a particular place of video exhibition is taken as the absolute criteria without any opportunity to the owner to show to the contrary that is, to show that on certain days in certain shows, seats remained unoccupied. Regarding the number of shows, we have already said, that an opportunity of representation or information is given. Similar should have been in the case of tickets also or at any rate, enough provision, a reasonable one, should have been made in order to cover the possible deficiency. A rigid standard has been taken and we in this connection refer to the judgment of the Bombay High Court in the case of Ramesh Waman Toke and Others Vs. The State of Maharashtra and Others, . We can state nothing more than what the Bombay High Court has done. We hereunder quote the following from the above judgment:

15. ...We have noticed that the basis of calculation of the consolidated sum in the case of a touring cinema is not the number of shows held in a touring cinema, nor is it the number of persons who are admitted to the cinema; it is not even the number of seats actually occupied on a particular day or in a particular month. (Emphasis supplied). The basis for calculating the consolidated sum of money is the gross collection capacity on the maximum number of shows per day which are permitted to be conducted by the owner of a touring cinema. If the permission issued by the prescribed officer permits an owner of a touring cinema to conduct two shows in a day and for 30 days in a month the total gross collection capacity will be calculated on the basis that the owner of the touring cinema has in fact conducted 60 shows in a month. The gross collection capacity is calculated on notional basis of all the seats and accommodation available in every show of every day of the month being occupied. The aggregate of all payments that has to be hypothetically made by persons seeking admission is the gross collection capacity.

16. Similar is the position in the case of video exhibition where lump sum duty is to be paid on the basis that the owner of a video exhibition conducts all the shows which he is permitted to conduct and that for those shows all the seats in the place of entertainment are occupied. In our opinion, this is not a tax on entertainment at all which the State Legislature is entitled to levy under item 62 of the State List. In order that the entertainment duty should amount to a tax on entertainment it should be levied on entertainment which is actually held and not on entertainment, which is theoretically capable of being held. Looking to the provisions which have been examined in details, it is clear to us that the said provisions do not take into account entertainment that is actually held by the owner of the touring cinema or the owner of the video exhibition. The basis on which tax can be validly levied is the fact of entertainment. The taxing event is the entertainment. If there is no entertainment at all, the question of levying entertainment tax in exercise of the legislative powers conferred upon the State Legislature does not arise at all. If the Act purports to levy tax on notional

entertainment, then the exercise of that taxing power must be held to be ultra vires the Constitution. This is exactly what has happened in the instant case.

6. In our case also, the position is somewhat strikingly analogous. The Act purports to levy tax on notional entertainment and, therefore, the exercise of that taxing power has to be held ultra vires the Constitution, i.e. Entry 62 of the List II of Schedule VII of the Constitution. As the above part is not severable from the other part, the whole of Section 6A is to be struck down as ultra vires.

7. It was urged before the Bombay High Court in the above case that what was sought to be levied by way of entertainment duty in Clauses (c) and (d) amended was not entertainment duty at all in the sense that it was not the duty on entertainment. The basis of calculation of the consolidated sum in the case of a touring cinema was not the number of shows held in a touring cinema, nor was it the number of persons who were admitted to the cinema; it is not even the number of seats actually occupied on a particular day or in a particular month, but the basis for calculating the consolidated sum of money was the gross collection capacity calculated on the notional basis of all the seats and accommodation available in every show of every day of the month being occupied. Similar was the position in the case of video exhibition where lump sum duty was to be paid on the basis that the owner of a video exhibition conducted all the shows which he was permitted to conduct and that for those shows all the seats in the place of entertainment were occupied. Looking to the provisions of Clauses (c) and (d) of Section 3(1) of the Bombay Entertainments Duty Act, the Division Bench held that the said provisions did not take into account entertainment that was actually offered by the owner of the touring cinema or the owner of the video exhibition and the Act purported to levy tax on notional entertainment and, therefore, exercising of that taxing power was held to be ultra vires the Constitution. Here, the consolidated amount cannot be quarrelled with because the Supreme Court has made position clear.

8. Rule 19(ii), however, was assailed on the ground that any Police Officer who was required by a general or special order of the licensing authority would have free-access to the video cinema at odd hours. Though Clause (ii) of Rule 19 does not specifically state the purpose for which a Police Officer can be required to have free access to the video-cinema, from the very nature of things, it can be spelt out that a Police Officer could be authorised to enter the precincts of the video cinema only for the purpose of maintaining law and order. As far as Rule 13(1) is concerned, we interpret the words "in the vicinity of the cinema" to mean "in the vicinity of the video-cinema." and not any other cinema. The word "the" is a definite article and when the same cinema is referred to earlier, the subsequent reference to the cinema is the video cinema. Even Mr. Vin, the learned Govt. Pleader, fairly conceded before us that with respect to Rule 13(1), the phrase "in the vicinity of cinema" would and should mean in the vicinity of cinema and with respect to Rule 19(ii) also, he conceded that a Police Officer could be required to have access to the video cinema only for the purpose of the

duties connected with law and order situation.

9. Rule 13(2) provides for refusal of a licence if the distance between the existing permanent, semi-permanent or touring cinema and the video cinema is less than 150 metres. There is no rationale behind this provision. It is a matter of common knowledge that in many cities, including in the City of Ahmedabad, there are permanent cinemas in juxtaposition without any provision of law being violated. There is no reason why such a provision should be made to strike the video-cinemas with. The petitioner of the petition No. 3443 of 1984 has given illustrations of a number of cinema theatres in various cities in Gujarat State where distance between two or more cinemas is less than 150 metres. These facts are not controverted in the affidavit-in-reply. Therefore, it is reasonable to infer, as contended by these petitioners, that this unreasonable restriction has been imposed on the video cinemas in order to oblige those permanent cinemas and Rule 15(2) is required to be set aside as violative of Article 14 of the Constitution of India.

10. In above view of the matter, we allow all the three petitions by declaring Section 6A of the Gujarat Entertainments Tax (Amendment) Act, 1984 and Rule 13(2) of the Gujarat Cinemas (Regulation of Exhibition by Videos) Rules, 1984 as ultra vires to the Constitution of India. Rule is made absolute in all the petitions with costs. At this stage, Mr. Vin seeks orally for a certificate under Article 133 of the Constitution of India. We see that this is not a fit case to be so certified. The prayer is rejected. The operation of this judgment is stayed for a period of six weeks from today in order to enable the State of Gujarat to take recourse in accordance with law, if any.