
(1964) 07 KL CK 0002
In the High Court Of Kerala
Case No : O. P. No. 183 of 1963

Ismail and Co

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 24-07-1964

Acts Referred:

Constitution of India, 1950 — Article 276, 276(2)

Citation : (1965) KLJ 351

Hon'ble Judges : K.K. Mathew, J

Bench : Single Bench

Advocate : M.I. Joseph, for the Appellant; C.S. Venkiteswara Iyer G. Rajagopala Rao for 2nd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Mathew, J.—The petitioner in this case, Ismail & Co., Mattancherry, Cochin, is a partnership concern engaged in the business of exhibiting cinematographic films at Mattancherry in the theatre called "Star Theatre". The petitioner's case is that for the successful exhibition of films in its theatre advertisement about the films exhibited is necessary and that without advertisement it is impossible to carry on its business successfully and that the tax on advertisements which is going to be imposed by the respondent Municipality is really a tax on its calling and cannot exceed the maximum of Rs. 250/- prescribed by Art. 276 (2) of the Constitution. Section 126 of the Kerala Municipalities Act, Act XIV of 1961 hereinafter called the Act, authorises the levy of a tax on advertisements from persons who erect, exhibit, fix, or retain upon or over any land any advertisement calculated at such rates and in such manner and subject to such exemptions as the Council may decide with approval of the Government. The relevant portion of Section 126 is as follows:

Every person who erects, exhibits, fixes or retains upon or over any land, building, wall, boarding or structure any advertisement or who displays any advertisement to public view in any manner whatsoever in any place, whether

public or private, shall pay on every advertisement which is so erected, exhibited, fixed, retained or displayed to public view a tax calculated at such rates and in such manner and subject to such exemptions as the council may, with the approval" of the Government, by resolution determine...

2. The Government of Kerala have notified the minima and maxima of the rates of tax leviable on advertisements erected, exhibited, fixed, retained or displayed u/s 126. Ext. P. 1 is a copy of that notification. The Municipal Council, Mattancherry, by its resolution No. 4 resolved to levy tax on advertisements within the Municipality under Sections 97 and 126 of the Act with effect from 1-10-1961 at the rates mentioned in the resolution. Ext. P. 2 is the copy of that resolution. The petitioner protested to the Municipality against the resolution to levy the tax on the advertisements when it saw Ext. P. 2 resolution, but the protest was of no avail, and therefore the petitioner has filed this petition to quash Ext. P.2 resolution and for prohibiting the Municipality from levying the tax on advertisements and for declaring Section 126 invalid.

The petitioner has challenged the competency of the State Legislature to enact Section 126 of the Act, but there is no substance in that challenge. Entry No. 55 in List II in the Seventh Schedule reads as follows:

Taxes on advertisements other than advertisements published in the newspapers.

Under entry No. 55 it is open to the State Legislature to pass a law imposing a tax on advertisements. Therefore Section 126, which authorises the Municipality to levy a tax on advertisements is perfectly valid.

3. The further question for consideration is whether the petitioner could be made liable to pay in any year by way of tax on advertisements a sum exceeding Rs. 250/-. It was argued for the petitioner that although the tax purports to be one on advertisements it is really a tax on its calling under entry No. 60 in List II of the Seventh Schedule, and therefore the limit prescribed by Art. 276 (2) of the Constitution cannot be exceeded. In support of the contention that the tax is a tax on the calling of the petitioner, the petitioner has relied on certain rulings of the Indian High Courts-In *Kantilal v Palitara Municipality* (A. I. R. 1955 Saurashtra 90) it was said:

The true test for determining whether a particular tax is a tax on "calling" referred to in Art. 276 of the tax on "entertainments" under item 62 of the State List is to ascertain the incidence of the tax. If the incidence falls on the person because he is engaged in the business of providing the entertainment for profit, it is a tax on his calling; but if the incidence of the tax falls on the. particular entertainment irrespective of whether the person providing the entertainment follows that calling or not, then it is a tax on the entertainment and falls within item 62 of the State List and as such will not be hit by Art. 276. If for instance the tax is to be paid on a cinema show irrespective of whether it is given by a professional exhibitor or by one following a different calling e.g., by a charitable society to raise funds for a charity, it is obvious that the tax can only be regarded

as a tax on entertainment and not a tax on calling, for what is taxed is not the calling of the person providing the entertainment but the entertainment itself.

It was ultimately held in that case that the notification imposing the theatre tax on cinema shows at a certain rate per show was not hit by Art. 276 (2) as the tax was a tax on entertainments under entry No. 62 of List II and not a tax on the calling of the person providing the entertainments. This ruling would not, in my opinion, support the contention of the petitioner. If at all it shows anything it shows that the tax in that case was a tax on entertainments and not a tax on the calling of the person who provided the entertainments.

4. In *Dhannalal v State of Rajasthan* (A. I. R. 1964 Rajasthan 106) it was held that merely because the proprietor or exhibitor of a cinema is called upon to pay the tax, it does not acquire the character of a tax on his calling or trade. In that case the additional entertainment tax levied by Section 6A of the Rajasthan Entertainment Tax Act, was held to be a tax on entertainments and not a tax on the calling or trade of the proprietor or exhibitor and that Art. 276 (2) of the Constitution was therefore not attracted. I am unable to see how this ruling helps the petitioner. In *S. S. Enterprises v State* (A. I. R. 1956 Punjab 203) the question was whether the tax on cinematograph shows was a tax on entertainment and fell within entry No. 62 in List II of the Seventh Schedule. The learned Judges held:

...it is quite clear that the tax falls under Entry 62 which deals with "Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling". This is clearly a tax on entertainment because it is the exhibition of a cinematograph film which is being taxed. Mr. Grover argued that the tax payable by the proprietor and that a person who exhibits cinematograph films or in other words is the proprietor for the purposes of this Act follows the calling of a cinematograph exhibitor.

Thus it is the profession of exhibiting films which is being taxed. Now it is quite clear that the person who pays a tax follows some calling or the other but for that reason alone the tax does not become a tax on his profession or calling. Otherwise the sales tax would be a tax on the profession of shop-keeping and any kind of tax would be a tax on the profession which the taxed individual follows. This is clearly a tax on entertainments and the mere fact that the person who pays the tax follows the vocation of providing entertainment for public does not make it a tax which falls under Entry 60

In *Ramesh Chandra v Union of India* (A. I. R. 1959 H. M. P. 17) the petitioner before the High Court was the owner of a cinema concern engaged in exhibiting talkie films for the entertainment of the public, admission being regulated by tickets. On 19--7--1955 by means of a notification, purporting to be one u/s 62 of the Punjab Municipal Act, the Municipality imposed a show tax of Rs. 2/- per show on the petitioner. It was held that the tax amounted to a tax on the profession of the petitioner, and therefore the total amount payable as show tax

could not exceed Rs. 250/- under Art. 276(2). I am not inclined to follow the reasoning of that decision. The main reason given in the judgment is that the tax was inseparable from the petitioner's profession which was that of exhibiting films to the public. The fact that the petitioner in that case had to pay the tax every time a show is given even if the cinema hall is empty was relied on as a circumstance to show that the tax was on the profession or calling of the petitioner. I do not think, this is a circumstance which is determinative as to the character of the tax. I think that the ruling does not lay down the correct test to decide the nature and incidence of a tax.

5. I think the tax in this case is a tax on the advertisements themselves. In this connection the ruling of the Supreme Court in *Western India Theatres v Cantonment Board* (A. I. R. 1959 S. C. 582 at 585) is relevant to show the nature and incidence of a tax of this character.

In view of this well established rule of interpretation, there can be no reason to construe the words "taxes on luxuries or entertainments or amusements" in entry 60 as having a restricted meaning so as to confine the operation of the law to be made thereunder only to taxes on persons receiving the luxuries, entertainments, or amusements. The entry contemplates luxuries, entertainments, and amusements as objects on which the tax is to be imposed. If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments, or amusements and both may, with equal propriety, be made amenable to the tax. It is true that economists regard an entertainment tax as a tax on expenditures and, indeed, when the tax is imposed on the receiver of the entertainment, it does become a tax on expenditure, but there is no warrant for holding the entry 60 contemplates only a tax on moneys spent on luxuries, entertainments or amusements. The entry, as we have said, contemplates a law with respect to these matters regarded as objects and a law which imposes tax on the act of entertaining is within the entry whether it falls on the giver or the receiver of that entertainment. Nor is the impugned tax a tax imposed for the privilege of carrying on any trade or calling. It is a tax imposed on every show, that is to say, on every instance of the exercise of the particular trade, calling or employment. If there is no show, there is no tax. A lawyer has to pay a tax or fee to take out a licence irrespective of whether or not he actually practices. That tax is a tax for the privilege of having the right to exercise the profession if and when the person taking out the licence chooses to do so. The impugned tax is a tax on the act of entertainment regulating in a show.

Applying this reasoning here, I think the tax in this case is not a tax on the profession or calling of the petitioner. The fact that the petitioner may not exhibit a particular film after having advertised it, would not make the tax on the advertisements a tax on its calling or trade. Although advertisement is necessary for the successful carrying on of the petitioner's business, it does not follow that a tax on advertisement is a tax on the calling or trade of the petitioner.

6. The soundness of the petitioner's contention can be tested in this way: there can be an advertisement which has no connection at all with a person's calling, profession or trade. A tax on such an advertisement would certainly have nothing to do with the profession or calling of the person making the advertisement and will not be considered as a tax on profession, trade or calling. The fact that the advertisement in this case is in connection with the trade, calling or profession of the petitioner would not alter the character of the tax and make it one on the trade, calling or profession of the petitioner.

7. The only other contention raised by the petitioner's counsel was that no notice was given to the petitioner by the Municipality before fixing the rates of tax on advertisements. I do not think that the contention that notice should have been given to the petitioner before the Municipality passed the resolution fixing the rates of tax for the advertisements is entitled to any weight. The fixation of the rates of tax on advertisements by the Municipal Council is legislative and not adjudicative in character and notice and hearing were unnecessary. I dismiss the writ Petition. No costs.