(2010) 04 AHC CK 0231

In the Allahabad High Court

Case No : Writ Petition No. 3910 of 2004

Krishna Kumar Gupta APPELLANT

Vs

State of U.P. & Ors. RESPONDENT

Date of Decision : 29-04-2010

Acts Referred:

Uttar Pradesh Entertainments and Betting Tax Act, 1979 — Section 12

Citation : (2010) 04 AHC CK 0231

Hon'ble Judges : Rakesh Sharma, J

Final Decision : Allowed

Judgement

1. Heard Sri Akhilesh Kalra, learned counsel for the petitioner and learned Standing Counsel for the respondent Nos. 1 to 5. Notices have already been served on respondent No.6.

2. Under challenge are order dated 29th July, 2004 passed by State of U.P., respondent No.l, the order/recovery citation dated 24th May, 2004 passed by Additional District Magistrate (Finance & Revenue), Agra and the order dated 6th August, 2001, the order of assessment of Entertainment Tax by the revenue authorities. The petitioner has sought that the recovery of Entertainment Tax for the period when his Cinema Hall situate in the city of Farrukhabad, U.P. had remain closed due to attachment and sealing by the Bank of Baroda branch at Agra. No entertainment tax be recovered from the petitioner for the said period. Due to statutory closure for the recovery of the banks loan, the Cinema Hall could not be run by the petitioner for a long period. It is still lying closed. No films were exhibited in the hall as such there was no question of recovery of Entertainment Tax from the petitioner. The Entertainment Tax ought not to have been levied.

3. As per learned counsel for the petitioner, the State Government had issued a Government Order on 18.7.1989 encouraging construction of modern permanent Cinema Halls in the areas where population is less than one lakh and made provisions for providing "grantinaid", exempting the Cinema Hall to pay

Entertainment Tax. The new halls were constructed under the scheme as spelt out in Clause 4 of the aforesaid Government Order. The Cinema Hall owner, beneficiary was required to give an undertaking that he would run the Cinema Hall for a minimum period of 5 years and in violation of this condition the District Magistrate may recover the "grantinaid" as arrears of land revenue. The petitioner took benefit of the "grantinaid" scheme, he established a Cinema Hall i.e. "Archana Talkies" at a small town Samsabad in District Farrukhabad. He had completed all the necessary formalities and the Cinema Hall was brought in the "grantinaid" scheme and the said benefits were''to be accorded to film exhibitors.

4. Since the petitioner was a small entrepreneur , he had taken a loan tor construction of the Cinema Hall from Bank of Baroda, Lawyers Colony branch Agra. The Cinema Hall was running peacefully in Samsabad town, however, the petitioner''s family undergone several unforeseen problems .and its financial condition deteriorated due to losses caused in running the Cinema. Samsabad being a small town was having less cinegoers. In later years because of onslaught of CD players, VCD players and DVD players, pirated videos, cable TV adverse effect was caused on Cinema Halls in Uttar Pradesh especially in small towns like Samsabad. Things had deteriorated. Due to losses the petitioner could not repay the loan amount which was to the tune of Rs.17.60/ lakhs. The creditor, Bank of Baroda filed regular suit No. 176/1994 for recovery of their loan. The Cinema Hall had also faced technical problems in running the Cinema Hall. There was technical fault in cinema projector, machines, the pictures could not be shown, the electricity bills inflated and Cinema Hall ran into losses since no films were being exhibited. The petitioner had to close down, the Cinema Hall facing immense difficulties.

5. The respondent No.5 District Magistrate on 26.10.1994 issued a notice to the petitioner to exhibit films or else "grantinaid" would be recovered. The petitioner submitted a detailed reply to the notice of 11.11.1984 indicating therein the above compelling reasons, difficulties, technical fault in the machines, projector due to which the Cinema Hall had to be closed down.

6. On the other hand, the Bank of Baroda which had already filed a suit for recovery of the loan obtained an attachment and sealing order from the Court on 24.10.1994. Since it was a judicial order of attachment and sealing of the property i.e. Cinema Hall, the petitioner could not run the Cinema Hall under these compelling circumstances. He could not show pictures and fulfil the condition No.7 of the agreement.

7. The District Magistrate/Entertainment Tax authorities were not satisfied with the reply submitted by the petitioner, they did not appreciate the hard circumstances, immense difficulties being faced by the petitioner. The District Entertainment Tax Officer, Farrukhabad had issued a recovery citation on 16.8.1995 for realization of Rs.12,50,288/from the petitioner for violating the condition No.7 of the Government Order dated 18.7.1989. Being aggrieved the petitioner filed a Writ Petition No.30122 of 1995 in this Hon''ble Court seeking

relief against the recovery proceedings. However, the petition was dismissed as withdrawn with the liberty to the petitioner to seek remedy by filing a representation to the State Government. The petitioner submitted a detailed representation to the State Government highlighting the aforementioned facts and circumstances which compelled the petitioner to close down the Cinema Hall. The State Government took note of the difficulties faced by the petitioner. It disposed of the representation on 23.10.2002 with the observations that if the petitioner undertakes to run the Cinema Hall for a period of five years then the recovery may not be made. The petitioner approached the Bank of Baroda and the District Entertainment Tax authorities/District Magistral to help him in reopening the Cinema Hall. The Bank of Baroda did not help the petitioner in reestablishing him. It was adamant in recovering the amount. The petitioner had failed in his efforts to get the attachment and sealing of the Cinema Hall withdrawn. The attachment order passed by the Civil Judge in the aforementioned suit was not recalled or set aside. The petitioner despite bona fide and honest efforts made by him impersuading upon the said authorities to open his Cinema Hall but he miserably failed. On failure he submitted another representation to the State Government and the district authorities. The State Government has been pleased to stay the recovery proceedings for one month. However, the district authorities again issued a recovery order of citation on 24.5.2004 on the basis of some order dated 6.8.2001. This order was not made available to the petitioner. He again preferred a statutory appeal to the State Government highlighting his difficulties. The petitioner''s appeal was rejected on 29.7.2004 by writing an order in telegraphic language that the appeal was not maintainable against the recovery order/citation. The petitioner acting bona fidely and honestly submitted a proposal before Bank of Baroda for "One Time Settlement" (O.T.S.). This proposal was under active consideration. The petitioner had undertaken that as soon as the attachment order dated 14.12.1994 is set aside or withdrawn and one time settlement is accepted by the Bank of Baroda, he would run the Cinema Hall for the remaining prescribed period of five years. The petitioner had no other alternative remedy available to him except seeking redressal of his grievances by approaching this Court.

8. The petitioner has putforth some legal submissions. The petitioner has submitted that under Section 12(1) of the Entertainment Tax Act (hereinafter referred to as the Act) the assessment of tax could be levied only after affording reasonable opportunity of hearing to the proprietor of the Cinema Hall. In the present case, no such opportunity was afforded to the petitioner before passing the recovery orders issued on 6th August, 2001 and 21st May, 2004. As per Section 34 the recovery of tax could be made as arrears of land revenue as such the petitioner''s appeal was maintainable under Section 12(2) of the Act and the State Government ought to have dealt with the appeal filed by the petitioner. This has not been done and the petitioner''s appeal had been rejected by passing a nonreasoned and non speaking order. The appellate authority has not taken into account the compelling circumstances and reasons under which the Cinema

Hall had to be closed as there was an attachment and sealing order. The Cinema Hall was closed under the attachment order passed by the Civil Court. In these circumstances, it was impossible for the petitioner to run his Cinema Hall. He would have fallen in contempt of Court for defiance of the Court''s order, if the District Magistrate''s directions for exhibiting the films were to be carried out. There was legal impediment in running the Cinema Hall to fulfil condition No.7. The petitioner has given an undertaking in para 30 of the petition that he is always prepared to run the Cinema Hall provided the attachment and seal is broken and one time settlement is arrived between the banker and the petitioner.

9. Sri Akhilesh Kalra, learned counsel for the petitioner has placed reliance on two judgments of Hon''ble Apex Court in support of his submissions that this Court can grant relief to the petitioner on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract was frustrated by the intrusion or occurrence of an unexceptional event or change of circumstances which was not contemplated by the parties at the date of the contract. There would in such a case, by no question of finding out an implied term agreed to by the parties embodying a provision for discharge because the parties did not think about the matter at all nor could possibly have any intention regarding when such a situation or change of circumstances which is so fundamental as to be regarded by law as striking at the root of the contract as a whole occurs. It is Court which can pronounce the contract to be frustrated and at an end. "The doctrine of frustration" would also apply in the present case as has been embodied in Sections 32 and 56 of the Contract Act.

10. Learned Standing Counsel has opposed the writ petition and led the Court to various submissions made in the counter affidavit. He has drawn attention of the Court to the terms and conditions of agreement, relevant provisions of the Government order dated 18th July, 1989 in which the terms and conditions regarding allowing "grantinaid" are spelt out. It is a condition precedent that a cinema exhibitor must exhibit films for a period of 5 years. The petitioner has failed to fulfil the terms and conditions of the agreement, executed between the parties in the light of the Government Order dated 18.7.1989. The petitioner has not run the said Cinema Hall and misused the entertainment tax collected by the cinegoers. The petitioner has already been given interim relief by the State Government vide Government Order dated 23rd October, 2002. The State Government had provided in this order that the petitioner would start running his Cinema Hall within three months and on not doing so, the recovery order citation was issued against the petitioner. The petitioner had not paid the entertainment tax and he was not entitled for "grantinaid". The petitioner has already taken the benefit of Government Order dated 18.7.1989 but with mala fide intention he took shelter of technical fault in the cinema machines, he failed to run the Cinema Hall during the stipulated period indicated in the notice. The petitioner''s representation has already been considered by passing a reasoned and speaking order. It was the duty of the petitioner to have honoured the terms and conditions spelt out in the written agreement executed between him and the

entertainment tax authorities. His appeal has rightly been rejected as the same was not maintainable against the recovery orders. He has displayed before this Court the provisions contained in Section 12(2) of the Entertainment Tax Act that such appeals seeking nonpayment of entertainment tax are not maintainable. The appellate authority has ample jurisdiction to dismiss the appeal summarily. No reasons have to be recorded in such orders as these appeals are not dealt with as judgments of the Court. The petitioner has failed to show his bona fide in running the Cinema Hall.

11. I have heard learned counsel for the parties and perused the impugned order and the materials on record.

12. The petitioner had established a Cinema Hall in a small town Samsabad, District Farrukhabad, U.P., taking the benefit of the Government Order dated 18.7.1989. The State Government some times in the 1980''s was encouraging constructions of permanent Cinema Halls in small towns where population was less than one lakh. The State Government made a specific provision giving benefit of "grantinaid" to such cinema exhibitors in small towns. Clause 2 of the aforesaid scheme was to the extent of 100% equivalent to the entertainment tax in 1st, 2nd and 3rd year upto 75% equivalent to entertainment tax. Clause 7 of the said Government Order provides that after completion of the period i.e. 3 years available for grantinaid as provided in clause 2 the beneficiary would give undertaking for running the Cinema Hall for 5 years and if there is violation of the condition the District Magistrate would have a right to recover the grantinaid as arrears of Land Revenue.

13. It is admitted to the parties that the petitioner after establishing the Cinema Hall had continuously run it for a period of three years. The Cinema Hall was constructed by taking a loan of Rs.17.60/ lakhs from the Bank of Baroda branch at Agra. It has also come on record that due to technical fault in the projector, machines installed in the Cinema Hall, the petitioner was unable to run the Cinema Hall. The record reveals that he had given written intimation to the entertainment tax authorities about such events. A notice was given to the petitioner by the concerned Entertainment Tax Officer and he had responded to the same by submitting a detailed reply on 11.11.1994. The details were given in this reply as to what had compelled the petitioner in not running the Cinema Hall. While the petitioner was awaiting decision an order was passed by Civil Judge on 14.12.1994 in a recovery suit preferred by Bank of Baroda seeking attachment and ceiling of the Cinema Hall of the petitioner. It is admitted to the parties and is apparent from the judicial order passed by the Civil Judge, Farrukhabad, a competent civil court that the Cinema Hall was in fact attached and sealed under orders of the said court. Due to attachment and sealing of the Cinema Hall, entire property, the petitioner could not exhibit films, run the Cinema Hall. It is clear from the record that the petitioner had apprised the district authorities and Entertainment Tax authorities regarding closure of the Cinema Hall demonstrating before them as to why the Cinema Hall is not being

run.

14. The Court has also taken note of the fact that the petitioner has sought one time settlement from the Bank of Baroda and he has apprised the State Government as well as the district authorities regarding pendency of his application seeking one time settlement.

15. It has also been brought on record that the State Government in its first order dated 23.10.2002 had admitted that the petitioner, Cinema Hall owner had in fact exhibited the films for a period of three years and had closed down the Cinema Hall on 8.6.1994. The case was covered by the Cinema Hall Encouragement policy of State Government dated 21st July, 1989. The Cinema Hall was closed on 18.6.1994 on the ground that the projector and machinery broken down, some technical defect had occurred in the machines. In addition to this the State Government has taken note of the fact that the Civil Judge, Farrukhabad has passed judicial order for attaching and sealing of Cinema Hall on 14.12.1994. As far as the bona fide and intention of the petitioner is concerned he had submitted before the District Magistrate, Farrukhabad and the Entertainment Tax authorities that he was prepared to run the Cinema Hall provided that the attachment and sealing order is vacated by the court and Bank of Baroda loans granted him interim relief of one time settlement (OTS). He had already persuaded the bank authorities that he intended to repay the loan and offered one time settlement. The relevant portion of the order dated 29.10.2002 passed by the State Government is quoted below:

(Vernacular matter omitted. ....Ed.)

16. It is clear from the above conclusions of the State Government spelt out in the Government Order dated 19.10.2002 that the Cinema Hall was closed due to compelling circumstances. The petitioner could not carry out the terms and conditions of the agreement because of unforeseen circumstances, subsequent circumstances.

17. It is also evident from the record that the opportunity of hearing was not afforded to the petitioner by the recovery officer as provided under Section 12(1) of the Entertainment Tax Act. The Assessing Authority or Recovering Authority ought to have taken into account the compelling circumstances like existence of judicial order of attachment and sealing and the inaction on the part of Bank of Baroda in not dealing with the request of the petitioner in arriving at a one time settlement. The State Government has hurriedly rejected the appeal of the petitioner on 29th July, 2004 without application of mind. It has not appreciated that the same circumstances under which the petitioner was going on 29.10.2002 were still prevailing when he had filed his appeal in the year 2004. The State Government ought to have passed reasoned and speaking order after giving opportunity of hearing to the petitioner. The Court has taken note of the undertaking given by the petitioner in para 30 of the writ petition to run the Cinema Hall for the desired period.

18. Here is a case where the Cinema Hall owner has run the Cinema Hall continuously for three years, a substantial period. However, he could not run the Cinema Hall for another two years to be fully eligible for the "grantinaid". The petitioner himself was not responsible for this situation. Because of nonrepayment of loan the recovery suit was filed against him and the Cinema Hall itself was attached and sealed. In these circumstances, how could the entertainment tax authorities could expect the Cinema Hall owner to exhibit the films for entertainment of cinegoers/ public of Samsabad town, collect money, tax from them and deposit the same in public exchequer. The Cinema Hall owner has been forced to close down its Cinema Hall because of the continuance of the attachment of sealing order and refusal of the bank in not taking action on the application of the petitioner seeking one time settlement providing him oxygen or ventilator. The Cinema Hall could not exhibit films earn and repay the loan to the banker and deposit entertainment tax to the State Government. As far as bona fide and integrity of the petitioner, nothing has been placed on record by the respondents that he had deliberately and wilfully closed down the Cinema Hall or converted into a shopping mall or godown or the premises was being let out, used for commercial activities as has been done in other cities. The datas have been placed before the Court that more than 50% of the Cinema Hall in Uttar Pradesh have been close down due to Government/ public apathy. The availability of CD, VCD, DVD players, cable network system, channels showing cinema has really affected single screen Cinema Hall owners. The films exhibitors have already been compelled to windup their business. This can be seen in the metro cities, A, B, C, D category of cities and towns in India where large number of Cinema Halls, famous Cinema Halls have been closed down. Viewing cinema is the principal source of entertainment to the common man, lower and middle class, Indians general masses.

19. There is substantial force in the submissions of Sri Akhilesh Kalra, learned counsel for the petitioner that .in the present case doctrine of frustration can be applied. Here is a case that there was a frustration of the alleged contract in the aforementioned facts and circumstances. The deposition of entertainment tax was dependent upon the exhibition of films and because of unforeseen circumstances like issuance of a judicial order of attachment and sealing of the Cinema Hall and inaction on the part of the bank in arriving at a one time settlement the petitioner is in fact ruined and is unable to discharge his burden as spelt out in the agreement. The State Government ought to have appreciated the difficulties faced by the petitioner and have applied its mind to the facts and circumstances of the case. The impugned order is a nonreasoned and nonspeaking order and is unsustainable. The petitioner''s case does find strength from the aforementioned judgments in the case of Naihati Jute Mills Ltd. v. Khyaliram Jagannath reported in (1968) 1 SCR 821 and AIR 1968 SC 522 (three J''s Bench) placed before this Court.

20. In view of the above discussion, the writ petition is allowed. The assessment order passed by the Entertainment Tax Officer is quashed. The order dated 29th

July, 2004 passed by the State of U.P. is quashed as is a nonreasoned and nonspeaking order. It is further provided that the order passed by the Additional District Magistrate (Finance & Revenue) Agra and the recovery citation issued against the petitioner is also quashed. The petitioner shall not be compelled to pay the Entertainment Tax and recovery charges in furtherance of the abovementioned impugned orders. All the necessary consequences shall follow.

21. It is made clear that the petitioner shall be bound by the undertaking given by him on affidavit in para 30 of the writ petition which is quoted below:

"30. That the petitioner undertakes that as soon as the order of attachment dated 14th December, 1994 passed in Regular Suit No.476 of 1994 is set aside or withdrawn and one time settlement is made from Bank of Baroda, the petitioner would run the Cinema

Hall and complete the prescribed period of five year; i.e the condition No. 7 of the Government Order dated 18th July, 1989, in these circumstances, the recovery of Entertainment Tax, initiated by the order dated 24th May, 2004, deserves to be stayed till that time.

