

(1987) 01 OHC CK 0016
In the Orissa High Court
Case No : O.J.C. No. 1176 of 1978

Kumud Chandra Singh Deo

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 22-01-1987

Acts Referred:

Orissa Entertainment Tax Act, 1946 — Section 4, 7A

Citation : (1987) 63 CLT 488

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

Bench : Division Bench

Advocate : A.K. Roy, S.K. Padhi and A. Mohanty, for the Appellant; Standing Counsel (C.T.) for Opp. Party No. 2 and 3 and Addl. Standing Counsel for Opp. Party No. 1 and 4, for the Respondent

Judgement

H.L. Agrawal, C.J.—This batch of four writ applications were heard together as they however round a common question of law and the facts are almost identical. They are therefore, being disposed of by this judgment.

2. The question of law involved in the writ applications is as to whether in the absence of a machinery provided under the Orissa Entertainment Tax Act, 1946 (hereinafter referred to as "the Act") for deciding a dispute with respect to the quantum of the imposition, the demands raised by the authorities can be sustained.

3. The Petitioners of all the writ applications are owners of the cinema halls situated in the town of Rourkela in the district of Sundargarh. The act was earlier administered through the Revenue Department under the control of the Board of Revenue. In 1963, the administration of the Act was transferred to the Commercial Tax Department under the Administrative control of the Finance Department. The State Government promulgated Orissa Ordinance No. 8 of 1971 which was published in the Orissa Gazette (Extraordinary) No. 1753 dated 29-10-1971 by which Section 7-A was inserted in the Act which came into force with effect from 1-1-1972. By the said provision a surcharge was levied on

payments for admission. The Ordinance was replaced by Orissa Act 3 of 1972. The language of Section 7-A continued to be the same excepting that a proviso was added to Sub-section (2). Thus, from 1-1-1972 three taxes were payable in respect of payment for admission to cinematograph exhibitions, namely, (i) tax u/s 4, (ii) extra tax under the 2nd proviso to Section 4 and, (iii) surcharge u/s 7-A.

4. The Petitioner were fixing adhesive stamps on the tickets for admission as per the approved rates fixed by the Commercial Tax Officer.

By a Communication dated 4-8-1974, the Commercial Tax Officer (O. P. No. 3) informed the owners of all the cinema houses within his Jurisdiction that surcharge would be imposed on them under the Act.

5. By the letters dated 18-11-1974, the Commercial Tax Officer (O. P. No. 2) intimated the Petitioners of O.J.C. Nos. 1176/78, 1378/80 and 1380/80. The Additional Commercial Tax Officer by his letter dated 12-1-1977 informed the Petitioners to deposit various amounts for different years beginning from 1972-73 in O.J.C. Nos. 1178/78, 1378/80 and 1380/80 and from 1974-75 in O.J.C. No. 1379/80 upto the period 1976-77, alleging that there had been short calculations of entertainment tax of varying amounts mentioned in the notices annexed to each of the writ applications (Annexure-7 series in O.J.C. Nos. 1176/78 and 1380/80, Annexure-5 section in O.J.C. No. 1378/80 and Annexure-11 and 12 in O.J.C. No. 1379/80).

It is not necessary to give the details of the demands as the matter is being disposed of on a short question of law.

6. The demands were contested by the Association of the Petitioners, namely, the Eastern India Motion Pictures Association, Cuttack Branch, but without result. Various other facts have been stated in the writ petitions, and in three of them, namely, O.J.C. Nos. 1176/78, 1378 and 1379/1980 challenge has also been made to the imposition of some show-tax. Learned Counsel appearing for the Petitioners, in view of the recent decision of this Court in *M/s. Durga Cinema v. State of Orissa* and Ors. O.J.C. No. 1129 of 1978, disposed of on 23-9-1986, however, did not agitate that question. .

7. Counter affidavit has been filed by opposite party Nos. 1 to 3 only in O.J.C. No. 1380/80, but the facts on which the argument was advanced are not disputed, It is also undisputed that until the addition of Rule 16-C by the Gazette Notification on 16-3-1977 in the Orissa Entertainment Tax Rules, 1947 (for short the Rules), the Commercial Tax Officer was not authorised to hold any inquiry if the return submitted by any proprietor of a cinema hall to him was incorrect or incomplete after issuing a notice to the proprietor calling upon him to produce the accounts.

8. On 16-3-1977 a rule as Rule 16-C prescribing a procedure for assessment was added for the first time in the Rules. It reads as follows:

" (I). If no return is submitted by the proprietor as required under R. 16-A within

the time specified therein or if the return submitted by him appears to the Commercial Tax Officer to be incorrect he shall, after making such inquiry as he considers necessary assess the tax due under the Act to the best of his judgment.

Provided that before taking action under this rule the Commercial Tax Officer shall issue a notice to the proprietor caning upon him to produce his accounts at a time and place to be specified in the notice and to prove the correctness and completeness of the return where the same has been submitted or to prove that he is not liable to submit any such return and shall also allow him a reasonable opportunity of being heard."

9. The main argument that was advanced by Mr. Roy was that in view of the fact that there was no machinery provided under the Act or the Rules which could go into the dispute raised by the owners of the cinema halls, the assessment orders resulting in the demands on the ground of short collection of entertainment tax for different periods were ultra vires and liable to be quashed.

10. A Bench of this Court in case of Ravi Talkies v. State of Orissa and Ors. ILR 1973 Cutt 8, accepted this argument and has taken the view that dispute may arise as to the quantum of the tax deposited by the proprietor as in these cases. There must, there fore, be some authority designated either under the Act or under the Rules who should have powers to decide such dispute. Unfortunately, such a provision is absent both in the Act and the Rules. Neither the Act nor the Rules have vested the power in any authority to assess the tax.

The assessment orders in question were accordingly quashed on the ground that the Commercial Tax Officer had no jurisdiction to pass the impugned orders of assessment. The other question, namely, the violation of the principles of natural justice was therefore, thought not necessary for determination.

11. I have already stated the periods for which the demands have been raised for the alleged short-fall in payment of the entertainment tax. It is not disputed that the amounts in question have been determined only with reference to the reports of the Auditors of the office of the Accountant General. It was submitted that there has been no application of mind by the assessing authority on certain observations made in Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, , that the Audit Department should not in any way substitute itself for the revenue authorities in the performance of their statutory duties. The submission made in this behalf is so obvious that it does not call for any detailed discussion, particularly in view of the observations made in the above case.

12. In all fairness, Mr. Roy also brought to our notice a later decision of this Court in M/s. Capital Talkies v. Assistant Commercial Tax Officer 1977 (2) C. W. R. 546, where an application was filed for quashing the demand under the Act as well as the penalty for non-payment of the outstanding demand, and one of the points raised was that in the absence of any machinery under the Act for assessment, the demand itself was without basis and did not have the sanction

of law. Ravi Talkies" case², (supra) was also referred to in paragraph 5 of this report, but in spite of that, it was observed:

In Section 4, there is a scheme of self-assessment and in the event of failure to pay the tax due under the Act, penalty is exigible u/s 14 of the Act.

The above observation no doubt waters down the ratio decidendi in Ravi Talkies case², but with great respect to the learned Judges constituting the subsequent Bench. I may say that if they did not agree with the views of the earlier Bench decision of this Court in Ravi Talkies case², the matter should have been referred to a larger Bench. The rule of precedents, however, has been that if there is any conflict between an earlier view and a later view of the High Court then the earlier view has to prevail. We are, however, informed that the State of Orissa has taken the Ravi Talkies case², to the Supreme Court and the same is shown in the hearing list there. We accordingly kept the judgment reserved for quite sometime awaiting disposal of the matter in the Supreme Court. But learning further that the matter may take some more time, we felt inclined to deliver our judgment.

13. A similar view was taken by a Bench of the Patna High Court in the case of Mangalchand Ramaehandra v. State of Bihar 1971 Bihar L. R. 1038. There a dispute arose regarding the assessment of market fees under the provisions of the Bihar Agricultural Produce Markets Act and no machinery was provided for resolving the dispute between the dealer and the Market Committee with respect to the quantum of market fee. It was held that on that account the order of the Market Committee was unsustainable in law.

It is also not in controversy that the assessment orders for the periods 1975-76 in all the four cases leading to the demand notices for the period upto 1975-76 were passed prior to insertion of Rule 16-C in the Rules, With respect to the demand notices regarding the short collection for the subsequent period, i. .e. 1976-77, although the demand was raised after the lacuna of the absence of the machinery was filed, it was submitted that with respect to the demands raised for this period as well as for the previous periods, no notice was issued by the opposite party and thus the demand notices were also vitiated on account of the violation of the principles of natural justice. The Supreme Court in the celebrated case of Swadeshi Cotton Mills Vs. Union of India (UOI), , observed:

"The audi alteram partem rule is a very flexible, malleable and adaptable concept of natural justice. To adjust and harmonise the need for speed and obligation to act fairly, it can be modified and the measure of its application cut short in reasonable proportion to the exigencies of the situation. Thus, in the ultimate analysis, the question (as to what extent and in what measure) this rule of fair hearing with apply at the pre-decisional stage will depend upon the degree of urgency, if any, evident from the facts and circumstances of the particular case."

The principles of audi alteram partem has been given a new dimension (if I may say so) by the Supreme Court in the case which is commonly known as the Olga

Tellis and Others Vs. Bombay Municipal Corporation and Others, , where it was observed:

"... But even the Law of Torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is reasonable and appropriate to the occasion and, what is even more important, the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him...."

14. The demands in all the four cases are, therefore, vitiated on the ground of violation of the principles of natural justice also and on that account, have got to be quashed and remitted back to the assessing authority for fresh assessment. But I would make myself bold to hold that the demands raised for the period prior to the insertion of Rule 16-C in the Orissa Entertainment Tax Rules must be altogether quashed on the ground that opposite party No. 3 had no jurisdiction to pass the impugned orders of assessment and raise the demands in view of the principle decided in Ravi Talkies" case³. This would clinch the issue and allow the matter to rest at that stage for the period in question upto 16-3-1977. Inference on the ground of violation of the principles of natural justice and remanding the matter to the assessing authority would entail institution of fresh assessment proceedings after following the principles of natural justice, but this would be confined only to the period when the assessment machinery was supplied in the Rules, and on the facts of the present cases would be confined to the period subsequent to 1976-77 only.

I would, however, make it clear that in case the Supreme Court upset the view of this Court in Ravi Talkies case³, then the rights of the parties would be governed by the ratio of the decision of the Supreme Court with respect to the period prior to the amendment also and if any remedy be available to the Department at that time in law, it would be open to it to proceed accordingly.

15. Learned Counsel for the Department had hardly any answer to the contentions raised on behalf of the Petitioners and the challenge thrown to the validity of the assessment save and except his placing reliance upon the case of M/s. Capital Talkies² (supra). I have already discussed above about this case.

16. As already stated, Mr. Roy did not press the demand relating to the show tax. Therefore, the demands made in O.J.C. Nos. 1176/78, 1378/80 and 1379/80 in that respect would stand.

17. Mr. S. K. Padhi who appeared for the Petitioner in O.J.C. No. 1176 of 1978 adopted the argument of Mr. Roy and did not advance any other argument.

18. The result of the foregoing discussions is that all these writ applications must succeed and the demand notices are quashed save and except those relating to the show tax as stated above. The assessment made and the demands raised in all the cases for the period upto 16-3-1977 are hereby quashed and the demands made for the period subsequent to that are also quashed but for that

period the matter is remitted back to I opposite party No. 3 for passing a fresh order after following the principles of natural justice and the procedure indicated in Rule 16-C of the Rules.

On the facts and in the circumstances of the case, I shall not burden the opposite parties with any costs.

L. Rath, J.

19. I agree.