

(2004) 06 BOM CK 0107

In the Bombay High Court

Case No : Writ Petition No. 1521 of 1986

Mahandrakumar Jain

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 17-06-2004

Acts Referred:

Bombay Entertainments Duty Act, 1923 — Section 4B, 4B(2), 4B(3)

Citation : (2004) 6 BomCR 702 : (2004) 3 MhLj 474

Hon'ble Judges : B.R. Gavai, J

Bench : Single Bench

Advocate : M.G. Bhangde, for the Appellant; N.S. Jog, A.G.P., for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—By way of present petition, the petitioner impugns the order passed by the Collector and District Magistrate, Chandrapur dated 27-6-1986 thereby ordering that the petitioner should deposit in the Government Treasury the evaded tax and surcharge of Rs. 67,349=75 plus penalty of Rs. 1,01,024=62 ps, totalling to Rs. 1,68,374=37 before 15-7-1986 and further ordering that on failure to do so, the amount will be recovered as per the provisions of Land Revenue Code.

2. The facts in brief out of which the present petition arises are as under :--That the petitioner is a proprietor of one Mahavir Touring Talkies, situated at Warora, Tq. Warora, District Chandrapur. The petitioner was served with show-cause notice dated 9-7-1986 under the provisions of Section 4B of the Bombay Entertainment Duty Act, 1923 (hereinafter to be referred to as "the Act") for "best judgment". The show-cause notice states that on various earlier occasions the petitioner's touring talkies was raided by various authorities and it was found that the petitioner was using duplicate tickets and certain persons were watching the show without having tickets. It is further stated that despite giving various opportunities and various notices, the petitioner had failed to compound the matter and as such, he was directed to show-cause as to why suitable orders

should not be passed to recover the entertainment tax as per the best judgment.

3. Vide reply dated 19-7-1985 the petitioner replied to the said show-cause notice and denied the charges. The petitioner submitted that the petitioner was not evading the taxes and that the petitioner had not committed any defaults as alleged in the show-cause notice. The petitioner further submitted in the reply that the net income shown in the said show-cause notice was not correct. In fact, the net income of the petitioner was much more.

4. The respondent No. 2 herein vide order dated 27-6-1986 rejected the contentions raised by the petitioner and held that the petitioner had evaded the taxes and directed him to pay the difference of taxes and penalty as aforesaid. In the order, the respondent No. 2 rejected the contention of the petitioner regarding the net income of the petitioner being more than as alleged in the show-cause notice. The respondent No. 2 in the order held that if the returns are to be accepted, then it could be assumed that the petitioner was running the business in loss and that no prudent businessman would run the business in losses. On the basis of these assumptions, he came to a finding that the returns were incorrect and, therefore, held that the petitioner had evaded the tax. Being aggrieved by the said order, the petitioner approached this Court by way of present petition.

5. Shri Bhangde, learned Counsel for petitioner, has raised three-fold challenges to assail the impugned order. They are :--

I. That the Collector cannot resort to "best judgment" directly. That before resorting to the best judgment, he has to first give notice that the returns are incorrect. Thereafter give an opportunity to the assessee to show that the returns are correct and only after that if he comes to a finding that returns are incorrect, he can resort to "best judgment".

II. That the penal provisions could be invoked only when the returns are not filed by an assessee and since the petitioner had admittedly filed returns, the penalty could not have been imposed upon the petitioner.

III. The calculation of the net income per ticket is not correct and as such, there is an error apparent on the face of record.

6. Smt. Jog, the learned Assistant Government Pleader, supported the order. She submits that it can be seen from the show-cause notice that the petitioner was habitual in not paying the taxes or running the shows in illegal manner. She submits that from the show-cause notice as well as the order itself it can be seen that the petitioner was served with various show-cause notices and as such, no prejudice is caused to the petitioner even if it is assumed that the show-cause notice is not given to him under Sub-section (2) of Section 4B. She submits that it can be seen from material on record that the petitioner is a tax evader and as such, not entitled to equitable relief.

7. After hearing the learned Counsel for the parties and the perusal of the

record, I find that the petition deserves to be allowed on the first ground itself and, therefore, it is not necessary to refer to the rival contentions made by the parties in respect of the other two grounds.

8. Section 4B of the said Act reads as under:--

"Section 4B(1) If the State Government is satisfied that the returns required to be furnished by or under this Act in respect of any entertainment in respect of which the entertainment duty is payable u/s 3 are correct and complete, it shall assess the amount of entertainments duty due on the basis of such returns.

(2) If the State Government is not satisfied that the returns furnished by a proprietor of any entertainment are correct and complete, and the State Government think it necessary to require the presence of the proprietor, or the production of further evidence, the State Government shall serve on such proprietor a notice in the prescribed manner requiring him on a date and at a place to be therein specified either to attend and produce or to cause to be produced all evidence on which such proprietor relies in support of his returns, or to produce such evidence, as is specified in the notice.

On the date specified in the notice, or as soon as may be thereafter, the State Government shall, after considering all the evidence which may be produced, assess the amount of entertainments duty due from the proprietor.

(3) If the proprietor fails to comply with the terms of the notice, the State Government shall assess, to the best of its judgment the amount of entertainments duty due from him after considering the amount of duty paid by the proprietor during the period of one year immediately before the submission of the unsatisfactory return, the monthly expenses for running the place of entertainment and any other relevant factors required to be considered for arriving at the amount of such duty.

(4) If a proprietor does not furnish returns in respect of any entertainment referred to in Sub-section (1) within the time prescribed in that behalf, the State Government shall, after giving the proprietor a reasonable opportunity of being heard and after considering the amount of duty paid by the proprietor during the period of one year immediately before the non-submission of the returns, the monthly expenses for running the place of entertainment and any other relevant factors required to be considered in that behalf, assess to the best of the judgment, the entertainments duty due from him, and may also direct that the proprietor shall pay, by way of penalty, in addition to the amount of duty so assessed a sum not exceeding one and a half times that amount."

9. From the perusal of the scheme of Section 4B, it is thus clear that firstly a proprietor is required to file his returns to the State Government and if the State Government is satisfied that the returns which are required to be furnished under the Act in respect of any entertainment in respect of which the entertainment duty is payable, then the State Government is required to assess the amount of

the entertainment duty on the basis of such returns. When the State Government is satisfied that the returns furnished by a proprietor are incorrect and incomplete and the State Government thinks it necessary to require the presence of the proprietor or the production of further evidence, the State Government is required to serve a notice to such a proprietor in the prescribed manner requiring him on a date and at a place to be specified therein either to attend and produce or to cause to be produced all evidence on which such proprietor relies in support of the return, as is specified in the notice. The State Government thereafter on the dates specified or on some other date, after considering all the evidence which is produced assess the amount of the entertainment duty due from the proprietor.

10. Thereafter, if the proprietor fails to comply with the terms of the notice, the State Government can take recourse to the best judgment, the amount of entertainment duty due from such a proprietor. Perusal of Sub-section (4) would also show that only on failure to furnish returns in respect of any entertainment referred to in Sub-section (1) within the time prescribed in that behalf, the State Government can take a penal action.

11. Thus, the scheme of the Act is very clear. Firstly, the assessment is to be done on the basis of the returns furnished by the proprietor if the State Government is satisfied that the returns are satisfactory. If the State Government is not satisfied with the returns, then it is required to give notice in writing in the prescribed form, requiring the proprietor to attend and to produce all the evidence on which the proprietor relies in support of his return or to produce such evidence as is specified in the notice. On production of such evidence, the State Government is required to assess the amount of entertainment duty due from the proprietor. Only on failure to comply with the notice as contemplated under Sub-section (2) of Section 4B, the State Government can assess the duty taking recourse to the "best judgment". Thus, it can be seen that the scheme provides that before a recourse could be taken to "best judgment", it is necessary that an opportunity is given to the proprietor to produce all the evidence on which he relies or such other evidence as is specified in the notice and give an opportunity of hearing to the proprietor. Only in case the proprietor fails to comply with the notice, it is permissible to take recourse to the assessment by "best judgment".

12. Admittedly, in the present case, the notice under Sub-section (2) of Section 4B has not been given to the petitioner. Though the learned A.G.P. has vehemently submitted that from the show-cause notice itself it can be seen that the petitioner was given ample opportunity to comply with the statutory provisions, he has failed to do so. However, I am unable to accept the said contention. The perusal of the show-cause notice itself shows that it is a notice for "best judgment" and not the one as contemplated under Sub-section (2) of Section 4B.

13. It is a settled principle of law that when the law requires a particular thing to

be done in a particular manner, it should be done in that manner alone or not done at all. Though there are various judgments of the Apex Court to this effect, I will refer to some of the recent judgments of the Apex Court in support of this proposition. They are : Babu Verghese and Others Vs. Bar Council of Kerala and Others, and Dhananjaya Reddy v. State of Kerala reported in (2001) 4 SCC 9.

14. The perusal of the record would clearly show that the respondent No. 2 has directly jumped to "best judgment" principle under Sub-section (3) of Section 4B without complying with the requirement under Sub-section (2) of Section 4B of the said Act. In my considered view, therefore, the impugned order is in violation of the scheme contemplated u/s 4B of the said Act. Even otherwise, it can be seen that under Sub-section (2), a proprietor has a valuable right of producing the evidence and of being heard, so that he can satisfy an authority that he has not evaded the taxes. In my view, failure to comply with the requirement of Sub-section (2) of Section 4B of the said Act has vitiated the entire proceedings. The impugned order, therefore, cannot stand the scrutiny of law. The impugned order is, therefore, quashed and set aside. The petition stands allowed.

15. Rule is accordingly made absolute in the aforesaid terms with no order as to costs.