
(1996) 04 AHC CK 0006
In the Allahabad High Court
Case No : C.M.W.P. No. 805 of 1995

Natraj Chhabigrih

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 17-04-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 131, 14, 143, 245, 246
Uttar Pradesh Entertainments and Betting Tax Act, 1979 — Section 3A, 3A(1)

Citation : (1996) 04 AHC CK 0006

Hon'ble Judges : M.C. Agarwal, J; B.M. Lal, J

Bench : Division Bench

Advocate : S.N. Singh and R.N. Singh, for the Appellant; Rakesh Dwivedi and A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

B.M. Lal, J.—At the very outset it is necessary to mention as to how this petition came to be listed before this Bench.

2. It so happened that this petition was earlier listed before this Bench and the argument advanced by the learned Counsel for the Petitioner was that this case was covered by a Division Bench decision of this Court rendered in Civil Misc. Writ Petition No. 1190 of 1994 Kamla Palace v. State of U.P. and Ors. whereby a bunch of petitions was disposed of on 10.7.1995 and impugned proviso to Sub-section (1) of Section 3A of the U.P. Entertainment and Betting Tax Act, 1979 (for short the Act) and the Government orders issued thereunder were declared ultra vires.

3. This Bench (comprising Hon'ble B. M. Lal and Hon'ble M. C. Agarwal, JJ) by its judgment dated 17.8.95 (since reported in 1995 (3) AWC 1664) arrived at the conclusion that the decision rendered in Civil Misc. Writ Petition No. 1190 of 1994, Kamla Palace v. State of U.P. and Ors. dated 10.7.1995 required reconsideration by a larger Bench, upon which Hon'ble the Chief Justice by order

dated 25.8.1995 constituted a Full Bench comprising Hon''ble V.N. Khare, Hon''ble Om Prakash and Hon''ble Rafat Alam, JJ. and subsequently reconstituted the Full Bench by order dated 16.1.1996 comprising Hon''ble A. P. Misra, Hon''ble Om Prakash and Hon''ble Rafat Alam, JJ.

4. The Full Bench by its judgment dated 22.3.96 after considering the matter at length decided that the law laid down in the case of Kamla Palace (supra) was not correctly laid down and held that the impugned proviso to Section 3A of the Act is a valid piece of legislation and sent back the case to this Bench for disposal on merits. Thus, this case was listed before this Bench.

5. Sri R. N. Singh, learned senior counsel appeared for the Petitioner and Sri Rakesh Dwivedi, learned Additional Advocate General, appeared for the Respondents.

6. The relief sought by this petition is to quash the amendment made in proviso to Section 3A of the Act by which the Petitioner is restricted from charging Rs. 1 per ticket towards maintenance charge which shall be utilised for maintenance and upkeep of the cinema halls of the Petitioner. The further relief sought is to issue mandamus directing the Respondents to permit the Petitioner to charge Rs. 1 per ticket from the cinema-goers which shall be utilised for maintenance of the cinema hall and its premises.

7. As regards the reliefs sought by the Petitioner in this petition, since the Full Bench of this Court ruled in this case as referred to above that the proviso to Section 3A of the Act is a valid piece of legislation, hence none of the reliefs sought in this petition can be granted on any ground whatsoever and the petition has virtually become infructuous and is liable to be dismissed as such.

8. However, giving reference of the observations of Full Bench in this case at page 42 of the judgment, Sri. R. N. Singh argued with full vehemence that the decision of Full Bench would not set aside the judgment of Division Bench in Kamla Palace (supra), therefore, despite the decision of reference Court, the judgment in Kamla Palace (supra) would operate as res judicata in this case, in view of Explanation 6 to Section 11, CPC Sri Singh also submitted that the reference Court expressed its opinion that these questions would not be gone into by it, rather would be finally adjudicated by the Division Bench concerned, i.e., this Bench, therefore, the same be decided by this Bench. Sri Singh further submitted that by the judgment of Kamla Palace (supra), bunch of petitions were allowed and reliefs were granted to a large number of Petitioners, therefore, refusal of similar relief to the similarly situated present Petitioner would be discriminatory and violative of Article 14 of the Constitution.

9. As regards the question of res judicata raised by Sri Singh, it may be made clear that the provisions of CPC have no application to the writ proceedings. However, the principles have full application. The principles of res Judicata are based on the need of giving finality to judicial decisions. The provisions of Section 11 of CPC are not exhaustive. The principle of res judicata is embodied in

Section 11 in relation to suits but even where Section 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality in litigation.

10. In such matters, while applying the principle of *res judicata*, a very important aspect to be taken into account is the effect of change of law. In order to attract the doctrine of *res Judicata*, the law applicable to the subject-matter at both the times, i.e., at the time of previous decision and also at the time of subsequent decision, must be the same. A decision on an issue of law will not be *res Judicata* in a subsequent proceeding between the same parties, where the law has, since the earlier decision, been altered by a competent authority or the Court. If there is a change of law by amendment of the statute by the Legislature, the previous decision between the parties will not operate as *res judicata*.

Similarly, when the Supreme Court or High Court interprets a statute in a manner different from the previous interpretation, it amounts to change of law. See *Alimiya Mahmadiya and Another Vs. Sayed Mohomed Baquir Eledroos Valde Saude Jaffer El-Edroos and Another*, and *Lila Watt Datta v. Karol Bagh Union Club* AIR 1981 NOC 211 and *Agra Electric Supply Co. Ltd. Vs. Sri Alladdin and Others*, .

11. Besides this, recently in *U.P. Rashtriya Chini Mill Adhikari Parishad, Lucknow v. State of U.P.* and Ors. JT 1995 (5) SC 475, Apex Court ruled that the Jurisprudence governing court functioning in this country makes a judgment, delivered by a Judge or a Bench comprising of more than one Judges, the judgment of the Court and not of the person holding the judicial office. The judgment holds good till it is set aside or its correctness is doubted by the higher court. Once the correctness of a judgment is doubted by the higher court, the judgment no longer remains the law of the land and is treated as non-est.

12. In this context, it may also be mentioned that, every legislation is presumed to be prospective unless it is made by the Legislature itself to be retrospective. Whereas every decision is presumed to be retrospective, unless it is made by the Court itself to be prospective.

13. In the instant case, since correctness of the law laid down by *Kamla Palace* (supra) is doubted by the Full Bench of this Court, the judgment no longer remains the law of the land and is treated as non-est in view of *Chini Mills* case (supra), therefore, in our considered opinion, although the judgment of *Kamla Palace* (supra) has not been set aside, yet it stands rendered non-est, therefore, would not operate as *res judicata*, and the effect of the law laid down by the Full Bench would be retrospective.

14. In *Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy*, from Bombay High Court, Apex Court ruled that if by an erroneous interpretation of the statute, the Court holds that it has no jurisdiction, the question would not operate as *res judicata*.

15. Learned Counsel for the Petitioner placed much reliance on Apex Court decision in *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.), Andheri and Others*, , where their lordships of Apex Court have ruled that in view of Section 11, Explanation IV, it could not be said that the earlier judgment would not operate as *res judicata* as one of the grounds taken in the subsequent petition was conspicuous by its absence in the earlier petition. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence.

16. There are no two opinions about the ratio laid down by their lordships of Apex Court but since the ratio laid down has no application to the facts of instant case, the Petitioner is not entitled to get any benefit of that case. In the instant case, on account of change of law, as stated above, the judgment in *Kamla Palace* (supra) would not operate as *res judicata*.

17. Apart from above, their lordships of Apex Court themselves have made it clear in the case of *Construction Co. (supra)* that Section 11, in view of Explanation VI, applies to public interest litigation as well but it must be proved that the previous litigation was the public interest litigation not by way of a private grievance. It has to be a bona fide litigation in respect of a right which is common and agitated in common with others. The onus of proving the want of bona fides in respect of previous litigation is on the party seeking to avoid the decision.

18. In the instant case, the matter of *Kamla Palace* (supra) is admittedly not a public interest litigation, for this reason also the ratio laid down in *Construction Co. (supra)* is not applicable to the facts of instant case.

19. Thus, for the reasons given above, the cases *Narayana Prabhu Venkateswara Prabhu Vs. Narayana Prabhu Krishna Prabhu (Dead) by L. Rs.*, ; *Amritsagar Gupta and Others Vs. Sudesh Beharilal and Others*, , relied upon by the learned Counsel for the Petitioner are of no avail for present Petitioner on the facts of instant case.

20. Now coming to the next argument advanced by Sri R. N. Singh that refusal of same relief to present Petitioner which has been granted to the Petitioners in *Kamla Palace* (supra) would be violative of Article 14 of the Constitution, we may mention that the equal protection clause is a founding faith of the Constitution and it is indeed a pillar on which rests the foundation of our democratic set up, therefore, it must not be subjected to narrow pedantic lexicography and while dealing with the equality clause of the Constitution under Article 14, the doctrine of reasonable classification cannot be lost sight of, which mandates that the requirement of equality before law does not mean that every law must have universal application for all persons who are not by nature, attainment of

circumstances in the same position. What Article 14 prohibits is, class legislation and not reasonable classification. In order to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differentia must have a rational relation to the object sought to be achieved by the statute, i.e., there must be a nexus between the basis of classification and the object of the statute. Thus the equality clause ensures that the likes must be treated alike. Therefore, applying this test to the facts and circumstances of instant case, it is to be noted that the Petitioners in Kamla Palace case (supra) were granted the relief by the Division Bench of this Court after declaring the proviso to Section 3A of the Act ultra vires whereas now the said law laid down by the said Division Bench stands no longer a good law in view of the law laid down by the Full Bench of this Court which has declared the proviso to Section 3A of the Act as a valid piece of legislation. Therefore, on account of change of law, Petitioners of Kamla Palace (supra) and the present Petitioner cannot be said to be similarly circumstanced or belonging to the same class and, therefore, the question of violation of Article 14 of the Constitution does not arise at all in the circumstances of instant case, and if even in such circumstances, the argument of learned Counsel for the Petitioner is accepted, it would amount to blocking the growth of law and the development of the law would stand stopped. Therefore, in our opinion, the argument advanced by the learned Counsel for the Petitioner cannot be accepted.

21. Sri R. N. Singh, learned Counsel for the Petitioner giving reference of the matter of Belgaum Gardeners Cooperative Production Supply and Sale Society Ltd. Vs. State of Karnataka, , contended that subsequent legislation making the decision of Tribunal ineffective was not approved by the Apex Court. We may point out that it is always open to the Legislature under our Constitutional Scheme within certain limits, to amend the provisions of the Act retrospectively and to change the basis on which a decision is given but it is not open for the Legislature to say that the judgment shall be deemed to be ineffective or the interpretation of the law given by the Court shall be otherwise than as declared by the Court. However, the facts and circumstances of Cauvery Matter (supra) were different and, therefore, are distinguishable. It may be made clear that the opinion given by Supreme Court on a Presidential Reference under Article 143 is advisory in nature. In Cauvery matter, Cauvery Water Disputes Tribunal, under Inter-State Water Disputes Act, 1956, enacted under Article 262 of the Constitution, directed Karnataka State by an interim order to release water to Tamil Nadu State. Governor of Karnataka State promulgated Karnataka Cauvery Basin Irrigation Protection Ordinance, 1991 nullifying the Tribunal's order. On reference, a Constitution Bench of the Apex Court held that under Article 262 of the Constitution of India, the powers exercisable by the Supreme Court under Article 131 of the Constitution were vested in the Tribunal, therefore, the orders of Tribunal were binding on the disputant States but the Ordinance interfered

with the adjudicatory process of the Tribunal which amounted to interference with Judicial power of the State and thus it was declared to be unconstitutional. This ratio is not applicable to the facts and circumstances of present case stated above as the decision by Full Bench has rendered the decision of Division Bench in Kamla Palace (supra) as non-est.

22. It is relevant to mention that notwithstanding the decision of the High Court or Supreme Court, the Legislature in exercise of its plenary powers conferred on it by virtue of Articles 245 and 246 of the Constitution may render a Judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. In *I.N. Saksena v. State of Madhya Pradesh* AIR 1976 SC 2250, the point in issue has been dealt with wherein it is ruled by the Constitution Bench of Apex Court that the distinction between a "legislative" act and a "Judicial" act is well-known. Adjudication of the rights of the parties according to law enacted by the Legislature is a Judicial function and it is for the legislature to lay down the law, prescribing norms of conduct which will govern parties and transactions and to require the court to give effect to that law. The rendering ineffective of judgments or orders of competent courts and tribunals by changing their basis by legislative enactment is a well-known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power. But the only care to be taken by the Legislature is that Legislature cannot by a bare declaration without any thing more, directly over-rule, reverse or override a Judicial decision at any time in exercise of Its legislative powers. However, by validating or legislating the law retrospectively, the Legislature can render a judicial decision ineffective. Similarly in the instant case, if the Full Bench, i.e.. higher Bench of this Court, overruled the decision of Division Bench in Kamla Palace case (supra), the law stands changed and, therefore, the question of violation of Article 14 of the Constitution does not arise at all.

23. Before parting with the case, it appears necessary to clarify the position that Sri R. N. Singh, learned senior counsel for the Petitioner contended with utmost emphasis that since the judgment of Division Bench in Kamla Palace case (supra) has not been set aside rather simply correctness of law laid down by it has been doubted by the Full Bench, hence that judgment still holds good and retains its binding effect on the parties and, therefore, it would operate as *res Judicata*.

24. With respect, assuming that unless and until the Division Bench judgment is set aside by the appellate Court, it would have binding effect on the parties being judgment in personam, we are unable to accept this position in view of the dictum laid down by their lordships of Apex Court in *Chini Mills* case (supra) where speaking for the Court his Lordships Hon^{ble} Mr. Justice Kuldeep Singh ruled, "Once the correctness of a judgment is doubted by the higher court, the judgment no longer remains the law of the land and is treated as non-est" Here

we may make it further clear that the expression "higher court" used in the underlined quotation may not be confused with appellate Court. The context in which the expression "higher court" has been used by the Apex Court in Chini Mills case (supra) was that the correctness of a Division Bench judgment was doubted by the Full Bench of this Court, and not by the appellate Court. Therefore, a Division Bench is higher court than a single Judge Bench and a Full Bench is higher court than the Division Bench of the same Court. The contention of Sri Singh is accordingly repelled.

25. In view of the premises of aforesaid, we are of the considered opinion that in view of the Full Bench decision of this Court in this case, present Petitioner is not entitled to any of the reliefs sought in this petition, neither on the ground of res Judicata nor on the ground of Article 14 of the Constitution nor on any other ground, therefore, the writ petition falls and is dismissed.