(2012) 05 AHC CK 0269

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Tax No. 167 of 2011

O.P. Sharma APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 29-05-2012

Acts Referred:

Constitution of India, 1950 — Article 51A
Uttar Pradesh Entertainments And Betting Tax Act, 1979 — Section 11, 11(1), 11(3), 2(1), 2(g)

Citation : (2012) 7 ADJ 635

Hon'ble Judges : Prakash Krishna, J;Ashok Bhushan, J

Bench : Division Bench

Advocate : Ashok Kumar, Praveen Kumar and Vinod Kumar Sharma, for the Appellant;

Judgement

Prakash Krishna, J.—The petitioner Shri O.P. Sharma who is Magician has by means of the present writ petition challenged the orders dated 28.1.2011 and 29.1.2011 whereby the District Magistrate, Gorakhpur has directed the petitioner to pay a sum of Rs. 2,71,800.00 towards Entertainment Tax and Rs. 20,000/-, as penalty. The petitioner applied for and was granted permission subject to certain conditions to perform magic shows for a period 6.1.2011 to 28.2.2011 from 9.00 a.m. to 9.00 p.m. at ''Shree Talkies, Mohaddipur without payment of any entertainment tax. Armed with the aforesaid permission, the petitioner started giving his performance of magic show at Shree Talkies, Mohaddipur. The further allegation is that there was some dispute between the petitioner and the District officials with regard to issuance of free passes to the viewers. Resultantly, the District Magistrate issued a notice dated 22.1.2011 with the allegations that the petitioner is carrying on dance shows instead of showing magic to the public and was required to show-cause as to why the Entertainment Tax under the provision of U.P. Entertainment & Betting Tax Act 1979, may not be levied.

2. The cause was shown which was not found satisfactory by the District Magistrate who ultimately passed the impugned order demanding the payment of

Entertainment Tax and also levied the penalty. Feeling aggrieved, the present petition has been filed. A counter-affidavit which is a short document has been filed by the respondents through Shri Mahendra Singh, Assistant Entertainment Commissioner.

3. In the counter-affidavit, the averments made in the writ petition have been denied by making general allegations. It has been stated that in the magic show, live dance programme was also shown. In the advertisement poster pasted in different parts of the District, dancers in dancing pose have been shown which clearly belies the case of the petitioner, vide paragraph 17 of the counter-affidavit. In paragraph 23 of the counter-affidavit an usual plea of availability of alternative remedy under the said Act has been set out.

4. The petitioner has reiterated his stand taken in the writ petition, in the rejoinder-affidavit.

5. Heard Shri Ashok Kumar, learned counsel for the petitioner and Shri A.C. Tripathi, learned standing counsel for the respondents.

6. The learned counsel for the petitioner submits that there is general exemption from payment of Entertainment Tax on magic shows. The State Government has issued exemption notification in exercise of its power u/s 11 of the Act, exempting the magic shows from payment of entertainment tax. One such notification was issued on 11.10.1995 vide (Annexure 3-A to the writ petition). In pursuance thereof, the petitioner applied for and was granted permission to hold magic shows subject to the conditions specified in the order passed by the Additional District Magistrate, Kanpur Nagar. None of the conditions having been violated, there was no question of realisation of any Entertainment Tax from the petitioner on such shows. In the show-cause notice dated 22.1.2011, the only material allegation against the petitioner is that on two occasions, after interval, two dance''s were performed on the pre recorded tune, by the dancers. The submission is that the period of one magic show is of two and half hours. In the said slot, a magician has to give many programmes of magic. Background music tune is an essential part of such performances. One or two dance performances on pre recorded tune for a total period of 5 to 7 minutes would not change the nature and character of magic show in any manner. Elaborating the argument, it was submitted that even classical and non-classical dances have been exempted from payment of Entertainment Tax by the State Government by issuing notification u/s 11 of the Act, from payment of Entertainment Tax. With regard to the question of availability of alternative remedy, it was submitted that the petitioner is challenging the very essential jurisdictional facts to levy Entertainment Tax and as such, the availability of alternative remedy has no bar to entertain the writ petition. Reliance was placed on certain decisions of Apex Court such as State of H.P. and Others Vs. Gujarat Ambuja Cement Ltd. and Another, and State of Kerala and Others Vs. Kurian Abraham Pvt. Ltd. and Another, .

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/op-sharma-appellant-hash-state-of-…

7. In reply, the learned standing counsel submits that in view of the fact that dances were performed during the course of magic show, the petitioner is liable to pay entertainment tax. The exemption was granted to exhibit magic shows and not to exhibit shows of dances. In the guise of magic show, the petitioner got performed dances on the stage on the pre recorded hit cinema films songs and as such has violated the conditions of the exemption from entertainment tax. He also raised the plea relating to availability of alternative remedy by way of an appeal to the State Government.

8. Considered the respective submissions of the learned counsel for the parties and also pursued the record.

9. On the facts of the present case, we are not impressed by the submissions of the learned standing counsel to relegate the petitioner to the statutory remedy by way of appeal to the State Government. The said remedy is not an adequate and efficacious on the facts of the present case as the petitioner was permitted to perform magic shows for a limited period i.e. 6.1.2011 to 28.2.2011. Even otherwise also, the jurisdictional facts to initiate and levy Entertainment Tax being absent as found in the later part of this judgment, the interest of justice will not be served by dismissing the writ petition on the ground of availability of alternative remedy. The objection raised by the learned standing counsel is therefore, rejected.

10. The U.P. Entertainments and Betting Tax Act 1979 has been enacted to consolidate and amend the law relating to tax on entertainments, amusements and on certain forms of betting. In the State of U.P. Entertainment has been defined in the definition clause namely Section 2(g). It includes any exhibition, performance, amusement, game, sport or race (including horse race) to which persons are admitted for payment and in the case of cinematograph exhibitions, includes exhibition of news-reels, documentaries, cartoons, advertisement shorts or slides, whether before or during the exhibition of a feature film or separately.

11. Section 3 of the Act is charging section. It levies entertainment tax on admission to entertainment. Payment for admission has been defined by giving an inclusive definition in Section 2(1) of the Act. The levy of Entertainment Tax is on all ''payment for admission'' to any entertainment. The taxable event therefore, is payment for admission to any entertainment.

12. Section 11 of the Act empowers State Government to grant exemption from Entertainment Tax for promotion of peace, international good will, arts, sports or other public interest, by general or special order. Under sub-section (4), the District Magistrate has been authorised to grant exemption if he is satisfied that the entire gross proceeds of an entertainment are to be devoted to philanthropic, religious or charitable purposes, without any deduction whatsoever on account of the expenses of the entertainment, he may subject to the rules made under the Act, grant exemption to such entertainment from payment of tax under this Act on such terms and conditions as he may deem fit to impose.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/op-sharma-appellant-hash-state-of-…

13. It is not in dispute that element of entertainment is therefore in the magic shows also, that is the reason the State Government has issued notification granting exemption from payment of entertainment tax to such shows. Proviso to Section 11 provides that the State Government may cancel such exemption if it is satisfied that the exemption was obtained through fraud or misrepresentation, or that the proprietor of such entertainment has failed to comply with any of the terms or conditions imposed or directions issued in this behalf.

14. A copy of the permission granted to the petitioner has been annexed as Annexure-1 to the writ petition. It contains as many as 12 conditions. It is not the case of the respondents that any of the conditions subject to which the permission to perform magic show was granted, has been violated by the petitioner. The only ground raised in the show-cause notice dated 22.1.2011 is that the District Magistrate (Entertainment Tax Department) has received information that while performing the magic show, together with the magic show, two filmy dances were also performed. One such instance dated 18.1.2011 in the show of 6.00 p.m. has been mentioned therein. It was found in the said show that after interval, two dances of Hindi feature films namely ''Slum Dog Millionaire'' and ''Dabang'' were performed with pre recorded music by the dancers. Further in the newspaper, namely ''Amarujala Compact'' dated 20.1.2011, a news item under the heading ''Munni Ka Jadu'' was published which shows that the alleged magic show is not a magic show but it is an ordinary entertainment programme and the entertainment Tax @ 25% of the total collection was proposed to be levied. In reply, it was stated that the magic show is being performed after taking the permission from the District Magistrate office and magic show is totally exempt from entertainment tax by the notification dated 11.10.1995. Magic and only magic show was performed.

15. The question which we are required to adjudicate upon is whether the allegations made in the show-cause notice are sufficient to establish that the petitioner performed the ordinary entertainment programme instead of magic show.

16. The facts are not much in dispute, we take the facts as are founded in the show-cause notice.

17. A magic is nothing but a trick. Dictionary meaning of magic is 1. the secret power of appearing to make impossible things happen by saying special words or doing special things. 2. The art of doing tricks that seems impossible in order to entertain people. 3. A special quality or ability that seems too wonderful to be real.

18. Adj. 1. having or using special powers to make impossible things happen or seem to happen: a magic spell/charm/potion/trick. There is no magic formula for passing exams - only hard work. 2. (informal) having a special quality that makes sth seem wonderful: It was a magic moment when the two sisters were reunited after 30 years. She has a magic touch with the children and they do

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/op-sharma-appellant-hash-state-of-…

everything she asks. Trust is the magic ingredient in our relationship. 3. [not before noun] (BrE, informal) very good or enjoyable: ''what was the trip like?'' Magic!

19. Magic (sometimes referred to as stage magic to distinguish it from paranormal or ritual magic) is a performing art that entertains audiences by staging tricks or creating illusions of seemingly impossible or supernatural feats using natural means. These feats are called magic tricks, effects, or illusions.

20. Performances we would now recognize as conjuring have probably been practiced throughout history. The same level of ingenuity that was used to produce famous ancient deceptions such as the Trojan Horse would also have been used for entertainment, or at least for cheating in money games, since time immemorial.

21. Various steps are taken by a Magician to distract the attention of public from one point and to get focused attention of all the viewers to a particular point so that he may successfully perform his trick. It is not in issue that duration of a show of magic is generally in between two and half hours to three hours with interval. During a show, a Magician is required to present various items of magic one after the other. He has to prepare himself and his assistants while performing one item and while switching to the next one. A swift action is required to shift to the next item, after the completion of earlier one, so that the continuity is maintained. During the intervening period, music etc. is played. In all such performances light music plays an important role. The department has not raised any objection with regard to the music played during such performances. The only objection is that during the show of about two and half hours to three hours, two live dances were performed on the stage by the dancers. The respondents thus are treating the magic show, a show of general entertainment. The issue is whether such understanding of the department is legally justified or not. Its answer depends upon the viewers'' point of view. Whether they made the payment for admission to such show to enjoy magic show or to enjoy the two dances which were performed. In our considered opinion, answer is very obvious. The viewers paid for admission to the show to enjoy magic show and not to enjoy the dances which were of 5 to 7 minutes in all. A man of ordinary prudence will not go to such show just to see the live performance of two dances on filmy songs, not even performed by an extra ordinary or a renowned performer. The dances were just ordinary dances, performed by the ordinary artist. The yardstick for judging the reaction on the viewers of the show has to be of prudent, reasonable person.

22. The department has not placed any evidence to show that the viewers coming to the show, made the payments for admission to see dances performed there.

23. By no stretch of imagination, it can be said that in a show of two and half hours to three hours duration, if two dances of 5 to 7 minutes are performed, the

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/op-sharma-appellant-hash-state-of-…

show would become dance show instead of magic show. The allegation in this regard is in paragraph 17 of the Counter-affidavit wherein it has been stated that from the inspection of magic show it was found that live dance was shown during magic show. An advertisement poster pasted in different parts of the district shows the dancers in dancing pose which clearly proves the case against the petitioner. The said paragraph 17 of the counter-affidavit is reproduced below:

17. That the contents of paragraph No. 29 of the writ petition are incorrect hence denied. From the inspection of magic show it was found that live dance programme was shown during magic show. An advertisement poster pasted in different part of the district shown the dancers on dancing pose which clearly proves the case against the petitioner. A true copy of the extract of relevant poster is being filed herewith and marked as Annexure No. CA-1 to this counter-affidavit.

24. Except the aforesaid paragraph, there is no pleading and proof to the effect that the show performed by the petitioner was not a magic show. A judicial notice can be taken of the fact that even in the programmes telecasted on television may be of news, music, interviews, commercial breaks, intervene. The Commercial breaks and their frequency depends upon the popularity and their durations knows as T.R.P. But the facts remains that such programmes are never treated as programme other than the programme telecasted. A music programme or exhibition of feature film remains the same notwithstanding the commercial breaks. If the logic of the respondents is imported, then all such programmes will become programmes of advertisements instead the programme being telecasted. On the basis of the said analogy also, it is difficult to hold that the show performed by the petitioner on the stage to amuse the public with help of music and dances is other than a magic show.

25. There is yet another angle to the issue. Attention of the Court was invited to a notification dated 22.7.1981 issued by the State Government in exercise of its power u/s 11(1) of the Act. By the said notification, the Governor is pleased to order that the Drama, Nautanki, Kawwali, Kavi Sammelan, Mushaira, Classical and Non-Classical Dance, shall be exempt from payment of entertainment tax. The said notification is reproduced below:

In exercise of the powers under sub-section (1) of Section 11 of the Uttar Pradesh Entertainments and Betting Tax Act, 1979 (U.P. Act No. 28 of 1979) and in supersession of all previous orders on the subject, the Governor is pleased to order that the following classes of entertainments shall be exempted from payment of entertainment tax with effect from August 16, 1981:

(1) Drama

(2) Nautanki

(3) Qauwali,

(4) Kavi Sammelan,

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/op-sharma-appellant-hash-state-of-…

(5) Mushaira

(6) Classical and Non-classical Music

(7) Classical and Non-classical Dance

(8) Variety programmes consisting exclusively of two or more of items 1 to 7 above.

(9) Games and sports whether held by registered sports associations or by any other body (excluding games of Skill and Video games or any other game of electronic devices by whatever name called)

(10) Skating

(11) Dangals and wrestling bouts including free style wrestling and

(12) Circus including acrobatic feats.

26. It was argued and rightly so that under the said notification, Classical and Non-Classical, dances are exempt from payment of Entertainment Tax with effect from August 16, 1981. It follows that no Entertainment Tax is payable on dances Classical and non-classical. The natural corollary is that even if one or two dances of hit Hindi films were performed during the course of magic show, these dances themselves are exempt from payment of Entertainment Tax under the aforesaid notification dated 22.7.1981. This also supports the petitioner''s case against the levy of Entertainment Tax on him.

27. It was also argued that there is no allegation of breach of any of the conditions granting exemption, from payment of entertainment tax. One of the conditions for grant of exemption is that during the course of programme, no obscene dance shall be performed. Neither it is proved nor alleged that any obscene dance was performed during the magic show. There being no violation of the conditions of grant of exemption from payment of Entertainment Tax, the levy of Entertainment Tax cannot be justified. The said argument has got substance and cannot be brushed aside.

28. Alongwith the counter-affidavit, a photo-copy of the advertisement poster pasted in the different parts of the District has been filed as Annexure CA-1 to show that dancers on dancing pose were shown therein vide para 17, already quoted above, it is difficult to decipher any such thing from the copy of the said poster. On the contrary in the major portion of the poster, it is mentioned that come with family to see the show of Magician O.P. Sharma and in the right side of the poster, a photograph of a girl has been shown who occupies a very small fraction of the poster. The said photograph is not in a dancing pose nor it can be inferred that it is a show of dance. The said advertisement poster negates the stand of the respondents. There is no invitation to the public to come to dance show. It is ingenuity of the advertisers to show a female figure invariably in almost in all the advertisements to attract the attention of the public, even in respect of such products exclusively meant for men.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/op-sharma-appellant-hash-state-of-…

29. It is useful to notice a recent decision of the Apex Court under the Act in Amit Kumar Vs. State of U.P. and Others, , wherein a fashion show was held at Gorakhpur for selection of ''Mr. Gorakhpur'' and ''Miss Gorakhpur''. Entertainment tax was not paid on the aforesaid fashion show, by the organizer. A show-cause notice was issued to the organizer. The organizer took the stand that programme was of competitive nature and there was no element of entertainment involved. It was stated that no fee was charged as admission was permitted on the basis of invitation card. The Supreme Court on these facts has held that fashion show was held with full knowledge that entertainment tax was payable in respect thereof and that though tickets may not have been issued in respect of the programme and only invitation cards had been issued, the same was merely a subterfuge for the purpose of evading and/or avoiding payment of entertainment tax. Contention that fashion show was held with the object of educating prospective students who would be interested in joining the Institute of Art, Fashion Designing and Modelling and was, therefore, exempt u/s 11(3) of the Act was rejected. Reliance was placed on the advertisement indicating that the object of the show was to invite people to come and watch the new world of glamour and modelling and to see the world of exotic fashion in Gorakhpur itself, vide para-15. Emphasis has been laid therein on object of the show, and if the said principle is invoked herein, the object of the show was of magic show and not of dance show.

30. Before parting with the case, it may be stated that a grievance has been raised by the petitioner that the proceedings giving rise to the present writ petition were set to motion as the petitioner refused to give free passes beyond a limit to the District Administration. The District Administration got annoyed and by way of revenge, the impugned notice and order have been passed. Be that as it may, it is not necessary for us to say anything in this regard.

31. The case of the petitioner is that performance of music and dance of short duration is necessary and integral part of such magic show. It is prevalent all over the country. In the other part of the country where a different language other than Hindi is popular, the Magicians perform dances of the regional popular films. At no point of time, District Administration of any District all over the country has raised any objection to such dance or music. There is no specific denial in the counter-affidavit except a general denial.

32. Before parting with the case, we may make general observations.

33. Until the last decade i.e. 1990s, the street performer was a common feature of the rural and the urban landscape which has now completely vanished from the horizon. The street performer was an integral part of the traditional Indian source of entertainment of the masses. However, the advent of other sources of entertainment notably cable, television and internet have dwindled the interest of the public from such street performances. This has forced the street performer to leave this avocation and to find new sources of livelihood. Among those hardest hit by this change of interest, is the traditional Indian Magician or jadugar. Magic

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/op-sharma-appellant-hash-state-of-…

is now a dying art in India with performances running to unsold tickets and empty seats. The zenith achieved by Indian magicians like P.C. Sarkar on the world stage has now reached its lowest ebb. Time has come for every Indian to feel concern. India is country of rich traditions. We value over traditional art. Article 51A of the constitution, under clause (f) states that it shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture.

34. It should be the priority of the Government to prevent this art from dying out by providing monetary assistance as well as educating the people about the science behind this art. Life of a magician and his junior artists is always in danger while giving the performances. They are dare devil persons. A small miscalculation may bring their lives to the end in a fraction of a second. Such persons need protective hands.

35. In view of above discussions, we are of the opinion that the action of the respondents demanding the Entertainment Tax is wholly arbitrary and cannot be sustained. The impugned show-cause notice and the order passed thereon are hereby quashed.

36. This Court on 7.2.2011 had passed a conditional stay order directing the petitioner to deposit security for the amount demanded in the form of NSC or fixed deposit to the tune of Rs. one lac and of the remaining amount of demand by other than cash or bank guarantee or fixed deposit.

37. In view of the success of the writ petition, the security furnished by the petitioner stands released forthwith and the respondents are required to issue necessary order in this regard and refund the security if so, deposited within a period not later than 15 days from the date of production of certified copy of this order. The writ petition succeeds and is allowed with cost of Rs. 5,000/- payable by the respondents, respondent No. 3 in particular, within a period of one month.

Downloaded from CourtKutchehry — https://dev.courtkutchehry.com/judgments/op-sharma-appellant-hash-state-of-…