

(2012) 06 AHC CK 0022

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 154 of 2012

Origins Advertising Private Limited

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 01-06-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Municipal Corporation Act, 1959 — Section 193(3)

Citation : (2012) 7 ADJ 549 : (2013) 1 AWC 69

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

Bench : Division Bench

Advocate : W.H. Khan, J.H. Khan and Gulrez Khan, for the Appellant; M.C. Tripathi, Vivek Varma and C.S.C, for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Prakash Krishna, J.—The petitioner is private limited company registered under the Companies Act, 1956 having its registered office at 2nd Floor, 382-383 Akarshan Complex, Vibhuti Khand, Gomti Nagar, Lucknow and regional offices at Kanpur, Bareilly, Jhansi, Gorakhpur and Varanasi. It is engaged in business of advertisement. It has been installing advertisement, hoardings etc in various cities such as Kanpur, Bareilly, Jhansi, Gorakhpur and Varanasi Nagar Nigam. The dispute in the present writ petition is confined to the advertisement tax on hoardings installed by the petitioner in the city Kanpur Nagar.

2. By means of the present writ petition, the petitioner has sought a rule in the nature of mandamus commanding the respondents to grant renewal and registration of license to install hoardings to the petitioner on the applications dated 8th March, 2011 and 8th April, 2011. The writ petition was got amended. After amendment, the following reliefs as amended have been claimed:

i. issue a writ, order or direction in the nature of mandamus commanding the respondents to grant renewal and registration to the petitioner on the applications of the petitioner dated 8.3.2011 and 8.4.2011 respectively;

i(a) issue a writ, order or direction in the nature of quashing the order dated 17.2.2012 (ANNEXURE-12) passed by respondent No. 2;

ii. issue a writ, order or direction in the nature of mandamus commanding the respondents to refund the amount of Rs. 10,44,150/- the excess tax deposited by the petitioner during the year 2010-2011 under Rules, 2009 as demanded by the petitioner by application dated 8.6.2011 with interest at the rate of 18% per annum;

iii. issue a writ, order or direction in the nature of mandamus restraining the respondents from demolishing/damaging/removing the petitioner's hoardings/advertisements and compensate the petitioner by a sum of Rs. 5 Lakhs which loss the petitioner suffered due to illegal action of respondents.

iv. issue any other writ, order or direction which the Hon"ble Court may deem fit and proper in the circumstances of the present case.

v. award costs to the petitioner from the contesting respondents.

3. It has been stated in writ petition that under U.P. Municipal Corporation Act, the Kanpur Nagar Nigam has imposed tax on hoardings and advertisement. The petitioner has been paying advertisement tax at the rate prevailing before framing of Rule known as U.P. Municipal Corporation (Assessment and Collection of Tax on Advertisement) Rule 2009 (hereinafter referred to as the Rules, 2009") dated 24th December, 2009 by the State Government but the said rules have been held to be ultra vires by this Court in Writ Petition No. 2710 (MB) of 2010 which was allowed alongwith other connected matters by the judgment dated 28th October, 2010 by a Division Bench of this Court at Lucknow. The said decision has been approved subsequently by a Full Bench decision of this Court in Writ Petition No. 373 of 2010, Taj Advertisement and others v. State of U.P. and others, by judgment dated 20th April, 2011. It was stated that respondents are still demanding advertisement tax from the petitioner at the rate mentioned in the Rules, 2009 which have been declared ultra vires. The petitioner is ready to pay advertisement tax at the rate which was prevalent before enforcement of Rules, 2009.

4. When the writ petition was heard at admission stage, a direction was issued by the order dated 3rd February, 2012 directing Ayukt, Nagar Nigam, to pass appropriate orders on the application dated 8.3.2011 filed by the petitioner for renewal of license followed by the reminder dated 16.9.2011. In pursuance thereof, Nagar Ayukt, Nagar Nigam considered the matter and rejected the renewal application as it was found by him that the petitioner is in arrears of advertisement tax, vide order dated 17th February, 2012. Legality and validity of the said order has been questioned in writ petition by amending it. The petitioner was permitted to amend the petition.

5. Counter-affidavit and supplementary affidavit have been filed by the respondents denying the claim of petitioner for renewal of advertisement license

on the ground that the petitioner is in arrears of advertisement tax amounting to Rs. 3,14,652 for the financial year 2010-11. He was not granted license for the financial year 2011-12 being defaulter but the petitioner did not remove his hoardings etc. notwithstanding the fact that his license was not renewed. A sum of Rs. 15,06,641/- is payable by the petitioner for the financial year 2011-12. Total a sum of Rs. 18,21,293/- is out standing for the aforesaid two years. For this reason, the renewal application was rejected.

6. Supplementary counter-affidavit dated 2nd May, 2012 was filed on behalf of respondent No. 2 stating that the advertisement tax was enhanced as per recommendation of Executive Committee since 1st April, 2003. In para-5, rate of advertisement tax prior to 1st April, 2003 and subsequently thereto have been mentioned. For the sake of convenience they are reproduced below:

That it is pertinent to mention that the petitioner deliberately raising this issue at this juncture just to mislead the Hon'ble Court whereas the present rate had been discussed way back in the year 2003 and at that point of time the advertisers had raised certain grievance regarding the increase in category A and "Super category. The rates which were prevalent prior to 1.4.2003 are quoted below:

And further as per the recommendation of the executive committee the rates were recommended since 1.4.2003 which is quoted below:

7. It has been further stated that Advertiser Association requested that the rate of tax may be mutually adjusted. As a result of discussion and meeting with the Advertiser Association, it was resolved that in place of Rs. 200 per sq. feet of Super category it was fixed to Rs. 125 per sq. feet and in place of Rs. 170 per sq. feet of A category it was lower down to Rs. 100 per sq. feet and the said rate continued till framing of the Rules 2009. All the advertisers and their associations including petitioner had agreed to pay the said rate and they have paid it continuously upto the framing of Rules 2009.

8. In para-9 of the supplementary counter-affidavit, it has been stated that an agreement was arrived at in between respondents and Advertiser Association in writing, copy whereof has been filed as annexure-S.C.A.-1. The stand taken in supplementary counter-affidavit is that the respondents are entitled to receive advertisement tax at the rate which was agreed upon by the Advertiser Association including the petitioner for the year 2006-07.

9. In reply, the petitioner has filed rejoinder-affidavit and supplementary rejoinder-affidavit. In rejoinder-affidavit, the petitioner annexed copy of notification dated 29.3.1959 with the allegation that he is liable to pay the advertisement tax at the rate prescribed in the said notification. The draft Rules, 2002 were never finalized and the Rules 2009 have already been declared ultra vires and no new rules have been framed. In supplementary rejoinder-affidavit, reply to the supplementary counter-affidavit has been given. The stand of the petitioner is that the proposed Rules 2002 were never finalized. Under threat and

pressure of Nagar Nigam advertisers started paying the advertisement tax according to the rates proposed in 2002 Rules. The validity of said Rules is subject-matter of challenge in civil suit as well as in other writ petitions. The alleged agreement entered into by the advertisement association including the petitioner is illegal, void and against the public policy. The agreement as set out in supplementary counter-affidavit was never acted upon and it could not be acted upon. In any view of the matter, the rate of tax was fixed by framing Rules 1959 and the same cannot be altered or changed by agreement of the parties. The legal plea that change in rate of tax is not permissible under law, by agreement has been set out.

10. Heard Shri W.H. Khan, learned senior counsel assisted by Shri Gulrez Khan, learned counsel for the petitioner and Shri M.C. Tripathi and Shri Vivek Varma, learned counsel for the respondents.

11. The main thrust of the learned senior counsel for the petitioner is that the petitioner is liable to pay advertisement tax as per Rules framed in the year 1959, copy whereof has been filed alongwith rejoinder affidavit. Submission is that the said rate of tax was not enhanced subsequently at any point of time. For the first time in the year 2009, Rules 2009 was framed by the State Government which has been held to be ultra vires. The tax can be demanded from the petitioner only as per the Rules framed in the year 1959 and not otherwise. Elaborating the argument, it was submitted that rate of tax can be enhanced by a procedure known to law and not by agreement between the parties. Even if, such agreement has been entered into by the petitioner, the same being void, illegal and against the public policy cannot be enforced. Strong reliance has been placed upon a judgment of the Apex Court in the case of The Amalgamated Coalfields Ltd. and Others Vs. The Janapada Sabha, Chhindwara, .

12. In contra, Shri M.C. Tripathi, Advocate appearing on behalf of the respondents submits that the petitioner is bound by the pleadings as they stand today. In the petition, the petitioner in clear terms has expressed its willingness to pay the advertisement tax at the rate prevailing immediately at the time of commencement of Rules 2009. The petitioner cannot now take a turn around. The petitioner has been paying advertisement tax as per draft Rules 2002. On the representation made by the Advertiser Association including the petitioner, the respondents acceded to their request by charging advertisement tax at the rate agreed upon. This has been continuing for the last so many years and it is too late to fall back on the rates which were fixed in the year 1959.

13. Considered the respective submissions of the learned counsel for the parties and perused the record.

14. A bare perusal of the impugned order dated 17th February, 2012 would show that the respondents calculated the advertisement tax as per Rules 2009 initially and it was found that a sum of Rs. 14,31,241/- was found due from the petitioner for the period upto 31st March, 2011. In subsequent paragraphs i.e.

paras-3 and 4 of the impugned order, authority took note of the fact that Rules 2009 has been declared ultra vires and therefore, tax cannot be charged at the rate prescribed therein. Thereafter, authority concerned calculated the advertisement tax at the rates which were prevalent immediately preceding the enforcement of Rules 2009 and has found that a sum of Rs. 3,14,652/- is due for the financial year 2010-11. In para-4 of the impugned order, it has been found that sum of Rs. 15,06,641/- is due for the financial year 2011-12. The license was not renewed for the financial year 2011-12 but the petitioner continued with the installed hoardings unauthorizedly.

15. Learned counsel for the petitioner has disputed the aforesaid outstanding amount only on the ground that if the rate of tax of the year 1959 is applied; the petitioner will not be in arrears of advertisement tax and would be entitled to receive the refund of excess amount. It was also argued that the petitioner is not laying any claim for refund of excess amount made for the earlier years. But for the financial years 2010-11 and 2011-12, he should not be treated as a defaulter, submits the counsel for the petitioner.

16. Shri M.C. Tripathi, learned counsel for the respondent took a fair stand and it is not disputed that Rules 2009 cannot be applied as they have been declared ultra vires. He also could not dispute that there has not been any subsequent notification after the year 1959 enhancing the rate of advertisement tax. His submission is that the Advertiser Association alongwith the petitioner agreed to pay the advertisement tax at the agreed rate. Evidently, the advertisers agreed to pay the advertisement tax at enhanced rate in the light of the draft Rules 2002. The petitioner continued to pay the advertisement tax in pursuance of agreement arrived at by him. Rules 2009 having been struck down, the petitioner is liable to pay advertisement tax at the rate which was prevalent immediately at the time of commencement of Rules 2009. He further submits that there is no equity in favour of the petitioner and this Court on the facts of the present case, should not exercise its extra ordinary jurisdiction in favour of such persons.

17. It is almost undisputed that the petitioner has not been paying the advertisement tax as per rule fixed in the year 1959. It appears that the draft Rules 2002 were published but not enforced. On the representation made by the petitioner alongwith Advertiser Association, the matter was amicably sorted out by reducing the tax as delineated in para-9 of the supplementary counter-affidavit. Not only that, the attending facts and circumstances of the case show that the said agreement entered into between the parties was acted upon and given effect to as a fact. It was not disputed and could not be disputed by the petitioner that the petitioner started paying advertisement tax at the rate which was agreed upon between the parties in the light of draft Rules 2002. This conduct of the petitioner continued without their being any objection at his end for considerable period of time running into years after years till the year 2009. The said facts further find corroboration from the pleadings as set out in the

present writ petition. Repeatedly, in paragraphs after paragraphs the petitioner has expressed its willingness to pay the advertisement tax "according to rate prevalent before enforcement of Rules 2009". The relevant paragraph-21 of the writ petition in this regard, is reproduced below:

That the renewal application was given by petitioner within time on 8.3.2011 and was reiterated by applications dated 16.9.2011 and the respondents ought to have renewed the same, as u/s 193(3) of U.P. Municipal Corporation Act. The respondent Nos. 2 and 3 have no option but to grant renewal, inasmuch as, the advertisement tax has been paid much in excess and the petitioner is ready to pay the advertisement tax according to rates prevailing before the enforcement of Rules, 2009. Moreover, there was no complaint that the petitioner's hoardings/ advertisements are in contravention of any bye-law made by Nagar Nigam.

The said stand has been reiterated in para-23 of the writ petition.

18. Noticeably, the writ petition was got amended by the petitioner but at no point of time, the petitioner got the aforesaid paragraphs amended. The petitioner is bound by its pleadings. It became wiser subsequently. Had the petitioner any grievance about payment of advertisement tax at the enhanced rate which was agreed upon since 2002, the petitioner should have pleaded the said fact in the writ petition itself. Plea of coercion and threat that the respondents have been coercing and threatening to the petitioner to pay the advertisement tax at enhanced rate has been set out for the first time in supplementary rejoinder affidavit, therefore, no credence could be given to the said plea and the same is liable to be rejected. Pointedly, query was put to the learned counsel for the petitioner that at what rate the petitioner had been paying the advertisement tax immediately preceding Rules 2009? Only reply which came out from his mouth is that the petitioner is not pressing for refund of excess payment made by it and for the financial years 2010-11 and 2011-12 it cannot be asked to make payment of advertisement tax over and above rate fixed in the Rules 1959. The said plea cannot be accepted in view of the agreement arrived at by the petitioner. The petitioner is guilty of non disclosure of material of facts in the writ petitions. In the original writ petition, the fact that the petitioner has been paying advertisement tax at the agreed rate has not been disputed. By way of amendment, para-26(f) has been added. For the first time, it came out with the case that the respondent-Corporation was entitled to collect the tax at the old rate, which was published on 29th March, 1959, when the respondent-Corporation made demand for the financial years 2002-03 and 2003-04, several suits as well as two writ petitions No. 22243 of 2010 and 22245 of 2010 were filed by the advertisers wherein this Court granted interim order dated 22nd April, 2010. The said interim order is continuing. As per said interim order, only amount of Rs. 26,208/- became due for the financial year 2010-11 and the same amount of Rs. 26,208/- became due for the financial year 2011-12.

19. Having given careful consideration to the pleadings of the parties and their submissions, we have no hesitation in making observations that the petitioner is

guilty of concealing material facts. The petitioner did not disclose to this Court that it agreed to pay advertisement tax as per agreement arrived at by mutual consent with the respondent-Corporation, after draft Rules 2002. This was a material fact and should have been disclosed in the writ petition. It is an acknowledged legal position that remedy of writ petition under Article 226 of the Constitution of India is an extraordinary jurisdiction conferred on High Court. It can be issued only in a case of grave miscarriage of justice or where there is flagrant violation of law. The petitioner's conduct may be so reprehensive that the Court may refuse to issue any writ even if, the order impugned is illegal or void. These are the well recognized principles for exercise of writ jurisdiction and it is not necessary for us to burden this judgment. In *Ritesh Tewari and Another Vs. State of U.P. and Others*, , in para-20, it has been observed as follows:

The power under Article 226 of the Constitution is discretionary and supervisory in nature. It is not issued merely because it is lawful to do so. The extraordinary power in writ jurisdiction does not exist to set right mere errors of law which do not occasion any substantial injustice. A writ can be issued only in case of a grave miscarriage of justice or where there has been a flagrant violation of law. The writ Court has not only to protect a person from being subjected to a violation of law but also to advance justice and not to thwart it. The Constitution does not place any fetter on the power of the extraordinary jurisdiction but leaves it to the discretion of the Court. However, being that the power is discretionary, the Court has to balance competing interests, keeping in mind that the interests of justice and public interest are coalesce generally. A Court of equity, when exercising its equitable jurisdiction must act so as to prevent perpetration of a legal fraud and promote good faith and equity. An order in equity is one which is equitable to all the parties concerned. Petition can be entertained only after being fully satisfied about the factual statements and not in a casual and cavalier manner. (*Vide Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others*, ; *Chimajirao Kanhojirao Shirke and Another Vs. Oriental Fire and General Insurance Co. Ltd.*, ; *Life Insurance Corporation of India and Others Vs. Smt. Asha Goel and Another*, ; *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, ; *Chandra Singh Vs. State of Rajasthan and Another*, ; and *Punjab Roadways Moga through its General Manager Vs. Punja Sahib Bus and Transport Co. and Others etc. etc.*,).

20. In *Parents Association of Students Vs. M.A. Khan and Another*, , the Apex Court has held that Court may in appropriate cases and keeping in view the subsequent events may either refuse to interfere with the impugned judgment or quash both the orders of the Division Bench and the Single Bench on the legal principle that if setting aside of an illegal order gives rise to another illegal order both orders may be quashed. Reference has been made to *Chandra Singh Vs. State of Rajasthan and Another*, and *Dove Investments Pvt. Ltd. and Others Vs. Gujarat Industrial Inv. Corporation Ltd. and Another*, .

21. The Court may take judicial notice of the fact that there has been escalation of price since the year 1959. The petitioner has failed to plead or to prove that it has charged its customer as per Rules 1959. If we permit the petitioner to pay advertisement fee as per Rules 1959, the petitioner would be enriched unjustly and on the other hand, Municipal Corporation, a public body would suffer. The respondent-Corporation is discharging duty towards public and it cannot be made to suffer at the cost of a person like the petitioner by permitting such person to get enriched unjustly.

22. In Suraj Singh and Another Vs. Nagar Ayukt, Nagar Nigam, , the observations made by a Division Bench of this Court is apposite. The relevant para-12 of the aforesaid judgment is reproduced below:

There is yet another relevant aspect which cannot be ignored. The petitioner have nowhere stated that they are realizing the same amount from their clients/ customers who approached them for installing the hoardings for advertising their product as they used to realize in the year 1974. The Nagar Nigam has enhanced the tax and advertisers are free to proportionately increase their fee from their clients. It can hardly be expected that the Nagar Nigam will be able to meet out the day-to-day expenditure on the rates which were prevalent 30 years back. It is common knowledge that the rates have escalated to a great extent and advertisers have also started charging exorbitantly from their clients. As such there should be no reason as to why the Nagar Nigam should not be paid Hoarding Tax at the revised rates. This Court cannot interfere even on the equitable grounds as claimed by the petitioners.

23. On the facts of the present case, taking into consideration the pleadings of the parties and their stands, we are not inclined to examine as to whether the rate of tax can be varied by the agreement. The question of validity of advertisement tax is not in issue. The issue, if any, is with regard to rate of advertisement tax.

24. Before parting with the case, we direct the respondents to take effective steps to get the draft Rules 2002 approved and finalized and get it enforced without any further delay.

25. In view of the above discussions, we do not find any merit in the present writ petition. The writ petition is dismissed. No order as to costs.