(2010) 03 GUJ CK 0032

In the Gujarat High Court

Case No : Special Civil Application No. 12672 of 2009

Paradise Cinema APPELLANT

Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 29-03-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Entertainment Tax Rules, 1979 — Rule 5
Gujarat Entertainment Tax Act, 1977 — Section 9, 9(1), 9(3)
Limitation Act, 1963 — Section 5

Citation : (2010) 03 GUJ CK 0032

Hon'ble Judges : Rajesh H. Shukla, J;K.A. Puj, J

Bench : Division Bench

Advocate : P.C. Kavina and B.P. Gupta, for the Appellant; Pranav Dave, AGP for Respondent 1, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—The present Application has been filed by the Petitioner for the prayer iner alia; issuing of writ of mandamus or any other appropriate writ, order or direction, quashing and setting aside the order passed by the Respondent No. 2 dated 31.3.1998 and the order dated 29.5.1997 passed by the Respondent No. 3 in Appeal No. 7 of 1996 as well as the order dated 17.6.1997 passed by the Prescribed Authority and Mamlatdar, Entertainment Tax, Junagadh passed in Assessment Case No. 2 of 1996 and the notice dated 4.8.2009 issued by the Respondent No. 4 directing the petition to pay Rs. 7,16,872/-. The Petitioner has also prayed for similar interim relief.

2. The facts of the case briefly summarized are that the Petitioner is an Administrator and Partner of Paradise Cinema and running a cinema in the name and style of Paradise Cinema at Porbandar. The Cinema was checked in the last show on 10.1.1996, i.e. third show at about 23:15 hours by the Entertainment Tax Inspector, Junagadh and a show-cause notice was issued pointing out certain irregularities/deficiencies, which were found in the said surprise checking on

10.1.1996 inter alia:

(i) In the cinema hall, unauthorized duplicate tickets are used instead of the approved tickets,

(ii) In the cinema hall, at the time of checking, 13 viewers were found in balcony, 9 in middle class and thus total 22 viewers were found without tickets,

(iii) In the the counter tickets with the cinema viewers the details of the rubber stamp and dates were not affixed,

(iv) The deposit amount which is required to be deposited as per Rule 5 of the Entertainment Tax Rules, 1979 has been less by Rs. 40,100/-.

(v) Unauthorised tickets were used and counter-foils had been destroyed before the show was over.

3. The show cause notice was replied by the petitioner vide letter dated 8.3.1996. However, after considering the same, the order came to be passed making assessment for recovery of tax and also for penalty in exercise of powers u/s 9(1) and 9(3) of The Gujarat Entertainments Tax Act, 1977 (hereinafter referred to as ''the Act''). A copy of the order passed by the Entertainment Tax Mamlatdar is at Annexure-A.

4. The said order came to be challenged by way of Appeal before the Entertainment Tax Collector, Junagadh, who disposed of the Appeal 7 of 1996 vide order dated 29.5.1997 (Anexure-B). The Revision Application came to be filed before the Entertainment Tax Commissioner against the said order passed in Appeal and the said revision application also came to be disposed of vide order dated 11.3.1998 (Annexure-D).

5. It is required to be noted that pending the revision, earlier, the petitioner had also filed Regular Civil Suit No. 43 of 1998 in the Court of learned Civil Judge (SD) with an application for injunction, and the injunction application was also granted on 30.10.1998. Thereafter, suit came to be finally heard and disposed of by the learned Civil Judge (SD), dismissing the same vide order dated 22.7.2009. Therefore, after the suit was filed, pending the suit, revision also came to be filed, which also came to be disposed of. However, the notice which was issued under the Bombay Land Revenue Code, was challenged by way of the aforesaid Civil Suit and the recovery was stalled. It is also contended that though the Civil Suit came to be dismissed vide order dated 22.7.2009, the copy of the notice dated 4.8.2009 issued to the petitioner is now sought to be challenged in the present petition on the grounds inter alia that the order passed by the Prescribed Officer and Mamlatdar and the Entertainment Commissioner are against the principles of natural justice. It is also contended that the various contentions, which have been raised by the petitioner have not been considered by the Respondent No. 2 in Appeal, and therefore, the order passed in Appeal and revision are also illegal. It is contended that the main two allegations against the petitioner is that the petitioner had issued unapproved tickets instead of

approved tickets and admitted total 22 viewers without tickets. Therefore, it has been contended that the explanation was given in the reply dated 8.3.1996 which has not been taken into consideration and it has not been appreciated that in the past about 25 years, such cinema was checked and no irregularities were found, and therefore, such an assessment could not have been made. It is also contended that before issuing a show cause notice, it is necessary for the Entertainment Tax Mamlatdar to have reason to believe that there was an escape from payment of tax. It is pointed out that merely on the ground of suspicion no notice should be issued. Further, it is contended that before issuance of show-cause notice, there was no formation of opinion by the Prescribed Officer that the income had escaped from payment of tax. It is therefore contended that there was no material before the Prescribed Officer to form an opinion and had recorded the statement of spectators in cinema and the impugned notice as well as the order passed are without any basis.

6. Further, it has been contended that while issuing a show cause notice, the Prescribed Officer has shown his intention to assess not only for one show but while passing the impugned order, he has made an assessment for three shows. It is therefore contended that the authority cannot be permitted to travel beyond the scope of show cause notice and the assessment for three shows could not have been made, which is illegal inasmuch as raid was for one show and irregularity at the most was found for one show and the assessment was made for three shows, which is illegal. It is also contended referring to the order of this Court in Special Civil Application 9693 of 1996 that the formation of opinion is necessary and it is also contended that the period of limitation for making reassessment is three yeas, and therefore, the assessment could not have been made beyond the period of three years. In support of this, reference is also made to the judgment and order of this Court (Coram: Hon''ble Mr. Justice A.H. Ahmadi and Hon''ble Mr. Justice N.B. Patel) in Special Civil Application No. 3213 of 1987, wherein it has been observed that the Prescribed Officer must record a finding of fact which alone would entitle him to exercise powers and jurisdiction u/s 9(3) of the Act.

7. Learned Senior Counsel Mr. P.C. Kavina with learned Advocate Mr. B.P. Gupta for the petitioner submitted that the impugned orders are passed in violation of rules and natural justice inasmuch as even if in the surprise checking, some irregularities were found, it could not have been dehors the scheme of the Act particularly Section 9 and 9(3) of the Act. Learned Counsel Mr. Kavina also submitted that the delay caused by the petitioner in filing the present petition, challenging the impugned orders, particularly the last impugned order passed in revision dated 31.3.1998 is bonafide and the Court may not nonsuit the petitioner on the ground of delay only without appreciating the merits of the case. He emphasized and submitted that the delay is required to be considered liberally in order to examine the merits of the case. He also emphasized that the ultimate object would be to do substantial justice, and therefore, delay should be condoned liberally as has been observed in judicial pronouncements. He

therefore submitted that if on merits, the case can be examined and the Court is satisfied, then the delay may not come in his way.

8. Learned Senior Counsel Mr. Kavina therefore tried to emphasize with regard to the merits of the case and submitted that the impugned order passed by the authorities, including in the revision, is without any jurisdiction and in violation of the principles of natural justice inasmuch as even in appeal and revision they have not considered the submissions or the contentions raised and they have mechanically passed orders confirming the order passed by the lower authority. He emphasized and submitted that it is obligatory for the authorities to consider while dealing with the appeal or the revision to consider the material and record the finding, and mere confirming the order passed by the lower authorities is not by itself sufficient. He submitted that from the totality of the facts, the evidence germane to the issue is ignored and the explanation offered is also not considered. He pointedly referred to this aspect and emphasized the revision application at page 32 and also emphasized that the cinema of the petitioner is checked regularly and there is no such irregularity found in the past. Therefore, even if the irregularity was found on a particular occasion, he cannot be penalized in this manner for making the assessment for the past three years and that too for the three shows. He therefore submitted that the action of the Prescribed Officer for making the assessment for three years for so-called issuance of duplicate tickets and irregularities and that too for three daily shows is highhanded and contrary to the rules of natural justice. Learned Counsel Mr. Kavina also referred to Section 9 of the Act and also pointedly emphasized Section 9(3) and submitted that Section 9(3) makes it clear that no penalty under this Sub-section shall be imposed unless the proprietor affected has had a reasonable opportunity of showing cause against such imposition. He also submitted that the powers should be exercised in a reasonable manner and referring to the order passed in appeal as well as in revision, he emphasized that both the authorities have failed to consider the explanation, and therefore, the present petition may be allowed. Learned Senior Counsel Mr. Kavina emphasized that for the delay, he may be saddled with costs. However, on merits, the case may be examined. He submitted that this Hon''ble Court in Special Civil application No. 9693 of 1996, has, in similar circumstances, set aside the order where the contentions raised were not considered and he has also referred to the observations made therein and submitted that therefore, the present petition may be allowed. He also referred to and relied upon the observations made by the Division Bench of this Court (Coram: Hon''ble Mr. Justice A.M. Ahmadi and Hon''ble Mr. Justice N.B. Patel) in Special Civil Application No. 3123 of 1987, referring to Section 9(3) of the Act and submitted that, as observed, the finding of fact must be recorded, which alone would entitle the authority to exercise his power and adjudicate u/s 9(3) of the Act. Therefore, learned Counsel Mr. Kavina submitted that since the authority, particularly the Prescribed Officer has not recorded any such finding of fact, the levying of the penalty cannot survive and it is beyond the jurisdiction of the authority and deserves to be set aside. He

therefore submitted that in the absence of any such finding of facts, which have also not been discussed and considered with reference to the explanation given by the petitioner in appeal and revision, the orders are liable to be set aside and the present petition may be allowed. Though the submissions have been made with much emphasis, both with regard to the aspect of delay and that it could be condoned liberally in order to keep in mind the ultimate object of justice and the petitioner cannot be nonsuited for the delay and his case must be considered on merits, is required to be appreciated.

9. Before adverting to the legal contentions, the factual aspects are required to be considered which reflect the attitude and the conduct of the petitioner. As can be reflected from the impugned notice as well as the order passed by the Prescribed Officer and Entertainment Tax Mamlatdar, it is not a question of mere lapse or irregularity, but this itself is sufficient to suggest mens rea for evasion of tax when not only the disclosure has been made but duplicate tickets have been issued coupled with the fact that as required under the rules, the counter foils are required to be maintained, but they have been destroyed. The viewers are admitted without issuance of tickets. This itself suggest about the mens rea for the evasion of tax. Not only that but the explanation is also considered as can be seen from the order passed by the Prescribed officer dated 17.6.1996 (Annexure-A). The said order is passed in detail referring to the irregularities. The explanation offered and the justification for arriving at the conclusion with regard to the mens rea for evasion of tax with every minute detail and thereafter the said order at Annexure-A dated 17.6.1996 is carried in appeal by way of Appeal No. 7 of 1996. The Collector - Entertainment Tax, even in Appeal has also referred to these details as to the irregularities and also referred to the reply or the explanation given by the Manager and infact the duplicate tickets have been issued as admitted by the Manager and therefore the initial say that booking clerk was not available and therefore by inadvertence the duplicate and unapproved tickets have been issued, has been considered. Thereafter the explanation has not been accepted. Further, however in revision also, the detailed order has been passed referring to the irregularities, and therefore, it cannot be said by any stretch of imagination that the order is a non-speaking order or is passed casually or in laconic manner as sought to be canvassed. Much emphasis has been made by learned Senior Counsel Mr. Kavina that the authorities are bound to give reasons and consider the explanation. Therefore, the much emphasis is given by learned Senior Counsel Mr. Kavina about need for reasons in the order is well-founded and there cannot be any quarrel with regard to this legal proposition. However, it cannot be said that the orders are non-speaking or are passed in casual manner and it also cannot be said that it has not referred to the issue involved in the matter and the orders are passed in a casual manner. There is also no quarrel that the reasons are the soul of the order and it reflects the decision making process. The Hon''ble Apex Court in case of Ran Singh and Another Vs. State of Haryana and Another, has made the observations on this aspect. However, as discussed above, in the facts of the

present case, it cannot be said that the orders passed by the authorities below are not reasoned order and they are cryptic or casual orders when it has dealt with the issue involved and the facts in detail.

10. The another facet of the argument with regard to delay is also to be appreciated. Though the learned Senior Counsel Mr. Kavina has much emphasized that on the ground of delay the petitioner may not be nonsuited and subject to any condition or cause, the case on merits is required to be examined and the approach should be doing the substantial justice is misconceived if examined in the background of the facts. The present notice and the impugned order dated 17.6.1997 carried in appeal and appeal has been decided and thereafter revision has also been decided. It is also required to be mentioned that admittedly, the Petitioner has also, after that, when the recovery was sought to be made, tried to stall the recovery by filing Civil Suit No. 43 of 1998 before the learned Civil Judge (SD) and the said suit was ultimately decided on 22.7.2009. In other words, the two parallel proceedings have been commenced and, as the revision was decided earlier, the notice for recovery was challenged by filing a Civil Suit and injunction has been obtained to pass the time and ultimately when the suit has been decided in July 2009 and thereafter again when the impugned notice for recovery has been issued dated 4.8.2009, it is sought to be challenged by way of present petition in the name of substantial justice. This also reflects the attitude of the petitioner that, not only that he is indulged in irregularity for evasion of tax but thereafter has successfully stalled the proceedings or recovery and now before this Court also, he claims indulgence in the name of substantial justice, including the delay in filing the present petition challenging the order passed in revision dated 31.3.1998. In other words, the petitioner desires to have a second innings at the hands of this Court once having successfully consumed the time by filing Civil Suit No. 43 of 1998 from the year 1998 to 2009 and now it is sought to be contended that he was pursuing a remedy under some misconception and therefore he has now filed this petition and the delay should be condoned subject to any cost to examine the case of the petitioner on merits. In other words, the say of the petitioner is that his challenge to the order passed in revision dated 31.3.1998 at Annexure-D may be permitted in the year 2010 for no reasonable explanation or sufficient cause having been shown.

11. It is required to be appreciated that the exercise of discretionary jurisdiction under Articles 226 and 227 of the Constitution of India is the discretion and having recourse to Section 5 of the Limitation Act on sufficient cause being shown it can be liberally interpreted. However, even if this discretion is there, it is required to be exercised in a guided manner. The Hon''ble Apex Court while dealing with the similar situation in case of Durga Prashad Vs. Chief Controller of Imports and Exports, has observed:

Likewise, the High Court acts on analogy of statute of limitation in proceedings under Article 226 though the statute does not expressly apply to the proceedings. The Court will almost refuse to give relief under Article 226 if delay is more than the statutory period of limitation.

12. Further, the Hon''ble Apex Court in case of Tilokchand Motichand and Ors. v. H.B. Munshi, Commissioner of Sales Tax, Bombay and Anr. AIR 1970 SC 8989, again referring to the exercise of discretion has observed that no hard and fast rule can be laid down and it depends upon discretion and the facts of each case. However, the underlying object is not to encourage the claims and the matters which have already been disposed of. Therefore, while exercising such discretion, the Court is under obligation to examine the conduct of the Petitioner also while examining the aspect of delay and sufficient cause.

13. In the facts of the present case, as reflected hereinabove, apart from the conduct or the irregularities for the purpose of manipulation in the entertainment tax, even for the purpose of remedies and pursuing the remedies, the Petitioner has been pursuing the remedy and after the revision was disposed of on 31.3.1998 by order at Annexure-D, he does not challenge it before the High Court and the suit is filed and ten years have been passed after the suit is disposed of, again the present petition is filed. Therefore, though the condonation of delay is liberally interpreted and delay is normally condoned, however, it is also to be considered with regard to the facts, and also the course adopted reflected the conduct and the attitude of the Petitioner. In the facts of the present case, therefore, we are of the considered opinion that the discretion cannot be exercised and the present petition deserves to be dismissed both on the ground of delay as well as on merits as discussed hereinabove. Accordingly, the present petition stands dismissed summarily.

