

(1991) 03 GUJ CK 0044
In the Gujarat High Court

Patel Talkies, Karjan and Another

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 13-03-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 537

Gujarat Entertainment Tax Act, 1977 — Section 11A(1)(b), 11A(1)(b)

Citation : (1992) 1 GLR 271

Hon'ble Judges : J.N. Bhatt, J;A.P. Ravani, J

Bench : Division Bench

Judgement

A.P. Ravani, J.—Is it necessary that the appointment of prescribed officer under the Gujarat Entertainment Tax Act, 1977 by the State Government should be notified in the Official Gazette? In case notification as required u/s 11A(1)(b) of the Gujarat Entertainment Tax Act, 1977 is not published in the Official Gazette, what is the effect thereof? These are some of the questions which arise in this petition.

2. Petitioner No. 1 is a partnership firm and petitioner No. 2 is a partner thereof. The firm is the owner of a cinema theatre at Karjan which was visited by the Inspector of Entertainment Tax. In connection with the irregularities noticed by him, a show-cause notice was issued by the Mamlatdar, Baroda. After hearing the parties, he came to the conclusion that there was evasion of Entertainment Tax. He also held the petitioners guilty and assessed the amount of tax and imposed penalty as mentioned hereinbelow:

Rs. 37,573-30: Tax assessed

Rs. 53,359-95: Amount of one and a half times penalty, Rs. 90,933-25: Total

The matter was carried in appeal before the Collector (Appeals) who modified the order as follows:

Rs. 17,167-15: Amount of tax assessed

Rs. 25,131-20: Amount of one and a half times penalty.

Rs. 42,298-35: Total

Out of the aforesaid amount, an amount of Rs. 17,167-15 ps. was paid. Hence balance amount of Rs. 25,750-73 ps. remained due and payable.

3. The matter was carried in revision before the Commissioner for Entertainment Tax, who after hearing the parties confirmed the order passed by the Collector. Hence this petition challenging the legality and validity of the aforesaid orders.

4. It is contended that the term "prescribed officer" is defined under the Act. Prescribed Officer would be Mamlatdar of the place in whose jurisdiction the cinema is situated. In the instant case the cinema is situated at Karjan and therefore Mamlatdar, Karjan, would be the prescribed officer for the cinema theatre owned by the petitioners. Since Mamlatdar, Baroda had issued show-cause notice and passed the order pursuant to the show-cause notice, it is submitted that the show-cause notice, is issued without jurisdiction and the order dated April 15, 1987 passed by the Mamlatdar, Baroda is also without jurisdiction. Therefore it is contended that the show-cause notice is nullity, the order passed by the Mamlatdar pursuant to the show-cause notice is also nullity. Hence the order passed in appeal and revision would also be, nullity-modified or nullity confirmed-but all the same the appellate order and revisional order remain nullity.

5. Learned Counsel for the respondents submitted that the Government has delegated powers to the Commissioner of Entertainment Tax u/s 11A(1)(b). In exercise of this power the Commissioner appointed the Mamlatdar, Baroda as the prescribed officer for the entire Baroda District by Office order dated November 28, 1985 which has been placed on the record. In view of this position the contention that the Mamlatdar, Baroda, is not the prescribed officer for the cinema theatre situated at Karjan cannot be accepted. Hence the contention fails.

6. It is contended that the appointment of Mamlatdar, Baroda, as prescribed officer for the entire area of Baroda District has not been notified in the Official Gazette and therefore the appointment of the Mamlatdar, Baroda, as prescribed officer is invalid and consequently the powers exercised by him are also without jurisdiction. Section 11 A(1)(b) provides for publication of notification in the Official Gazette not in connection with appointment. As far as the appointment of prescribed officer is concerned. Section 11A(1)(a)(iii) only provides that for carrying out the purpose of the Act the State Government may appoint such number of other officers and persons (with suitable designations) as the State Government thinks necessary. As indicated hereinabove these powers of State Government are delegated to the Commissioner u/s 11 A(3). The Act nowhere provides that while making appointment of prescribed officer the State Government or the Commissioner of Entertainment Tax, as the case may be, shall notify such appointment in the Official Gazette. Therefore the contention that the appointment of Mamlatdar, Baroda, as prescribed officer for entire area

of Baroda District has not been published in the Official Gazette and therefore his appointment is invalid cannot be accepted.

7. However, learned Counsel for the petitioner submits that notification as required u/s 11A(1)(b) specifying the area within which he is to function and the powers and duties conferred on the prescribed officer is required to be notified in the Official Gazette. No such notification is published in the Official Gazette. Therefore it is submitted that the powers exercised by the Mamlatdar, Baroda, in issuing show-cause notice and passing the order should be held to be illegal and void. We proceed on the footing that no such notification as required u/s 11A(1)(b) is issued. Hence the question: will such defect render the action taken by the prescribed officer (i.e. the Mamlatdar, Baroda) invalid? Or, can such actions or decisions be treated as nullity?

8. The answer to the aforesaid question depends upon as to whether the provisions of Section 11 A(1)(b) are mandatory or directory. For deciding as to whether a particular provision is mandatory or directory, one has to look carefully to the entire scops, nature and design of the statute. In order to ascertain the intention of the legislature the Court is required to take into consideration the nature and the design of the statute and also the consequences following from construing it in one way or the other. The observations made by the Supreme Court in this connection in the case of *The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyia*, are relevant. The relevant part of the observations reads as under:

For ascertaining the real intention of the legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.

The aforesaid provisions have been approvingly quoted by the Supreme Court in the case of *Atlas Cycle Industries Ltd. v. State of Haryana*, reported in AIR 1979 SC 1149. In para 20 of the report, it is stated as fellow"s

Thus two considerations for regarding a provision as directory are: (1) absence of any provision for the contingency of a particular provision not being complied with or followed, and (2) serious general inconvenience and prejudice that would result to the general public if the act of the Government or an instrumentality is declared invalid for non-compliance with the particular provision.

9. Applying the aforesaid considerations it is obvious that there is absence of any provision indicating the consequence of non-application in the Official Gazette of the area assigned and the powers conferred and the duties to be performed by

the prescribed officer. On the other hand, on account of such technical defect If the actions taken by such officer are to be invalidated, there would be general inconvenience and it may result into several intractable administrative problems. Again, this appears to be only a procedural requirement. Applying the aforesaid considerations laid down by the Supreme Court, it is obvious that the provision as regards publication in the Official Gazette contained in Section 11A(1)(b) is merely directory and not mandatory. Hence on account of technical defect of non-publication of the area assigned and duties to be performed etc., would not render the actions taken by such officer invalid.

10. Assuming for a moment that the provision is mandatory, then also the defect of non-publication in the Official Gazette is at the most be an irregularity and not nullity. This is so because the safest rule to determine what is an irregularity and what is nullity is to see whether the party can waive the objection. If he can waive it, it amounts to irregularity; if he cannot it is a nullity. *Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others*, . A party cannot confer jurisdiction by consent, but one can very well waive the necessity of publication in Official Gazette. Therefore also this would be a case of irregularity and not that of nullity.

11. In this connection reference may be made to a decision of the Supreme Court in the case of *State of U.P. Vs. Rafiquddin and Others*, . In that case the Supreme Court held that 21 candidates of 1970 examination were appointed to the judicial service illegally in breach of the rule, and all such persons were ineligible for the post in question. Even so, the Supreme Court observed as follows:

A person who is ineligible to judgeship but who has nevertheless been duly appointed and who exercises the powers and duties of the office is a de facto judge, he acts validly until he is properly removed. Judgment and orders of a de facto Judge cannot be challenged on the ground of this ioeligibility for appointment.

The aforesaid observations have been made by the Supreme Court after referring its earlier decision in the case of *Gokaraju Rangaraju Vs. State of Andhra Pradesh*, , wherein the Supreme Court has referred to the de facto doctrine in relation to the powers exercised by the judicial officer. In view of these decisions of the Supreme Court it may be that in this case also the de facto doctrine can be invoked. However, even if one were not to invoke the doctrine and these later decisions of the Supreme Court, as indicated hereinabove non-publication in the Official Gazette as required under the provisions of Section 11A(1)(b) is mere procedural, technical requirement. Therefore it is merely directory and not mandatory so as to invalidate the actions taken by the prescribed officer.

12. Learned Counsel for the petitioner has relied upon the following decisions of the Supreme Court: *Ballabhdas Agarwala Vs. J.C. Chakravarty*, . It was a case wherein the Health Officer of the Municipality was not duly empowered as

delegated authority to institute criminal proceedings under the Act on the date on which he made the complaint. It was contended that the complaint could not be sustained. Such defect was held to be incurable under the provisions of Section 537 of Criminal Procedure Code. Such is not the position in this case and hence the decision is of no help to the petitioner. Nika Ram Vs. State of Himachal Pradesh, . It was a case of recording confession by Magistrate of Second Class but he was not specially empowered in that behalf. In that context the Supreme Court held that the confession recorded u/s 164 was not admissible in evidence as the mandatory requirements of the provisions of Section 164 were not complied with. As indicated earlier in the instant case there is no mandatory requirement of law and the requirement of Section 11A(1)(b), is merely directory and non-compliance thereof does not vitiate the appointment. State of Uttar Pradesh Vs. Singhara Singh and Others, This is also a decision with regard to confession u/s 164 of Criminal Procedure Code. For the same reason this also does not help the petitioner.

13. Reliance is placed on the decision of the Supreme Court in the case of Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others, . In the context of the provisions of the Gujarat Agricultural Produce Market Act, the Supreme Court held that publication of notification in Gujarati in a newspaper as required u/s 6(5) of the Act was mandatory and not directory. It was held to be mandatory because in absence of proper publicity, right of trade and business might have been hampered, without affording to them an opportunity to offer objections and suggestions. In that case notification was not at all published in the newspaper, and new varieties of agricultural produce were included. Therefore, the defect was held to be fatal. In the instant case as indicated hereinabove, the provisions of the statute do not require publication of appointment in the Gazette; and even if it is considered that it is required to be published in the Gazette, it is merely directory and non-compliance thereof does not vitiate the appointment.

No other contention is raised.

14. In the result the petition fails, and it is rejected. Rule discharged. Ad interim relief granted earlier on April 30, 1990 and continued as per the order dated 19-12-1990 stands vacated.

At this stage the learned Counsel Mr. S.R. Shah requests that the order vacating the interim relief be kept in abeyance till May, 31, 1991 so as to enable him to approach the Supreme Court. The request is granted.