

(1993) 12 KAR CK 0013

In the Karnataka High Court

Case No : Writ Petition No"s. 12392 to 12412 of 1992 etc.

Pushpanjali Touring Talkies

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 14-12-1993

Acts Referred:

Evidence Act, 1872 — Section 103, 104, 106

Karnataka Entertainment Tax (Amendment) Act, 1990 — Section 4 A (6)

Citation : (1994) ILR (Kar) 427

Hon'ble Judges : Shivashankar Bhat, J

Bench : Single Bench

Advocate : B.G. Sridharan, Yamuna Sridharan, Anjana Sridharan, K. Suryanarayana Rao, B.K. Bopaiah, A.V. Gangadharappa, N.S. Srinivasan, K. Chandrasekhar, S.V. Subramanyam and C.H. Ranganatha Rao, for the Appellant; H.L. Dattu, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Shivashankar Bhat, J.—In all the above cases, the office is directed to prepare the cause title, preamble etc.

2. The petitioners are the exhibitors of cinematograph shows governed by the provisions of the Karnataka Cinemas (Regulation) Act, 1964 and the Rules framed thereunder. They are also liable to pay the taxes under the provisions of the Karnataka Entertainment Tax Act, 1958 ("the Act", for short). Petitioners are challenging the validity of Sub-section (6) of Section 4A of the Act as amended in the year 1990 and Rule 41 C of the Rules framed under the Act, as amended in the year 1991. The petitioners operate in mofussil areas and villages and there is no dispute that they operate in the areas covered by the Table annexed to Section 4A of the Act. The petitioners have to pay tax in advance u/s 4A. In case they do not conduct any show or any number of shows, to that extent refund of the tax paid can be sought for. The requirement to be complied with under Sub-section (6), while seeking the refund is challenged as unenforceable,

unwarranted, arbitrary etc. Rule 41C introduced in the year 1991 is also challenged on various grounds.

3. The primary tax liability is created by Sections 3, 3A and 4 of the Act, providing for the tax, surcharge thereon and the levy of additional tax. However, Section 4A gives an option to the operators conducting the shows in the areas covered by the Table to pay the tax at a fixed rate depending upon the gross collection capacity, a term which is defined in the Explanation in the said Section. This tax is paid in advance; however, subsequently, if the operator is not able to conduct all the shows, he can seek refund proportionately of the tax relatable to the shows not conducted. Sub-section (6) as inserted in the year 1985 stated that:

"It shall be presumed that proprietor of an entertainment has conducted all the shows permitted to be conducted by him under the Karnataka Cinemas (Regulation) Act, 1964 unless he produces a certificate in the prescribed form along with his returns from the local authority or any other authority notified by the Government that any such show has not been conducted."

Similarly there was. Rule 41C governing the payment of tax u/s 4A and the Certificate to be produced while seeking the refund.

4. These were challenged earlier. In NIRMALA CHITRA MANDIRA v. STATE OF KARNATAKA AND ORS. 1. W.P. No. 13638 of 1986 DD 26.8.1987, the Court found that no obligation was created in the authority referred in Sub-section (6) of Section 4A to issue the Certificate referred therein. Therefore the Court issued a Mandamus to the State Government as follows:

"(i) to prescribe the authority who is competent to issue the certificate in form X-C.

(ii) to provide for the procedure in the rule for issue of the certificate.

(iii) to impose corresponding obligation on such local authority to issue the certificate as per the rules to be prescribed, and

(iv) to provide for a remedy to the exhibitor in case of refusal or delay to issue the certificate.

It is also made clear that the impugned provisions shall not be enforced until the above directions are complied with."

Earlier the provisions of Section 4A(6) were upheld on the ground that the said Section was introduced with the sole object of preventing evasion of tax by an exhibitor and that insistence on purchasing the Certificate in Form X-C is also necessary. This Decision was affirmed in W.A. 2265/87 on 19.1.1988.

5. Thereafter the State Government amended the Act as per Karnataka Act No. 7 of 1990. One of the amendment, relevant here, is the substitution of Sub-section (6) as follows:

"It shall be presumed that the proprietor of an entertainment has conducted all the shows permitted to be conducted by him under the Karnataka Cinemas (Regulation) Act, 1961, unless he produces along with his return a certificate in the prescribed form, from the prescribed authority that any such show has not been conducted, and for this purpose the prescribed authority shall issue the certificate, after such enquiry as deemed fit within ten days from the date of receipt of the application in this behalf."

This sub-section was to come into force from the date of the amendment Act viz., 1.4.1990. Thereafter the Rules were finalised and on 10.6.91 the Rules were amended including Rule 41C. In fact Rule 41C was substituted with effect from 26.8.87. The new Rules 41C specified the officers competent to issue the certificate referred to in Section 4A(6). The proprietor shall have to file a declaration before the authority concerned while seeking the Certificate. If the Certificate is not obtained or issued within the time specified in Sub-rule (1) the proprietor shall have to return and pay taxes as if he has conducted all the shows without prejudice to his claim for refund or adjustment of the tax so paid in respect of shows not conducted. Sub-rules (v) and (vi) of the Rules which are very relevant reads as follows:

"(v) Where the authorities specified in Clause (ii) have failed to issue the certificate within the time specified under Sub-section 6 of Section 4A from the date of filing the application referred to in Clause (ii) or have issued before the time specified in Sub-section 6 of Section 4A, but after payment of tax as specified in Clause (iv), the proprietor may after adducing the proof along with the copy of the declaration before the Entertainment Tax Officer to that effect, may claim refund of the excess tax paid in respect of shows not conducted.

(vi) The Entertainment Tax Officer shall subject to verification of the Certificate in Form X-C obtained and produced belatedly or after being satisfied that the proprietor has failed to obtain the Certificate within the time specified in Sub-rule (1), as the case may be, and after making such enquiries as may be necessary, refund such amounts, equal to the amount of tax paid in respect of shows not conducted or adjust out of the refundable amount any tax, penalty or other amount due under the Act, for any period by the Proprietor."

From the above it is very clear that a proprietor may seek refund of the excess tax paid even without obtaining a Certificate referred in Section 4A(6). However this Rule is also challenged as arbitrary, etc. It was also contended that this Rule was substituted with effect from 26.8.1987 even though the new Section 4A(6) came into force only from 1.4.90.

6. Mr. Sridharan, learned Counsel, contended that it is impossible to comply with the newly substituted Rule 41C for the anterior period prior to its publication. I do not find any such difficulty. It may be, the officer of the local authority may expect some more material for him sometimes to issue the Certificate. Further it is clear that even without the Certificate the operator can seek refund of the tax.

Sub-section (6) of Section 4A and Rule 41C are not the charging provisions. They do not create a new liability. They govern the procedure when a claim for refund is made. The competence of the State Government to make a Rule with retrospective effect is not under challenge. In fact Section 18(3-A) enables the State Government to make a Rule with retrospective effect. It was contended that when new Section 4A came into force in the year 1990, the new Rule cannot be made to be operative from a prior date. This argument overlooks the fact that there was an earlier Section 4A(6) the validity of which was upheld by this Court. However, the State was restrained from enforcing the provisions of Section 4A(6) and Rule 41C as they were in the statute book. This Court restrained the enforcement of those provisions because of the lacuna found in the Rules and the failure of the Government to prescribe the authorities. It is quite well settled that if a law is declared invalid, the law can be amended retrospectively by removing the defect found in the law, which is the basis for the Decision of the Court while nullifying the law. Similarly if Section 4A(6) could not be enforced because of certain defects, and the Court issues certain directions for removal of those defects the restraint imposed on the State against the enforcement of the provision would automatically cease to operate. This is very clear from the last sentence in the order made by the learned Judge in the earlier Writ Petition, which is quoted above. The rule making power is traceable to the earlier Section 4A(6) which was almost similar to the substituted Section. When there is a power to make a law and enforce it, the said power can be exercised prospectively or retrospectively unless the law has already restricted the said power of making further law in any particular manner.

7. Mr. Sridharan also urged following grounds, which require to be considered:

(A) Section 41-A(6) is arbitrary and confiscatory since it enables the levy of tax irrespective of the actual number of shows conducted, unlike the case covered by Section 4; Sub-section (6) is a superfluous and unnecessary provision, which in effect creates a hard and onerous burden on the petitioners, as a condition to have the tax reduced or obtain the refund, when any show is not conducted. By assuming that all seats are sold and tax collected accordingly, it becomes discriminatory, when compared to the operators covered by Section 4, where, tax is levied only on the basis of actual admissions.

(B) Power to issue the requisite Certificate is vested in officers of local authority, who have nothing to do with the enforcement of the provisions of the Act in any manner.

(C) Whether the operator conducted any particular number of shows or not is a matter for the assessing authority to decide and therefore necessary power to hold enquiry in that regard, should have been exclusively given to him.

(D) If the officer referred in Section 4-A(6) refuses to issue the Certificate or a wrong Certificate is issued, the operator is left with no remedy.

8. In *Galaxy Theatre Vs. State of Karnataka*, one of the challenges was against

Section 4-A. In that connection, the Bench observed at page 2474:

"Section 4A provides for an alternative manner of paying the entertainment tax in lieu of the levy under Sections 3 and 3A. The levy is based on the gross collection capacity. The phrase "gross collection capacity" is defined in the Explanation to Section 4A(1). This is a concept equated to the entire accommodation being filled up in the theatre on any day under aggregation of all the payment received for such admission. On the face of it this is a simple procedure which would save the cinema theatre owners from maintaining an elaborate account for the payment of tax under Sections 3 and 3A. While Sections 3 and 3A imposes the tax on the basis of the actual admission for each show, Section 4A enables the cinema theatre owners to pay a lumpsum based on the full capacity of the cinema theatre. However, u/s 4A the theatres are classified with reference to the population of the local area where the theatres are situated."

9. Section 4A prior to its amendment had been already upheld by this Court in *BASAVESWARA TOURING TALKIES AND ANR. v. STATE OF KARNATAKA* 3. W.P.No. 2137 of 1983 etc. DD 22-8-1983, and this was affirmed by a Division Bench. The Bench pointed out in *M/s. Galaxy Theatre's* case that scheme of Sections 4 and 4A and the Table comprised in them are substantially similar to the present Sections 4 and 4A and in the concluding parts of the Decision, attack against Sections 4 and 4A was repelled. The Bench referring to Section 4-A held at page 2495 in *Galaxy Theatre's* case:

"This contention need not detain us long. It is an alternative provision for the benefit of the tax payer and to simplify the procedure. It avoids the maintenance of an elaborate account of the collections made at every show in a theatre. Section 4A enables the theatre owner to pay a lumpsum in lieu of the tax under Sections 3 and 3A. The concession shown to the regional films and the films which have won awards cannot be nullified under Article 14 for the reasons already stated, while considering the main contention. Mr. Srinivasan however contended that the concept of gross collection capacity is very harsh and a theatre owner will have to imagine the existence of a situation wherein the theatre is deemed to have been fully occupied for a show on any particular date and the said particular date is not forthcoming in the Act.

It is not possible to accept this contention. There is no difficulty in imagining a situation when the entire seats are filled up and compute the possible collection from such admissions. There is no vagueness in the provision. It is obvious that the date for computation will be the date nearest when the exhibitor applies u/s 4A. Section 4A itself provides that the option thereunder will have to be exercised once a year and shall be final in that year. No contention was advanced regarding the impracticability of working out various provisions to Section 4A and therefore we need not consider the same. It will not be in the interest of theatre owners themselves to have these provisions struck down."

It is true that this Court had no occasion to consider specifically the validity of Section 4-A with reference to its procedural aspects.

10. Section 3 is the primary charging Section, levying a tax on each admission to an entertainment. The tax is levied on "each payment for admission". Section 3A levies a surcharge and Section 4 levies an additional tax in the manner specified in the said Section. Section 5 requires the operator (proprietor) to furnish returns of the payments for admission to entertainment in the prescribed manner. As per Section 5, entertainment tax payable under the Act (except in the case of Sections 4A and 4B) is levied in respect of each payment for admission and is entirely based on the number of admissions. Section 6A requires the filing of the returns relating to complimentary tickets and to payment for admissions, in the prescribed manner; the proprietor is required to pay into a Government treasury the full of amount of tax, before he submits his returns. Section 6A(3) empowers the prescribed authority to go into the correctness of a return filed and to determine the tax payable under Sections 3, 3A and 4. The authority is empowered to levy penalty u/s 6-A(4). Section 6B provides for the assessment or reassessment to the best of the judgment of the authority, the tax due under Sections 3, 3A, 4 or 4A. There are also provisions for appeals, and revisions. Section 10 empowers the Government to authorise any officer to search any place of entertainment for the purpose of satisfying himself whether the provisions of the Act or any Rules are being complied with.

11. Section 4-A governs shows in certain places, categorised on the basis of the population. In these areas, in lieu of the taxes payable under Sections 3 and 3A, tax is levied on the basis of gross collection capacity. "Gross collection capacity" is explained in the Explanation. Basically it is the potentiality of the theatre to collect the maximum payment on full admission to the theatre on the basis that the theatre exhibits all the shows during the entire year. This payment u/s 4A is optional to the proprietor. In fact, it is actually convenient to him, as it reduces the procedural burden of filing periodic returns etc. The option shall have to be exercised in advance, seven days prior to the date on which he commences to exhibit shows; the manner of opting and the conditions are found in Rule 41-A and other Rules found in Part VI-A of the Rules.

12. Mr. Sridharan contended that in view of the presumption created by Section 4A(6), it is impossible for any proprietor to establish that he did not exhibit all the shows and that the proprietor is thrown to the mercy of an officer of the local authority, who has otherwise, nothing to do with the enforcement of the Act. The learned Government Advocate pointed out that a substantial part of the entertainment tax is payable to the local authority as per Section 17 and therefore the local authority is vitally interested in the revenue raised under the Act.

13. The learned Government Advocate is right in relying on Section 17. A substantial part of the levy under the Act goes to the local authority and it can be expected of the local authority to keep a watch over the shows exhibited at a

theatre located within its jurisdiction. It cannot be held that the officer of the local authority has no connection at all to the enforcement of the provisions of the Act. Further, if any show is not conducted by the proprietor, it will be convenient for him to approach the local authority at the earliest point of time informing him that particular show or number of shows was not (or were not) conducted.

14. In mofussil areas and villages, the assessing authority is not available and it will be inconvenient for the proprietor to rush to the officer or the assessing authority to inform him of the non-conducting of any show. Here, a convenient mode of evidencing the non-conducting of the show is attacked as arbitrary and irrelevant; such a contention has to be repelled, as a contention of convenience to nullify a beneficial provision.

15. There is a fallacy in the challenge advanced to the validity of Section 4A(6). The petitioners assume that the presumption provided for in that Section is an irrebuttable presumption; they assume that if the Certificate from the officer of the local authority is not obtained, the presumption is unshakable. These are incorrect foundations on which the entire case is sought to be built by the petitioners.

16. A businessman will always try to exploit the business opportunity to its maximum capacity. Therefore, the natural presumption is that the proprietor has conducted all shows, to derive the maximum collection. This presumption is statutorily recognised by Sub-section (6) of Section 4-A. However, this presumption gets dislodged on production of the Certificate referred to therein. If the Certificate is produced, the assessing authority cannot start with any presumption against the proprietor; then it will be for him to make an order on the basis of the Certificate and other materials. However, if the Certificate is not produced, the presumption operates against the proprietor. Just like any other presumption, it is rebuttable. The Act nowhere says that the presumption u/s 4A(6) is a conclusive presumption, If Certificate referred therein is not produced, then, the proprietor shall have to satisfy the assessing authority that a particular number of shows were not conducted, by adducing other evidence; the initial burden is cast on the proprietor, in such a situation.

17. Legislature is competent to lay down the Rules governing burden of proof depending upon the circumstances of a case; when a particular fact is within the knowledge of a person, burden is on him to prove the existence of such a fact. Same principles are found in Sections 103, 104 and 106 of the Evidence Act. Only because, the non-conducting of a show is a negative fact, and it is more onerous to prove a negative fact, the natural presumption recognised by the statute cannot be considered as arbitrary. There are several circumstances which can be brought out in evidence by the proprietor to prove that a particular show was not conducted. One of the important circumstance will be to produce the counterfoils of the tickets bearing continuous serial numbers, from which one can infer whether this continuity can be inferred only by the conduct or non-conduct

of a particular show. A natural calamity, sudden outbreak of violence, prohibitory order issued in a locality and such other circumstances will be a pointer to the fact that in all likelihood a particular show was not conducted.

18. The attack against Section 4A(6) is entirely on an erroneous assumption as to its scope; since the presumption is a rebuttable one, and the principle behind it is a well known evidentiary principle, I have no hesitation to reject this contention. For the same reasons similar grounds of attack against the Rule in question also are to be rejected.

19. No other ground survives for consideration.

20. Writ Petitions are accordingly dismissed. However, in case, the enquiries under Rule 41C read with Section 4A(6) are not completed, in any one of these Cases, petitioners are permitted to prove their respective claims before the concerned authority according to law. Rule discharged. No costs.