(1982) 08 PAT CK 0007

In the Patna High Court

Case No : Civil writ Jurisdiction Case No. 513 of 1976

Rajni Ranjan and Others APPELLANT

Vs

State of Bihar and Others RESPONDENT

Date of Decision : 28-08-1982

Acts Referred:
Bihar Cinemas (Regulation) Act, 1954 — Section 5, 9

Citation : (1983) PLJR 321

Hon'ble Judges : S.S. Hasan, J;H.L. Agrawal, J

Bench : Division Bench

Advocate : Shreenath Singh, G.C. Bharuka and Navanili Prasad Singh, for the Appellant; J.P. Shukla (G. P. 2) and Ram Chander Jha, for the Respondent

Final Decision : Allowed

Judgement

S. Skamsul Hasan, J.—Petitioner No. 1 is a partner in the firm which is petitioner no, 2, carrying on business in exhibiting cinematograph film in the town of Muzaffarpur in a cinema house with "a sitting capacity of 865 persons. The said cinema house is a licensee under the provisions of the Bihar Cinemas (Regulation) Act, 1954 (Bihar Act XV of 1954) (hereinafter referred to as ''the Act''). The petitioners are aggrieved by Annexure 1 which is a notification dated 7.1.1976. By this notification, in exercise of the power conferred u/s 9 of the Act, an amendment has been made in the Bihar Cinemas (regulation) Rules, 1974. By this rule the licence fee leviable on the petitioners has been raised to Rs. 1400/-. Section 5 of the Act prescribes the restrictions on the powers of the licensing authority in granting licence under the Act to a Cinema. Sub-section (2) of Section 5 of the Act provides that subject to clauses (a) and (b) of sub-section (1) of this section and to the control of the State Government, the licensing authority may grant licences under this Act to such persons as that authority thinks fit and on such terms and conditions subject to such restriction as it may determine. Sub-section (3) provides for appeal in cases of refusal to grant a licence and Sub-section(4) empowers the State Government to issue directions to the licencees either specifically or general for the purposes mentioned therein. Section 9 of the Act empower? the State Government to frame Rules for the purpose of carrying into effect the provisions of the Act. Clause (a) of sub-sections (2) of section 9 of the Act, which is relevant for the present purpose reads as follows:

(2) in particular, and without prejudice to the generality of the foregoing power, such rules may provide for--

(a) Prescribing the terms, conditions and restrictions, if any, subject to which licences may be granted under this Act.

Rule 8 of the Bihar Cinemas (Regulation) Rules, 1974, (hereinafter referred to as ''the rules'') provides power to the licensing authority to grant licence. Rule 9 of the Rules provides power of refusal of licence and rule 10 prescribes the period and fees leviable for the issue of licence. Rule 10 reads as follows :--

The licence granted under rule 8 and those permanent licences which are in existence shall be valid for a period of three years from the date from which the licence is granted subject to annual inspection and payment of prescribed fees revoked earlier by the licensing authority. For each licence or renewal thereof, a fee shall be charged according to the following rates namely-

No. of Seats

Licence fee for a period not exceeding three months.

Licence fee for a period exceeding three months but not exceeding six months

Licence fee for a period exceeding six months but not exceeding one year.

1

2

3

4

Upto 200

0

60

100

201 to 500

40

80

150

501 and over

50

112

200

By the impugned amendment the table of fees prescribed under rule 10 have been amended which reads as follows :--

Upto 200

1:0

300

600

201 to 500

250

500

1000

501 to 1000

350

700

1400

1001 and over

500

1000

2000

2. One of the points raised in this application was that the Act does not provide specifically for payment of the licence fee nor is there any specific delegation to the State Government or any other authority to prescribe any fee and in spite of that rule 10 of the Rules was framed. An Ordinance was, therefore, promulgated on the 22nd February, 1979, during the pendency of this writ petition, by which sub-section (2) of section 5 of the Act was substituted. By that Ordinance clause (a) of sub-section (2) of section 9 was also amended and after amendment clause (a) reads as under:--

(a) Prescribing the terms, conditions, restrictions and imposition of fees subject to which licence may be granted under this Act.

3. The petitioners have, in this application, challenged the increase in the

amount of fees levied for the licence by Annexure 1 on the simple ground that there is no quid pro quo for such levy. This submission is based on a point of law that is now well settled and completely crystallised by numerous decisions of the Supreme Court holding that no fees can be levied by any authority in the absence of quid pro quo. A passage from the decision in Kewal Krishan Puri and Others Vs. State of Punjab and Another, , which fortifies the point at issue, while deciding this question, may be usefully quoted below :--

8. The leading case of this court which has been referred and followed in many subsequent decisions is the case of Commr. Hindu Religious Endowments, Madras v. Lakshmidra Thirtha Swamiar of Sri Shirur Mutt (1954 SGR 1005). The point decided therein was that the provisions relating to the payment of annual contribution contained in Section 76 (i) of the Madras Religious and Charitable Endowments Act, 1951, is a tax and not a fee and so it was beyond the legislative competence of the Madras State Legislature to enact such a provision. The meaning given to the word ''tax'' by Latham, (C.J. of the High Court of Australia in Mathews v. Chicory Marketing Board, 60 CLR 263 has been quoted with approval at page 1040 and has been often repeated in many other decisions. Generally speaking a fee is defined to be a charge for a special service rendered to individuals by some Governmental agency. A question arises--, "special service" rendered to whom, which kind of individuals? Mr. V. M. Tarkunde who appeared for the Haryana Marketing Board stressed the argument that service rendered must be co-related to those on whom the ultimate burden of the fee falls. In our opinion this argument is neither logical nor sound. The impose of fee and the liability to pay it is on a particular individual or a class of individuals. They are under the obligation to submit accounts, returns or the like to the authorities concerned in cases where quantification of the amount of fee depends upon the same. They have to undergo the botherations and harassment, sametimes justifiably and sometimes even unjustifiably, in the process of discharging their liability to pay the fee. The authorities levying the fee deal with them and realise the fee from them. By operation of the economic laws in certain kinds of impositions of fee the burden may be passed on to different other persona one after the other.

A few lines occuring at page 119 in the judgment of the Privy Council in the case of Attorney General for British Columbia v. Esquimalt and Nanimo Rly. Co., 1950 AC 87 may be quoted with advantage. They are as follows-

It is probably true of many forms of tax which are indisputably direct that the assessee will desire, if he can, to pass the burden of the tax on to the shoulders of another. But this is only an economic tendency. The assessee''s efforts may be conscious or unconscious, successful or unsuccessful; they may be defeated in whole or in part by other economic forces. This type of tendency appears to their Lordships to be something fundamentally different from the ''passing on'' which is regarded as the hall-mark of an indirect tax.

The authorities, more often than not, almost invariably, will not be able to know the individual or individuals on whom partly or wholly the ultimate burden of the fee will fall. They are not concerned to investigate and find out the position of the ultimate burden. It is axiomatic that the special service rendered must be to the payer of the fee. The element of quid pro quo must be established between the payer of the fee and the authority charging it. It may not be the exact equivalent of the fee by a mathematical precision, yet by and large or predominantly, the authority collecting the fee must show that the service which they are rendering in lieu of fee is for some special benefit of the payer of the fee. It may be so intimately connected or interwoven with the service rendered to others that it may not be possible to do a complete dichotomy and analysis as to what amount of special service was rendered to the payer of the fee and what proportion went to others. But generally and broadly speaking it must be shown with some amount of certainty, reasonableness or preponderance of probability that quite a substantial portion of the amount of fee realised is spent for the special benefit of its payers.

4. The State Government in its counter affidavit has not made out a case that there is any quid pro quo for the levy of the impugned fee and has stated in paragraph 10 of its counter affidavit that the levy of licence fee is in nature of tax and therefore, the question of quid Pro quo does not arise. In course of the submissions also learned Government Pleader No. II conceded the absence of quid pro quo, but submitted that the levy was not a fee but a tax. The impugned Annexure 1, therefore, has got to be quashed in case it is held that the impugned imposition is a ''fee''.

5. It is however, to be examined whether the submission of the learned Counsel for the State is correct to the effect that the fee so levied is a ''tax''. Apart from other grounds, to which I shall deal with hereafter, one of the grounds given is that the amount so collected is deposited ''in the consolidated head''. This submission has to be rejected in view of the decision in the The Secretary, Government of Madras, Home Department and Another Vs. Zenith Lamp and Electrical Ltd., . It is stated in paragraph 33 of the decision as follows:--

It was urged that various Articles in the Constitution show that lets taken in courts are taxes, For instance by virtue of Art. 220 all fees being revenues of the State will have to be credited to the consolidated fund but this court has held that the fact that one item of revenue is in the Cosolidated Fund is not conclusive to show that the item is a tax. In the The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., it was held:

A tax is a compulsory exaction of money of public authority for public purposes enforceable by law and is not payment for services rendered. It is not possible to formulate a definition of fees that can only apply to fill cases as there are various kinds of fees. But a fee may generally be defined as a charge for a special service re(sic)dered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the services, though in many cases such expenses are arbitrarily assessed..

The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is a payment for special benefit or privileges.

6. It is absolutely clear that there is wide distinction between a ''tax'' and a ''fee'' the former being levied as a part of common burden, while the latter is for special benefits or privileges. Merely because an item of revenue is credited to the consolidated fund does not show conclusively that it is a ''tax'' there being no constitutional contemplation that a fee should be credited to a separate fund and not in the consolidated fund.

7. Learned Counsel for the State strongly relied on the decision in the Corporation of Calcutta and Another Vs. Liberty Cinema, and submitted that the levy though has been described as fee both in the statute, the rules as well as the licence yet, it could be a ''tax''. Relying on this decision he has submitted that although in the Calcutta Municipal Act (33 of 1951 the levy was described as fee, it was held to be a tax. Section 443 of the Bengal Act read with section 548 thereof lays down that "no person shall, without or otherwise than in conformity with the terms of a licence granted......keep open any......cinema house" and "every, licence.....granted under this Act......shall specify...... (e) the tax or fee if any, paid for the licence......" the licence fee was enhanced by the Calcutta Municipality. The Supreme Court held that the levy was a tax.

8. The above submission of the learned Counsel for the State has been completely answered in the The Municipal Council, Madurai Vs. R. Narayanan and Others, . The Calcutta decision in Liberty Cinema (Supra) has been dealt with at great length in this decision. As I have been able to understand, the distinction is firstly that the Calcutta Act provides for the levy of tax or fees both in section 548, thus placing the power to tax in a chapter concerned with licences and ''permissions, while in the Madras Act, which was the subject matter for decision in R. Narayanan''s case (Supra), powers are more precisely stated and this power of impose licence fee is in different part of the statute, which is different from parts relating to taxation and finance. The Bihar laws relating to similar provisions are even more explicit in the sense that taxation is prescribed in a separate statute altogether, that is the Bihar Entertainment. Tax Act. The present Act, in which levy of fee is prescribed, does not speak of ''tax'' anywhere. Another reason which weighed with the Court in Zenith Lamp''s case (Supra) was that no service to be rendered was laid down in the said statute and therefore, levy should not be a ''fee''. This question has also been answered in R. Narayanan''s case (Supra). A comparison between Madras Act and the Calcutta Act as has been made in R. Narayanan''s) case, can also be profitably used by comparing the Calcutta Act with the Bihar Statute, and as I have already stated, Bihar statute is more akin to the Madras Legislation where two powers are described separately in different Chapters in the Madras Act and in different Acts

in Bihar unlike the Calcutta Act where power has been described in the same section.

9. Learned Counsel for the petitioner has also submitted that the contention of the State Government in the counter affidavit that levy is a tax raises the objection of Legislative incompetency. According to him, the Government was not empowered to levy such a tax. Learned Counsel for the State in reply referred to Entry No. 62 of List II of the Seventh Schedule and stated that this tax has been levied on the authority vested by this entry, which reads as follows;

62. Taxes on luxuries, including taxes on entertainments, amusements, bettipgs and gambling.

In my view, there is no substance in the submission of the learned Counsel for the State. In the aforesaid List II power to levy taxes etc. has been provided from Entry Nos. 45 to 62. In the context of Entry No. 62 the State has already exercised power by passing the Bihar Entertainment Tax Act, 1948. The more appropriate Entry would be, in my view Entry No. 33, which empowers the State Government to pass laws with regard to cinemas, entertainment etc. and Entry No. 66 gives power to the State Government to levy fees in respect of any of the matters in the List, but not including fees taken in any court. In Y.V. Shrinivasamurthy v. The State of Mysore (AIR 1959 Supreme Court 894) the submission that was repelled was that since the word ''cinemas'' has been used in Entry No. 33 of List II, tax cannot be imposed under Entry No. 62 of that list. It was held that Entry No. 62 was wide enough to include cinemas also. From this it follows that tax can only be levied under Entry No. 62 and fees under Entry Nos. 33 to 66 of List II. In this decision it was also held that tax on Cinematographic show is leviable under Entry No. 62 of List II.

10. Reference may also be made to the case of The Secretary, Government of Madras, Home Department and Another Vs. Zenith Lamp and Electrical Ltd., . While discussing Entry 3 of List II, the words ''fees taken in court'', which have been excluded from Entry No. 66 of List II, the Supreme Court has observed as follows:-

It seems plain that ''fees taken in court'' are not taxes for if it were so, the word ''taxes'' would have been used or some other indication given.

It has further been stated;

..in List II taxes that can be imposed start form Entry 45......It follows that ''fees taken in Court'' cannot be equated to ''taxes''.....

11. In view of the decision in Zenith Lamps Case (Supra) the contention of the learned Counsel for the State therefore has no merit. Therefore, Annexure I have to be quashed because it is a fee levied without their being any quid pro quo which unjustifies such a levy. In the result application is allowed and Annexure "1" is quashed, but, without costs.

