

(1972) 12 OHC CK 0009

In the Orissa High Court

Case No : O.J.C. No's. 59, 60, 61 and 62 of 1969

Ravi Talkies

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 01-12-1972

Acts Referred:

Constitution of India, 1950 — Article 226
Orissa Entertainment Tax Act, 1946 — Section 10, 11, 12, 13, 14
Orissa Entertainment Tax Rules, 1947 — Rule 16, 17, 32

Citation : (1973) 39 CLT 135

Hon'ble Judges : S.K. Ray, J;B.K. Patra, J

Bench : Division Bench

Advocate : A.K. Ray, for the Appellant; R.K. Mohapatra, Standing Counsel (C.T.), for the Respondent

Judgement

B.K. Patra, J.—These are four applications under Article 226 of the Constitution raising an important question relating to the Constitution of the Orissa Entertainments Tax Act, 1946 (Act V of 1946 (hereinafter referred to as the Act)). The facts giving rise to these writ petitions are, for all practical purposes, identical barring only the difference in the amounts of entertainment tax demanded and the periods for which they are so demanded. The Petitioner is common to all the four cases being the proprietor of a Cinema bearing the name ?Ravi Talkies? at Bhubaneswar. The grievance of the Petitioner relates to the excess entertainment tax demanded from him for four different periods as detailed hereunder. O.J.C. 59 69 relates to the period 1-9-1965 to 31-3-1966; O.J.C. 60 69 relates to the period 1-4-1966 to 31-3-1967; O.J.C. 61 69 relates to the period 1-4-1967 to 31-3-1968; and O.J.C. 62 69 relates to the period 1-4-1968 to 30-9-1968.

2. The Petitioner commenced his business on 1-9-1965. He intimated to the Commercial Tax Officer, Khurdha who then had jurisdiction over Bhubaneswar the different rates of admission and the tax he was going to charge thereon. None of the opposite parties pointed out to him at any time that the rates so intimated

were not in accordance with law. He was depositing in advance the entertainment taxes due on the tickets issued by him. On 5-11-1968, the Assistant Commercial Tax Officer, Assessment Unit, Bhubaneswar (Opposite Party No. 4) issued a notice to the Petitioner asking the latter to produce his books of accounts by 8-11-1968 (Vide Annexure IV). On 6-11-1968, the Additional Commercial Tax Officer, Assessment Unit, Bhubaneswar (Opposite Party No. 3) wrote to the Petitioner (Annexure-V) stating that the entertainment tax collected by the latter was not proper and was not in accordance with the provisions of Section 4 of the Act and directed him to collect the tax in accordance with the rates mentioned in the letter. Referring to his letter, the Petitioner submitted (Annexure-VI) that ever since he started the business he had been collecting taxes at rates approved by the then Commercial Tax Officer, and asked for certain clarification as to why an objection was being taken regarding the correctness of the rates. With reference to Annexure - VI, the Additional Commercial Tax Officer asked the Petitioner to appear before him on 19-11-1968 to obtain clarification regarding the basis of collecting entertainment tax (Annexure-VII). But meanwhile, the Commercial Tax Officer, Assessment Unit, Bhubaneswar (Opposite Party No. 2) passed the impugned order dated 8-11-1968 (Annexure-VIII) assessing the Petitioner to excess tax for the periods above-mentioned. The excess taxes charged are Rs. 1429.08 p.; Rs. 5,669.81p.; Rs. 5,957.22p.; and Rs. 3,436.96p respectively for the periods 1-9-1965 to 31-3-1966, 1-4-1966 to 31-3-1967, 1-4-1967 to 31-3-1968, and 1-4-1968 to 30-9-1968. Being aggrieved by the orders of assessment, the Petitioner has in these writ applications challenged the levy inter alia on the following grounds:

(1) Although the liability to pay the tax is created by Section 4 of the Act, no provision has been made either in the Act or in the rules framed thereunder for assessment of the tax in case of dispute, and consequently, the Commercial Tax Officer had no jurisdiction to assess the liability; and

(2) assuming that the Commercial Tax Officer had jurisdiction to make the assessment, he has violated the principles of natural justice, in as much as having fixed up 19-11-1968 for discussion with the Petitioner, the assessment was made behind his back on 8-11-1968.

3. A common counter affidavit has been filed by the opposite parties in all the four applications. After setting down certain facts to show that excess tax was due from the Petitioner, it is averred that Section 4 of the Act apart from creating the liability provides for the machinery for assessment and collection of tax and that consequently the Commercial Tax Officer had jurisdiction to make the impugned assessments. It is further stated that the Petitioner was directed to produce his accounts for the period 1-4-1968 to 30-9-1968 before the Assessing Officer on 30-10-1968 and the books of accounts were actually produced by the Petitioner on that day. For the period 1-9-1965 to 31-3-1968, the Petitioner was directed to produce his account on 8-11-1968 which was accordingly done (Annexure A and B). It is after perusing those accounts that the impugned orders

were passed. It is therefore, not correct to say that the Petitioner had not been given adequate opportunity to be heard before his liability was determined and that principles of natural justice have been violated. It was lastly contended that as u/s 14(4) of the Act appellate powers have been conferred on the Assistant Commissioner the Petitioner if he was aggrieved had a remedy under the Act and as such remedy had not been availed of by him the writ applications are incompetent and should not be entertained.

4. To understand the various contentions raised by the parties it is necessary to make a brief reference to the scheme of the Act. Section 3 of the Act defines certain expressions. Sub-section (7) thereof gives an inclusive definition of 'payment for admission' in the following terms:

(7) "payment for admission" includes:

(a) any payment made by a person who having been admitted to one part of a place of entertainment, is subsequently admitted to another part thereof, for admission to which a payment involving a tax or a higher tax is required;

(b) any payment for seats or other accommodation in a place of entertainment;

Section 4 is the charging section and provides that there shall be levied and paid to the State Government on all payments for admission to any entertainment a tax at the rates mentioned therein. Section 5 provides that on the application of the proprietor of any entertainment in respect of which the tax is payable u/s 4, the State Government may allow the proprietor on such conditions as may be laid down to compound the tax payable in respect of such entertainment for a fixed sum; or to pay the amount of the tax due by means of a consolidated payment at such percentage of the gross proceeds, as may be fixed by the State Government. Section 6 provides that except in cases referred to in Section 5, no person shall be admitted for payment to any entertainment where the payment is subject to tax except in the manner laid down in that section. Section 7 deals with the manner of payment of tax and may be quoted.

7. Manner of payment of tax:

(1) The tax shall be levied in respect of each person admitted for payment, and in the case of admission by stamped ticket, shall be paid by means of the stamp on the ticket and, in the case of admission otherwise than by stamped ticket, shall be calculated and paid on the number of admissions.

(2) The tax in the case of admission otherwise than by stamped ticket shall be recoverable from the proprietor.

(3) Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any institution, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time or for any privilege, right facility or thing combined with the right of admission to any entertainment or involving

such right of admission without further payment or at a reduced charge, the tax shall be paid on the amount of the lump sum and shall be twenty-five per cent of such lump sum notwithstanding anything contained in Section 4:

Provided that where the State Government are of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the admission to an entertainment, or covers admission to an entertainment during any period during which the tax has not been in operation, the tax shall be levied on such an amount as appears to the State Government to represent the right of admission to entertainments in respect of which the tax is payable.

Section 8 and 9 are not relevant for our purpose. Section 10 deals with the manner of recovery of tax and provides that any amount due on account of the tax or penalty imposed under Sub-section (2) of Section 14 may be recovered by the State Government as if it were an arrear of land revenue. Section 11 provides for inspection of any place of entertainment by officers authorised by the State Government and Section 12 exempts them from payment for such entry into a place of entertainment. Section 13 is not relevant. Section 14 provides for penalties and runs thus:

14. Penalties :- (1) The proprietor of any entertainment who:

(a) admits any person for payment to any place of entertainment in contravention of the provisions of Section 6, or

(b) fails, without sufficient cause, to pay the tax due from him within the time prescribed, or

(c) fraudulently evades the payment of any tax due under this Act, or

(d) contravenes any of the provisions of this Act, shall, on conviction by a magistrate, be liable in respect of each such offence to a fine which may extend to five hundred rupees, and shall, in addition, be liable to pay any tax which should have been paid.

(2) Without prejudice to the provisions of Sub-section (1) the proprietor of any entertainment who defaults in a manner specified in any of the Clauses (a) to (d) of Sub-section (1) shall be liable to pay a penalty amounting to rupees two hundred and fifty or double the amount of tax, if any, evaded, whichever is greater, if so ordered by the Commercial Tax Officer empowered by the State Government in that behalf:

Provided that before imposing a penalty under this sub-section the proprietor concerned shall, in every case, be given a reasonable opportunity of adducing evidence in answer to the allegations made against him and of being heard.

(3) Any person aggrieved by an order imposing penalty under Sub-section (2) may, within thirty days from the date of communication of such order, appeal in the prescribed manner to the Assistant commissioner of Sales Tax appointed

under the Orissa Sales Tax Act, 1947 within whose jurisdiction the entertainment concerned was being held.

Explanation:-For the purposes of this sub-section 'jurisdiction' shall have reference to this jurisdiction assigned to the Assistant Commissioner under the said Act.

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The only other section which is relevant is Section 16 which gives power to the State Government to make rules for securing the payment of the tax and generally for carrying into effect the purposes of the Act.

5. There are three stages in the imposition of a tax. The first is the declaration of liability that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment, that ex-hypothesis has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery if the person taxed does not voluntarily pay. There is no doubt that Section 4 of the Act is the charging section which creates a liability for payment of entertainment tax collected on the admission fee. There is also no dispute that this tax is recoverable by the State Government from the proprietor of the entertainment, in this case, the Petitioner. But the Act nowhere provides for the machinery for assessment of the liability of the proprietor. That is obviously because power has been given under Sub-section (1) of Section 16 of the Act to the State Government to make rules for securing the payment of the tax and generally for carrying into effect the purposes of the Act. The power given under this sub-section is therefore wide enough to enable Government to make rules for determination of the tax liability of an Assessee. The mode and the manner in which that liability is to be determined could have been provided in the rules framed under the Act. But a perusal of the rules does not indicate that any such provision has been made therein. The only rules to which our attention was drawn by the learned Counsel for the opposite parties are Rules 16, 17 and 32 of the Orissa Entertainment Tax Rules, 1947. Rule 16 thereof imposes the liability on the proprietor to maintain certain registers, and to make the same available for inspection by the Commissioner of Sales Tax. Rule 17 imposes the liability on the proprietor to produce or cause to be produced before the commissioner of any commercial tax officer nominated by the commissioner, all books and records kept by the proprietor in connection with any entertainment and all tickets and all portions of tickets and all stamps for the time being in his possession and to allow such officer to inspect and to take an account of the same. The officers are also empowered to remove the records for purposes of examination or inquiry. Rule 32, which appears to us to be redundant, makes certain provisions which are already covered by Rules 16 and 17.

6. Section 4 of the Act undoubtedly creates a liability for payment of the tax. In pursuance of this liability, it is open to a proprietor on whom the liability rests to

collect the tax from visitors and deposit the same in the treasury. But cases may arise where the quantum of the tax deposited by the proprietor is disputed as has happened in these cases, There must, therefore, be some authority designated either under the Act or under the rules who should have powers to decide such dispute. Unfortunately such a provision is absent both in the Act and the rules. Neither the Act nor the rules have vested any authority either in the commissioner or in any of his subordinate officers to make any assessment of the tax either suo motu or in the case of any dispute. That being so, the Commercial Tax Officer acted without authority in making the impugned assessments at Annexure-VIII. The assessments are, therefore, liable to be quashed.

7. The contention advanced on behalf of the Department that machinery has been provided for in Section 14 of the Act for hearing (If appeals against orders of assessment and that consequently this Court should not entertain these applications when the Petitioner has not availed himself of the remedies provided for in the Act is thoroughly misconceived. Section 14 as already pointed out relates only to imposition of penalties on the proprietors under certain circumstances. Sub-section (3) thereof provides for an appeal to the Assistant Commissioner against an order imposing penalty under Sub-section (2). That section has nothing to do with an order of assessment. The impugned orders in these cases are orders of assessment and not orders imposing penalty. Section 14 of the Act has therefore, no application to the present cases.

8. In view of our finding that the Commercial Tax Officer had no jurisdiction to pass the impugned orders of assessment, the further question whether in passing such orders, he violated the principles of natural justice as is alleged by the Petitioner does not arise for determination.

9. In the result, we allow these writ applications and quash the orders of assessment at Annexure-VIII to the writ applications. Opposite parties should pay Rs. 200 - (Rupees two hundred only) as consolidated cost to the Petitioner in all the four applications.

S.K. Ray, J.

10. I agree.