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**(2005) 07 AHC CK 0209**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 374 of 1997

Sanjib Dhawan

APPELLANT

Vs

State of U.P. and Anand Prakash Gupta

RESPONDENT

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**Date of Decision :** 11-07-2005

**Acts Referred:**

Uttar Pradesh Cinematograph Rules, 1951 — Rule 24(1), 3(1)

**Citation :** (2005) 4 AWC 3861

**Hon'ble Judges :** Rajes Kumar, J;R.K. Agrawal, J

**Bench :** Division Bench

**Advocate :** Govind Krishna, for the Appellant;

**Final Decision :** Allowed

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## Judgement

Rajes Kumar, J.—In the present writ petition petitioner has sought the following relief:

"i. To issue a writ order or direction in the nature of certiorari calling for the records of the case and quash the impugned order dated 15.4.97 passed by the respondent No. 2 contained in annexure"7" to the writ petition;

ii. to issue a writ order or direction in the nature of mandamus directing the respondents not to realise any amount on the basis of the impugned order dated 15.4.1997 and also not to give effect to the recovery memo No. 289 dot 5.5.97 issued pursuant to the order, aforesaid;

iii. to issue any other such order or direction which may deems fit and proper under the circumstances of the case;

iv. award costs to the petitioner."

2. Brief facts of the case are as follows:

Petitioner being encouraged by the incentive scheme dated 21.07.1986 issued by the State of U.P. submitted an application before the Licensing Authority under

Rule 3(1) of the U.P. Cinematography Rules, 1951 for raising a permanent construction of a cinema building under the name and style of Bhagwan Talkies, Katra, Shahjahanpur. The licensing authority after due consideration accorded the permission for raising the construction of permanent cinema hall. After completion of construction of the permanent cinema building petitioner submitted an application for grant of licence for the exhibition of feature films under the scheme before the respondent No. 2, who after inspection of cinema premises has directed the petitioner to exhibit the feature films w.e.f. 18.03.1989 and also accorded the benefit provided under the scheme dated 21.07.1986. Under the scheme dated 21.07.1986 the petitioner was entitled to recover the entertainment tax but was not liable to pay and entertainment tax for the period of two years. In the third year, the petitioner was required to deposit only 25% of the entertainment tax collected from the viewers at the time of charging admission fee and the remaining 75% benefit under the grant-in-aid scheme. Similarly for the fourth and fifth year, the petitioner was required to deposit only 50% of the total tax collected and the remaining amount was in the nature of aid given to the petitioner in the grant-in-aid scheme. Instead of making any payment in cash towards aid, under the grant-in-aid to the State Government entitled the owner to appropriate 100% collected by him for the first two years towards aid similarly to the extent of 75% in third year and to the extent of 50% each for fourth and fifth year. The petitioner after accordingly, availed the benefit of grant-in-aid scheme w.e.f. 18.03.1989, the date on which the petitioner has been accorded permission to avail the benefit. It appears that on 08.01.1993 the petitioner has sold the cinema building by executing a sale deed to the respondent No. 3 w.e.f. 08.01.1993. Respondent No. 3 carried on the business of exhibiting the feature films on the said building.

3. On 13.07 1995 a show cause notice was issued by the respondent No. 2 alleging therein that the petitioner has violated the terms and conditions of the agreement already accorded in his favour on 19.03.1989 and as such he was directed to deposit the entertainment tax amounting to Rs. 12,29,618.88p. The petitioner in compliance to the aforesaid show cause notice filed detailed reply stating therein that there was no bar in selling the cinema premises in favour of the respondent No. 3. who has also agreed to bear all the consequences with regard to the exhibition of the feature films by executing an indemnity bond. It appears that the respondent No. 2. instead of deciding the issue, referred the matter to the respondent No. 1 vide order dated 13.07.1995 and thereafter, respondent No. 1 after considering the entire facts and circumstances arrived at a conclusion that the petitioner is not required to deposit the aforesaid amount since has not violated any of the terms and conditions mentioned in the agreement dated 11.03.1989 and accordingly, passed an order to the effect that the petitioner was not liable to pay the entertainment tax. After the aforesaid order, the respondent No. 2 passed an order on 15.04.1997 directing the petitioner to deposit a sum of Rs. 19,01,527.40p. including the interest at 10%. The aforesaid amount has been demanded on the ground that at the time of

inspection dated 06.06.1993 made by the Commissioner, Entertainment Tax certain irregularities were found and on the basis of which a sum of Rs. 1,250/- towards tax was assessed and Rs. 2,000/- was levied towards penalty, which has also been deposited on 29.03.1994 vide challan No. 2, which establishes that at the time of inspection dated 06.06.1993 irregularities relating to the tax evasion was found. It has been accordingly, inferred that in view of the irregularities relating to the evasion there was a violation of the agreement and accordingly, decision has been taken to revoke the grant-in-aid Respondent No. 2 accordingly, demanded a sum of Rs. 12,29,639 12p. which relates to the grant-in-aid during the period 19.03 1989 to 18.03.1994 and the interest @ 18% from the year 1993-94 to 1996-97 Rs. 6,71,888,28p. and accordingly, a direction was issued to deposit a sum of Rs. 19,01,527.40p. In the present writ petition petitioner was challenged the aforesaid order dated 15.04.1997. Counter and rejoinder affidavits have been exchanged

4. Heard learned counsel for the parties.

5. Learned counsel for the petitioner submitted that benefit which has been availed under the grant-in-aid scheme vide Government Order dated 21.07.1986 can not be demanded. He submitted that for the alleged irregularities the grant-in-aid can be revoked prospectively. but no demand can be raised for the earlier period during which benefit has been availed. He submitted that the grant-in-aid can only be cancelled w.e.f. 15.04.1997 and the demand for the remaining period can not be made. In support of his contention he relied upon the Division Bench decision this Court in Writ Petition No. 297 of 1997, Neelara Talkies, Jalalabad, district Shahjahanpur v. District Magistrate and submitted that Civil Appeal No 1543 of 1998 against the said order has been dismissed by the Apex Court on 10.04 2002. Learned Standing Counsel submitted that under the scheme once it is found that terms and conditions have been violated, the benefit given under the scheme can be revoked retrospectively from the date of its grant and the benefit availed under the scheme can be demanded, which has been done in the present case by the impugned order. He further submitted that in clause 2 of the agreement it was specifically mentioned that the petitioner would follow the conditions and in case if it is not being done, the District magistrate would immediately cancel the grant-in-aid and under the said agreement it is also declared by the petitioner that he and his heirs would be bound with the conditions and abide with the orders and conditions and he would be responsible for the deposit of the amount at the normal rate. He submitted that in view of aforesaid averments made in the agreement he is liable to pay the entire amount of grant-in-aid which he has availed since inception, in as much as he has violated the terms and conditions.

6. Having heard learned counsel for the parties, we are of the view that the agreement dated 13.03.1989. allowed the petitioner to avail the grant-in-aid can only be cancelled prospectively on the violation of the terms and conditions from the date of the order and not retrospectively. Before the Division Bench in Writ

Petition No. 297 of 1997, Neelam Talkies Jalalabad, district Shahjahanpur v. District Magistrate similar controversy arose wherein on the violation of the terms and conditions the authority concerned has demanded the entire amount availed towards grant-in-aid under the scheme dated 21.07.1986 from the date of im(sic)ption vide order dated 21.01 1992 On the consideration of argument of the parties and the entire facts and circumstances, the Division Bench held as follows:

"We see force in this submission of counsel for the petitioner. Unless there is a clear provision that in the event of any condition of the grant-in-aid scheme being violated, the recipient of the benefit would be liable to surrender the entire benefit, we are of the view that the respondent could not have legally called upon the petitioner to deposit the entire amount equal to the benefit including that which he availed under the scheme for the period, anterior to the date of the order when benefit under the scheme was specifically taken away. To make the impugned order legally enforceable, there must have been a clear provision that in the event of violation of any condition of the grant-in-aid scheme, the respondent would be entitled to reopen the matter of tax, which in the case of the petitioner would be assumed to have been deposited in view of Rule 24(1) and to create a demand of the full amount of tax right from the first day when benefit under the grant-in-aid was granted. There is no such provision under the Act or the Rules nor on the reasonable interpretation of the scheme, can there be one.

No finding has been recorded by the respondent that the petitioner has been violating the grant-in-aid scheme right from the inception and that violation discovered on 22.4.1991 when surprise check was carried out at 2.35 p.m. on the cinema premises, was not the first and the only one. Also there is no finding that on earlier occasions, the petitioner was found to have been seriously involved in tax evasion. In the absence of such findings, the question is whether it will be reasonable to hold that the petitioner is liable to pay tax at the full rate of the entire period, covered by the scheme simply on the ground of the discovery of violation of a condition of the scheme on a single date viz. 22.4.1991, when surprise check was made on the cinema premises. In the absence of any finding as aforesaid, it will be reasonable to infer that the petitioner had abided by all the conditions of the scheme before 22.4.1991 i.e. during the major period covered by the scheme. There being no serious violation of any condition of the scheme prior to 22.4.1991. we are of the view that it will not be equitable, fair and just to hold that the petitioner is liable to pay the entire amount equal to the benefit taken under the scheme. We make it clear so that we may not be misunderstood, that we are not . expressing any final opinion on the question whether or not in the event of the discovery of any condition of the scheme being violated, the proprietor of a cinema hall could be called upon to refund the entire benefit, taken under the scheme. What we hold is that on the facts and in the circumstances of the case, the impugned order of the respondent calling upon the petitioner to deposit tax at the full rate right

from the first day of the period covered by the scheme, is not sustainable. A single inspection/surprise check furnishing sufficient clue of tax evasion or of any other serious violation of a condition of the scheme in the past we well though carried out at the fag-end of the period covered by the scheme may be sufficient to take away the benefit of the entire period covered by the scheme. But in the instant case, the record does not point out the past history of the petitioner and the tax evasion on the part of the petitioner as discovered on 22.4.1991 does not warrant a conclusion that the petitioner was liable to pay tax at the full rate of the entire period, covered by the scheme. Each case will depend on its own facts and circumstances. The case at hand does not induce us to accept the contention of the respondent.

The order dated 25.7.1987 (Annedxure"2" to the writ petition) granting benefit under the grant-in-aid scheme simply provides that the District Magistrate would be entitled to cancel the order granting benefit under the scheme upon the discovery of any condition of the scheme being violated and in that event, the tax would be realised in the manner as if there is no grant-in-aid scheme at all. The order dated 27.1.1992 does not clothe the District Magistrate with the power to realize tax at the full rate right from the first day, when the benefit under the grant-in-aid scheme was granted.

It is submitted by the learned Standing Counsel that while (wailing benefit under the grant-in-aid scheme, the petitioner himself gave an undertaking in Form-I appended to the grant-in-aid scheme, para 6 of which clearly shows that the petitioner had given an undertaking that in the event of any condition of the scheme being violated, the District Magistrate would be entitled to cancel the order of grant-in-aid and that in that event the tax would be released from him in the same manner as if there was no such scheme at all. It is not disputed that the petitioner had given an undertaking as envisaged by para 6 of Form-I (Praroop-I), appended to the grant-in-aid scheme. But the question is whether para 6 of Form-I could be construed in such a fasion as to cloth the District Magistrate with the power to retrieve the entire benefit from the petitioner, taken under the scheme. In our view, the scheme deserves to be interpreted in a reasonable, just and fair manner. Unless the scheme itself indicates, it will be wholly arbitrary to construed the scheme in the manner that immediately upon the discovery of any term of the scheme being violated howsoever trivial that may be the District Magistrate would be entitled to retrieve the entire amount equal to the benefit given to the petitioner under the scheme.

In this case, the contention of the respondent can be rejected for the simple reason besides other reasons that para 6 of Form-I appended to the scheme does not support his contention that the petitioner had given an undertaking to deposit the entire tax collected under the scheme immediately upon the discovery of any term of the scheme being violated."

7. In Special Appeal No. 1543 of 1998 against the aforesaid order. Apex Court held as follows:

"We have heard learned counsel for the appellant and sent the relevant provisions. We are of the view that the High Court is right in the view it has taken. If the intention was to require the assessee to pay tax at the normal rate even for the period during which the grant-in-aid had not been cancelled, that provision should have expressly stated so. As it reads, it cannot be held to have any retrospective operation.

The appeal is dismissed.

No order as to costs."

8. Apex court has categorically held that if the intention was to require the assessee to pay the tax at normal rate even for the period during which the grant-in-aid, had not been cancelled that provision should have expressly stated so, and as it reads it can not be held to be any retrospective operation.

9. In view of the aforesaid decision of the Apex Court it is held that the grant-in-aid to the petitioner can not be cancelled with retrospective effect. It can be cancelled with prospective effect and no demand can be made for the earlier period during which grant-in-aid has been availed prior to the date of its cancellation.

10. Perusal of the impugned order shows that only one inspection by the Deputy Commissioner Entertainment Tax has been made basis for arriving to! the conclusion that the petitioner has violated the terms and conditions of the agreement. It has been stated that in the alleged discrepancies a sum of Rs. 1,200/- has been assessed and Rs. 2,000/- has been imposed towards penalty. In the impugned order nature of the violation has not been referred, in as much as it has not been referred that the irregularity of such nature which shows that the petitioner was involved in evasion in past also and in these circumstances, we are of the opinion that on the basis of one inspection, in which some irregularity has been alleged the amount of grant-in-aid, which has been availed can not be demanded retrospectively.

11. For the aforesaid reasons demand raised by the impugned order is not sustainable and liable to be quashed.

12. In the result, writ petition is allowed. Order dated 15.04.1997 is quashed. There shall be no order as to costs.