(1996) 02 AHC CK 0060

In the Allahabad High Court

Case No : Civil Miscellaneous W. P. No. 1162 of 1991

Shesh Mahal Talkies,Ballia — APPELLANT

Vs

State of U.P.& Ors. — RESPONDENT

Date of Decision : 26-02-1996

Acts Referred:

Uttar Pradesh Entertainments and Betting Tax Act, 1979 — Section 12(1)(d), 12(2), 3
Uttar Pradesh Entertainments and Betting Tax Rules, 1981 — Rule 65(2)

Citation : (1996) 02 AHC CK 0060

Hon'ble Judges : R.K.Gulati, J

Final Decision : Allowed

Judgement

R.K. Gulati, J.—The petitioner Shesh Mahal Talkies was granted a licence to run the cinema business under Section 3 of the U.P. Entertainment and Betting Tax Act, 1979 (for short "the Act"). The cinema house of the petitioner was inspected on 1411991 by the Entertainment Tax Officer, Faizabad along with the Entertainment Tax Inspector. It is alleged that certain discrepancies were noticed on the said inspection for which a showcause notice was issued to the petitioner. As the reply given by the petitioner was not found satisfactory, the Commissioner of Entertainment Tax, U.R, Lucknow the second respondent by his order dated 3031991 subjected the petitioner to a penalty of Rs. 2,000 apart from demanding certain amount of entertainment tax under clause (d) of Section 12 of the Act on the allegation that the petitioner had fraudulently evaded or attempted to evade the payment of tax due under the Act. Feeling aggrieved, the petitioner preferred an appeal to the State Government as contemplated under subsection (2) of Section 12 of the Act. The appeal was, however, dismissed by the Special Secretary Finance (Entertainment Tax Department), U.P. Lucknow, the first respondent not on merit but on a technical ground for the alleged noncompliance by the petitioner of subrule (2) of Rule 65 of the Rules framed under the Act and known as U.P. Entertainment and Betting Rules 1981 (hereinafter referred to as "the Rules"). The petitioner has preferred this writ petition seeking quashing of the orders passed by the Entertainment

Commissioner and the Special Secretary Finance (Entertainment Tax Department), U.P. Lucknow, dated 3031991 and 2861991 respectively. The petitioner has also prayed for a writ of mandamus prohibiting the respondents not to start any recovery proceedings on the basis of the orders impugned in the writ petition.

2. On behalf of the second and third respondents, namely, the Commissioner of Entertainment Tax and the Collector/District Magistrate, Ballia, a common counteraffidavit has been filed.

3. Before noticing the contentions urged on behalf of the petitioner, the relevant provisions which have a bearing on the questions raised in the writ petition, may also be noticed at this stage.

4. Section 12(1)(d) of the Act inter alia provides that where a Commissioner or District Magistrate is satisfied that the proprietor of an entertainment has fraudulently evaded or attempted to evade the payment of tax in any manner whatsoever, he shall after giving the proprietor a reasonable opportunity of being heard, assess to the best of his judgment, the amount of tax due from the proprietor and also impose a penalty not exceeding to Rs. 1,000. Subsection (2) of Section 12 of the Act confers the right of appeal to an aggrieved person. The provisions contained in subsection (2) of Section 12 of the Act are as under:

"(2) Any person aggrieved by an order under subsection (1) may, within fifteen days from the date of service of such order, prefer an appeal to the State Government in such manner as may be prescribed, and the order of the appellate authority shall be final."

5. The procedure and the authority to whom the appeal shall lie, is provided by Rule 65 of the Rules. As the provisions contained in that rule have an important bearing on the fate of the writ petition, the provisions are set out below which reads as under:

"65. Appeals. (1) An appeal under subsection (3) of Section 10, subsection (2) of Section 12, subsection (3) of Section 15 or subsection (4) of Section 21 of the Act shall be preferred to the Secretary to the Government of Uttar Pradesh in the Finance (Entertainment lax) Section, U.P., Secretariate, Lucknow along with a certified copy of the order against which the appeal is made and stating clearly the ground or grounds of appeal. A copy of the notice, if any, received, and the reply to notice, if any, given shall also be submitted.

(2) A copy of the appeal alongwith its enclosures shall also be supplied simultaneously to the officer against where order the appeal is preferred and to the District Magistrate concerned who shall supply necessary records and such other information to the Government as may be required alongwith his comments.

(3) Where, on perusal of the appeal, the State Government is satisfied it may grant a temporary stay and send a copy of its order to the Commissioner as well

as to the District Magistrate concerned and on receipt of such order no further action in the matter shall be taken by any of the said officers.

(4) A copy of the final order passed by the Government on the appeal shall also be sent to the Commissioner and the District Magistrate concerned, and,

(i) if the appeal is finally allowed by the Government and the temporary'' stay granted, if any, is confirmed, all further proceedings in the matter shall be dropped;

(ii) if the appeal is allowed only partially, the order under appeal shall stand amended in accordance with the orders issued by the Government and action shall be taken as per amended order;

(iii) if the appeal is rejected, the temporary stay granted, if any, shall stand vacated." As already observed, the first respondent had dismissed the appeal on the view that the petitioner had failed to comply the requirement of subrule (2) of Rule 65 of the Rules which require that a copy of the appeal alongwith its enclosure shall also be supplied simultaneously to the officer against whose order the appeal is preferred to the District Magistrate concerned who shall supply necessary record and such other information as may be required alongwith his comments. The stand taken by the petitioner was that he had already forwarded a copy of the memorandum of appeal to the Commissioner of Entertainment Tax as well to the concerned District Magistrate under registered cover. The appeal was however, dismissed on the allegations that the petitioner had not furnished a copy of the postal receipt against which the registered covers were sent to the aforesaid authorities.

6. Learned counsel for the petitioner challenged the impugned orders on merit and also on the ground that the first respondent, the Special Secretary Finance (Entertainment Tax Department) U.P., Lucknow, has manifestly erred in dismissing the appeal on the grounds which were not available to him inasmuch as the petitioner had already made the necessary compliance of subrule (2) of Rule 65 of the Rules.

7. It was urged that the Special Secretary Finance (Entertainment Tax Department), U.P., Lucknow, the first respondent, arbitrarily dismissed the appeal without making any inquiry from the second respondent and ascertaining the true facts as to whether or not the petitioner had made the compliance of the commission attributed to it and had not supplied a copy of the memorandum of appeal to the second and third respondent. In the alternative it was contended that m any case the petitioner should have been afforded an adequate opportunity before dismissing the appeal to make the necessary compliance of subrule (2) of Rule 65 of the Rules if the first respondent was of the opinion that the petitioner had failed to comply with the requirements of subrule (2) of Rule 65 of the Rules.

8. The Court was also invited to the averments contained in paragraph 21 of the

writ petition. The said paragraph of the writ petition is set out below:

"21. That the petitioner explained and replied against the irregularities shown by the Entertainment Commissioner in the order dated 3031991. The copy of appeal was sent by the petitioner through registered post to the Entertainment Commissioner on 861991.

A photostat copy of receipt is being enclosed to the writ petition as Annexure No. 4 and the same was got received in the office of District Magistrate, Ballia. A photostat copy of the appeal is enclosed as Annexure 5 to this writ petition."

9. In paragraph 16 of the counteraffidavit fifed on behalf of the respondents 2 and 3, the assertions made in paragraph21 of.the writ petition, have not been denied. On the contrary, they have been specifically admitted. From the affidavit exchanged between the parties the position that emerges, is that the very premises on which the impugned order was made is knocked off from the bottom. In view of the admission in the counteraffidavit, there is no justification left to sustain the impugned order dated 2861991 passed by the respondent No. 1 inasmuch as the charges levelled against the petitioner that he had not supplied a copy of the appeal along with its enclosure to the officer against whose order, the appeal was preferred and to the District Magistrate concerned, was factually incorrect. The complaint of the petitioner that the impugned order was made without any proper inquiry to ascertain the true facts, is not without basis. If little efforts were made before passing the impugned order, the petitioner could have been saved from rushing to this Court and being unnecessarily harassed. The impugned order is liable to be set aside on this ground alone.

10. The impugned order is not liable to be sustained for another reason also. Assuming that there was failure or omission on the part of the petitioner to supply a copy of the appeal alongwith an enclosure as contemplated under subrule (2) of Rule 65 of the Rules, it was merely an irregularity which could have been cured subsequently by providing an opportunity to the petitioner. The error was not such an illegality as to render the appeal totally ineffective vitiating the appeal itself. It is no doubt true that there is no provision under the rule or the Act requiring the appellate authority to call upon the appellant to rectify the mistake or omission in the presentation of an appeal. But such power should be held to be inherent where omission occurs like the one in the instant case, is not vital or substantial. A right of appeal is a statutory one and unless there is any explicity in the statute or the rules made thereunder such a right cannot be taken away, The appellate authority, it cannot be said, had no power to call upon the petitioner to comply with the requirement of subrule(2) of Rule 65 of the Rules and to remove the defect if there was any. The object of subrule (2) of Rule 65 of the Rules is to facilitate the appellate authority to find out whether the appeal is in time or not and to apprise the relevant authorities that an appeal has been preferred and to give those authorities an opportunity of contesting the appeal if so desired and to have the version of the other side on the merits of the

appeal No hard and fast rule of general applicability can be laid down for dealing with the appeals filed defectively under the provisions under review. Appropriate orders will have to be passed having regard the facts and circumstances of each case but the most important step to take cases of defective presentation of appeal is that they should be carefully scrutinised at the initial stage soon after they are filed and the appellant be required to remedy the defects.

11. The object of the court is to decide the right and not to punish them for mistakes, omissions that they make in the conduct of their cases by deciding otherwise than in accordance with law provided the omission or the mistake is not intended to over reach the court an opportunity should normally be allowed to remove the defect or to remedy the omission. If that is done it is not a matter of favour or grace but what is required by the interest of justice.

12. English courts have consistently taken the view that more errors procedure should not be allowed to defeat justice. In Kendall v. Hamilton, (1879) 4 App. Cas. 504. Lord Pen/ance observed:

"Procedure is but the machinery of the law after all the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extiguish, legal rights, and is thus made to govern where it ought to subserve."

This pronouncement was referred to and followed in Cropper v. Smith, (1884) 26 Ch. D. 700710. Bowen L.J. said:

"...it is a well established principle that the object of courts is to decide the rights of the parties, and not be punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights...! know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

13. This court is unable to appreciate the circumstances in which the appellate authority thought it proper to refuse the petitioner an opportunity of rectifying the omission and to make compliance of subrule (2) of Rule 65 of the Rules. The memorandum of appeal which was otherwise in order and having regard to the facts and circumstances of the case. I am clearly of the opinion that the appeal should not have been dismissed on a technical view of the matter ought to have been decided on merits. The substance of the matter ought to have been looked into and some little departure from the rules of procedure should not have been permitted to defeat justice.

14. Thus, judged from any angle the order passed by the appellate authority was wholly unwarranted and cannot be allowed to stand. The impugned order of the appellate authority is accordingly set aside with the direction that the appellate

authority will decide the appeal on merits and in accordance with law bearing in mind the observations made hereinabove.

15. In the result the writ petition succeeds in part and is allowed accordingly. There shall be no order as to casts.