

(1976) 12 AHC CK 0011

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 3090 of 1973

SRI THAROO MAL

APPELLANT

Vs

SRI PURAN CHAND PANDEY, COMMISSIONER, ROHILKHAND
DIVISION and Another

RESPONDENT

Date of Decision : 01-12-1976

Acts Referred:

Constitution of India, 1950 — Article 226, 276
Constitution of India, 1950 — Article 226, 276
Constitution of India, 1950 — Article 226, 276

Citation : (1977) 6 CTR 64

Hon'ble Judges : D. M. Chandrashekhar, J

Bench : Division Bench

Judgement

D. M. Chandrashekhar, J. - In this petition under Article 226 of the Constitution, the petitioner has prayed for quashing the levy of Theatre Tax imposed by the Municipal Board, Pilibhit (hereinafter referred to as the Municipal Board).

2. The material facts necessary for the decision of this petition, are briefly these : The petitioner is a partner in a cinema theatre in Pilibhit town which has a population of about 70,000. At its meeting held on 11-4-1972, the Municipal Board passed a resolution proposing to levy Theatre Tax at the rate of Rs. 25 per show. The Municipal Board published the above proposal in the manner prescribed by S. 94 of the U.P. Municipalities Act, 1916, (hereinafter referred to as the Act) on 16-5-1972, in a local Hindi Weekly Deshvakt. No objections to this proposal were received from any one within 15 days from the date of such publication. Thereafter the Municipal Board submitted the proposal under sub-S. (4) of S. 132 to the Prescribed Authority, namely, the Commissioner, Rohilkhand Division. On 24-8-1972, the Prescribed Authority returned the proposal to the Municipal Board for further consideration as it (the Prescribed Authority) felt that the proposed rate of tax was too high. On 28-8-1972, the Municipal Board re-considered the proposal and modified it by reducing the rate of tax to Rs. 15 per show; but the modified proposal was not published by the Municipal Board in any

newspaper.

3. On 16-9-1972, the petitioner and two other cinema operators of Pilibhit sent to the Municipal Board their objections to the proposal to levy Theatre Tax. Copies of such objections were sent to the Prescribed Authority and the District Magistrate. On 18-9-1972, the Municipal Board sent its modified proposal (to levy Theatre tax at the rate of Rs. 15 per show) to the Prescribed Authority, but the said objection did not accompany the modified proposal. On 31-10-1972, the Prescribed Authority sanctioned the modified proposal. On 18-11-1972, the draft rules for levy of Theatre Tax were published and objections thereto were invited within 30 days from the date of such publication. On 15-12-1972, the petitioner filed objections to the draft rules. Thereafter the Prescribed Authority considered the draft rules and accorded sanction thereto. The Municipal Board passed a special resolution under S. 134 for imposition of Theatre Tax with effect from 16-4-1973; and a notification under S. 135 of the Act was published in the U.P. Gazette dated 14-4-1973 for imposition of Theatre Tax with effect from 16-4-1973.

4. In this petition, the petitioner has alleged, inter alia, as follows. On 23-4-1973, he applied for the copies of the proceedings of the Municipal Board relating to the levy of the impugned tax. On 30-4-1973 the office of the Municipal Board informed him that no copies would be issued. On 3-5-1973, the petitioner, his Advocate and two other cinema exhibitors went in a delegation to meet the Commissioner to voice their grievance in respect of the imposition of Theatre Tax and submitted a review petition. During the talk the Commissioner informed the delegation that no objections were brought to his knowledge before he approved the modified proposal of the Municipal Board.

5. Shri Puran Chand Pande, the then Commissioner, Rohilkhand Division, has been impleaded by his name as respondent - 1. But he has neither entered appearance, nor filed any counter-affidavit traversing the averment as to his having told the petitioner that no objections were brought to his notice before he sanctioned the proposal to levy Theatre Tax. The deponent of the counter affidavit filed on behalf of the Municipal Board (respondent-3), is the Octroi Superintendent thereof. He has merely denied the petitioners averment as to what the Commissioner told the petitioner and other cinema exhibitors.

6. Shri Shanti Bhushan, learned counsel for the petitioner, challenged the validity of the levy of Theatre Tax on the following three grounds :

(i) The levy of Theatre Tax is vitiated on account of non-consideration of the objections to the proposal to levy that tax.

(ii) The rate of tax is so excessive as to render the tax confiscatory in nature and hence the tax is invalid, and

(iii) The impugned tax violates the restriction imposed by Article 276 of the Constitution inasmuch as it exceeds Rs. 250 per annum on a person.

7. In order to appreciate to first contention of Shri Shanti Bhushan, it is necessary to set out S. 132 and 133 of the Act which prescribe the procedure for the levy of a tax by a Municipal Board. S. 132 reads :

"132. (1). Any inhabitant of the municipality may, within a fortnight from the publication of the said notice, submit to the board an objection writing to all or any of the proposals framed under the preceding section, and the board shall take any objection so submitted into consideration and pass orders thereon by special resolution.

(2) If the board decides to modify its proposals or any of them shall publish modified proposals and (if necessary) revised draft rules alongwith a notice indicating that the proposals and rules (if any) are in modification of proposals and rules previously published for objection :

Provided that on such publication shall be necessary where the modification is confined to reduction in the amount or rate of the tax originally proposed.

(3) any objections which may be received to the modified proposals be dealt with in the manner prescribed in sub-S. (1).

(4) When the board has finally settled its proposals, it shall submit them along with the objection (if any) made in connection therewith to the prescribed authority."

Sec. 133 reads :

"133. (1). In the case of a municipality other than a city, if the proposed tax falls under clauses (i) to (xii) of sub-S. (1) of S. 128, the prescribed authority after considering the objection received under sub-S. (4) of S. 132, may either refuse to sanction the proposals or return them to the board for further consideration, or sanction them without modification or with such modification not involving an increase of the amount to be imposed as it deems fits.

(2) In any other case, the prescribed Authority shall submit the proposals and objections to the State Government, who may pass any the orders described in sub-s. (1)."

8. It is seen that Sub-S. (1) of S. 132 provides that any objection to a proposal to levy a tax by a Municipal Board, should be submitted to the Municipal Board within a fortnight from the publication of the notice of such proposal.

9. It is not disputed by Shri Shanti Bhushan that the petitioner and other cinema exhibitors did not file their objections to proposal to levy Theatre Tax within the aforesaid period of a fortnight from the date of publication of the proposal in a local newspaper on 16-5-1972. Such objection were submitted to the Municipal Board only on 16-9-1972 by which time it had reconsidered its original proposal (after the same had been returned to it by the Prescribed Authority) and had passed a resolution to modify its original proposal by reducing the rate of tax from Rs. 25 to Rs. 15 per show.

10. Even so, Shanti Bhushan contended that the provision in S. 132(1) as to the time limit for filing objections to a proposal of levy of a tax, is not mandatory, but is only directory and that even where such objections are filed beyond such period, the Municipal Board is bound to forward such objection to the Prescribed Authority and the Prescribed Authority is bound to consider such objections before according its sanction to such proposal.

11. On the other hand, Shri S. C. Khare, learned counsel for the Municipal Board, contended that it is only where such objections are filed within the time limit prescribed by S. 132 (1) that the Municipal Board is required to forward such objections to the Prescribed Authority along with the proposal to levy tax and the Prescribed Authority is required to consider such objections and that, where such objections are filed beyond time, there is no obligation on the Municipal Board to send them to the prescribed Authority, nor is there any obligation of the Prescribed Authority to consider them.

12. It may be, that even where the objection to a proposal to levy a tax are filed beyond the time limit prescribed by S. 132 (1), there is no prohibition against the Municipal Board forwarding such objections to the prescribed Authority and the prescribed Authority considering such objections. But, we are unable to accede to the contention of Shri Shanti Bhushan that even where such objections are filed beyond time, the Municipal Board is bound to forward such objections to the prescribed Authority and the prescribed Authority is bound to consider them.

13. Moreover, in the present case, when the original proposal of the Municipal Board to levy Theatre Tax at the rate of Rs. 25 per show, was considered by the prescribed Authority, the petitioner and other cinema exhibitors had not even filed their objections. Hence no question of consideration of objection could arise then As stated in the proviso to sub-Section (2) of S. 132, when a Municipal Board modifies its original proposal by reducing the amount or rate of the proposed tax, publication of such modified proposal is not necessary. Filing of objections to such modified proposal (reducing the proposed amount of rate of proposed tax), is not contemplated in S. 132, nor is consideration of such objections by the prescribed Authority at that stage, contemplated in S. 133.

14. Shri Khare submitted that though the ministerial act of despatching the modified proposal of the Municipal Board to the Prescribed Authority, was done on 18-9-1972 the decision of the Municipal Board to do so, must have been prior to 16-9-1972 on which date the petitioner and other cinema exhibitors sent their objections to the Municipal Board and that those objections might not have come to the notice of the Municipal Board before it decided to submit the modified proposal to the Prescribed Authority. There is some force in the above submission of Shri Khare, though we do not rest any conclusion on the circumstances explained by him.

15. As there is no obligation either of the Municipal Board to forward to the Prescribed Authority the belated objections filed by the petitioner and other

cinema exhibitors or on the Prescribed Authority to consider such objections, the procedure followed by the authorities in levying the impugned tax, cannot be said to suffer from any illegality. Moreover, sub-sec. (3) of S. 135 of the Act provides that a notification in the official gazette, of the Municipal Boards resolution to levy a tax, as sanctioned by the State Government or the Prescribed Authority, shall be conclusive proof that the tax has been imposed in accordance with the provisions of the Act. As there was no non-compliance with the mandatory provisions in regard to the procedure for imposing the impugned tax even if there was any irregularity in such procedure, such irregularity was cured by S. 135 (3) of the Act. Hence the first ground urged by Shri Shanti Bhushan should fail.

16. Elaborating his ground of attack on the tax, Shri Shanti Bhushan submitted that Pilibhit is not a city, but only a town, that there are 3 or 4 theatres therein, that the impugned tax at rate of Rs. 15 per show, irrespective of the number of tickets actually sold for each show, would be so excessive as to render the impugned tax confiscatory in nature and hence invalid. He relied on following observations of the Supreme Court in *Rai Ram Krishna & others vs. State of Bihar*.

"Where for instance, it appears that the taxing statute is plainly discriminatory, or provides no procedural machinery for assessment and levy of the tax, or that it is confiscatory, Court would be justified in striking down the impugned statute as unconstitutional. In such cases, the character of the material provisions of the impugned statute is such that the court would feel justified in taking the view that, in substance, the taxing statute is a cloak adopted by the Legislature for achieving its confiscatory purposes."

17. On the other hand, Shri Khare maintained that the petitioner had not furnished any factual data to show that the rate impugned tax is so excessive as to render it confiscatory. Shri Khare pointed out that there is no restriction on the rates of admission or the prices of tickets which the petitioner may charge and that hence it is open to him to recoup the tax paid or payable by him by increasing such rates or prices. Shri Khare submitted that if the seating capacity of the petitioners theatre is taken as 500, the impugned tax at the rate of Rs. 15 per show would result in a burden of no more than 6 paise per ticket.

18. We think the contention of Shri Khare is sound. The petitioner has not shown that the rate of the impugned tax is so excessive as to be confiscatory in nature. Even if it is taken that the seating capacity of his theatre is 300 and the average of the number of tickets sold for each show is only 150, the incidence of the impugned tax would be only 10 paise per ticket on an average. As there is no restriction on increasing the rates of admission to the theatre or prices of tickets, he can pass on the burden of tax by increasing such rates or prices by 10 paise per ticket on the average. Such increase can be more for tickets of higher classes and less for tickets of lower classes. It is difficult to believe that by raising the rates of admission by 10 paise per ticket on the average, the collection of gate money in the petitioners theatre would be so adversely affected that he would be

driven out of business. Hence we are unable to accept the contention of Shri Shanti Bhushan that the impugned tax is invalid on the ground of being confiscatory in nature.

19. Lastly, it was urged that the impugned tax is in the nature of a tax on profession, trade or calling and that hence it is invalid as it (the tax) exceeds Rs. 150 per annum.

20. A complete answer to the above contention as found in the following observation of this Court in *Niranjan Lal Bhargava Trust vs. State of U.P.* in which the same contention had been urged and repelled by this court :

"The last contention is that theatre tax cannot exceed Rs. 250 per annum because in its nature it is a tax on profession, trades, callings and employments and must conform, therefore, to the terms of Article 276 of the Constitution. That contention is shortly disposed of. List II of the Seventh Schedule contemplates a tax on profession, trades, callings and employments as different in nature from a tax on entertainment and amusements. It contains two separate entries in that behalf, namely entry 60 and entry 62 respectively. Whether legislation falls under one entry or the other, will depend upon the essential content of the legislation and the question in every case will be whether it can be properly said to fall under one entry or the other. In the case before us, we are concerned with a tax on entertainment and amusements. While it may incidentally affect the trade or calling of the person on whom the tax is visited, that will not alter the essential content of the legislation. It is a tax which falls under entry 62 and not under entry 60 of List II of the Seventh Schedule. In this connection, *Theatres (supra)* and *Y. N. Srinivasamurthy vs. State of Mysore* AIR 1959 S.C. 894 where the same view has been taken."

21. All the contentions urged by Shri Shanti Bhushan fail.

22. In the result, we dismiss this petition with costs. The interim order made on 10-5-1973 staying the operation of the notification imposing the impugned tax, stands vacated.