
(2004) 07 AHC CK 0131

In the Allahabad High Court

Case No : C.M.W.P. (Tax) No's. 885 and 15082 of 2004

Sushila Chitra Mandir

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 09-07-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Entertainments and Betting Tax Act, 1979 — Section 3

Citation : (2004) 4 AWC 3076 : (2004) 4 AWC 3075

Hon'ble Judges : Umeshwar Pandey, J; B.S. Chauhan, J

Bench : Division Bench

Advocate : W.H. Khan and J.H. Khan, for the Appellant; C.K. Rai, S.C., for the Respondent

Final Decision : Dismissed

Judgement

B.S. Chauhan, J.—This writ petition is an example to show as to what extent a litigant can stake his claim to rob the public exchequer, that's too through a writ court. Petitioner claims that when there is a tax holiday as the order is issued to that effect, the concerned dealer does not have to apply for exemption. He gets the relief automatically and the exemption is only between the Revenue and the dealer and not between the dealer and the consumer. The dealer has a right to collect the tax from the consumer and pocket it, and there is no obligation on this part to make the payment of the said amount to the State.

2. By means of the Petition No. 885 (Tax) of 2004 petitioner prays for quashing the sale proceedings dated 1.7.2004 in which the cinema hall of the petitioner along with the buildings and land has been auctioned in favour of the respondent No. 2 for nonpayment of entertainment tax collected by the petitioner.

3. The case has a chequered history as petitioner has approached this Court several times. The State of Uttar Pradesh issued an order dated 21.7.1986 providing for entertainment tax holiday for cinema halls in particular area if constructed and run in accordance with the terms incorporated therein. Petitioner

raised the construction of the cinema hall and it was granted licence to exhibit the films in 1990 and the petitioner started exhibiting the films. Petitioner has never been granted the tax exemption by the statutory authority in view of the provisions of the said Government order dated 21.7.1986 nor petitioner claims that any application has ever been made for that purpose. In view of the provisions of Entertainment and Betting Tax Act, 1979 (hereinafter called the Act, 1979), certain recoveries of entertainment tax were attempted to be made from the petitioner but he approached this Court by filing the Writ Petition No. 23754 of 1991 for restraining the authorities from making recovery of tax. This Court did not grant any interim relief. The writ petition was disposed of vide order dated 30.1.2004 directing the petitioner to file an appeal against the demand notices in view of the provisions of Section 12 (2) of the Act, 1979. It appears that appeal of the petitioner was not decided and the statutory authorities tried to make the recovery of entertaining tax, and for that purpose they issued sale proclamation dated 13.11.2003. Being aggrieved, petitioner filed Writ Petition No. 15082 of 2004 raising the grievance that on one hand the appeal is not being decided, on the other hand recovery is being made. Therefore, the sale proclamation be quashed. On being confronted, Shri W. H. Khan, learned counsel for the petitioner could not satisfy the Court as under what circumstances if there was no order of tax exemption in favour of the petitioner the tax had not been deposited, and in such an eventuality under what statutory provision the appeal was maintainable for the reason that the appeal under the Act, 1979, is provided in case the amount of tax is disputed or being recovered in spite of the exemption order.

4. In the said case. the petitioner did not mention anywhere that he had not collected the tax from the cinema-goers, and if he has collected, no explanation was furnished as to why it had not been deposited with the Revenue. Thus, in the said writ petition vide order dated 12.4.2004 the petitioner was directed to explain as under what circumstances the appeal could be decided. If he was not disputing that he had collected the tax from cinema-goers and not deposited with the Revenue, or in absence of any order of tax exemption in pursuance of the Government order dated 21.7.1986, the matter remained pending. In the meanwhile, in pursuance of the sale proclamation, the cinema hall has been auctioned on 1.7.2004. Hence this petition.

5. Shri C. K. Rai, learned standing counsel has raised the preliminary objection regarding the maintainability of the petition contending that as earlier petition. i.e., Writ Petition No. 15082 of 2004 for quashing the sale proclamation is still pending, how second petition could be filed for quashing the auction-sale, a consequential act. Shri Rai also submitted that petitioner has not approached this Court with clean hands as the earlier writ petition was filed as Miscellaneous Writ, and another petition has been filed as Tax Writ. It may only be to avoid the Bench, which had heard the earlier petition.

6. We fail to understand that if the Writ Petition No. 15082 of 2004 filed by the

petitioner remained pending before this Court for the basic relief how the writ petition can be filed challenging the consequential order, i.e., auction sale as in the earlier writ petition the sale proclamation dated 13.11.2000 is under challenge. There is no separate cause of action giving rise in the later case which may warrant the petitioner to file the second writ petition.

7. Challenging the consequential order without challenging the basic order is also not permissible.

8. In *P. Chitharanja Menon and Others Vs. A. Balakrishnan and Others*, , the Hon'ble Supreme Court held that in absence of challenge to the basic order, subsequent consequential order cannot be challenged.

9. Similar view has been reiterated in *Roshan Lal and Others Vs. International Airport Authority of India and Others*, , wherein the petitions were primarily confined to the seniority list and the Apex Court held that challenge to appointment orders could not be entertained because of inordinate delay and in absence of the same. validity of consequential seniority cannot be examined. In such a case, a party is under a legal obligation to challenge the basic order and if and only if the same is found to be wrong, consequential orders may be examined.

10. In *H.V. Pardasani and Others Vs. Union of India (UOI) and Others*, . the Apex Court observed that if "petitioners are not able to establish that the determination of their seniority is wrong and they have been prejudiced by such adverse determination, their ultimate claim to promotion would, indeed, not succeed."

11. Similar view reiterated in *Government of Maharashtra and Others Vs. Deokar's Distillery*, .

12. In view of the above, we are of the considered opinion that the Petition No. 885 (Tax) of 2004 is not maintainable, rather petitioner ought to have perused his earlier petition.

13. At this juncture, Shri W. H. Khan, learned counsel for the petitioner has requested to summon the earlier petition and to hear the same today along with this petition, otherwise petitioner would suffer an irreparable loss.

14. As learned standing counsel appearing for the respondents also agreed to it, we called the said file and heard it along with the later petition.

15. Sri W. H. Khan, learned counsel for the petitioner has submitted that if the petitioner has invested a huge amount in raising the construction of the cinema hall and he was entitled to the benefit of Government order dated 21.7.1986 and petitioner had a right to collect the entertainment tax from the cinema-goers and keep it with him as the scheme provided for the benefit of the petitioner and the amount so collected was not required to be deposited in the Revenue, therefore, the question of realisation of the said amount could not arise. However, Shri

Khan could not show us any order of tax exemption under the said Government order dated 21.7.1986. The averment made by Sri Khan cannot be accepted as no person other than the State has a right to collect the tax, and in a case like this, the petitioner was the agent between the State and the cinema-goers. Even if the exemption of tax had been granted to the petitioner, it was for the benefit of the cinema-goers and not for the petitioner, as he could sell the tickets without entertainment tax or to the extent of exemption provided under the said Government order.

16. Petitioner established a Cinema Hall in 1990. At that time, a Grant-in-Aid Scheme was prevalent granting exemption on entertainment tax. If certain conditions were fulfilled. The exemption of entertainment tax was reduced every year by 25% meaning thereby, if exemption of entertainment tax was granted, the cinema owner was exempted from realizing from the cinema-goers and depositing the entertainment tax in the first year completely ; in the second year 75% ; 3rd year 50% ; and in the 4th year 25%. Petitioner had not been granted tax exemption, nor he claims that he had ever applied for it.

17. The incentive of entertainment tax exemption was given to develop the cinema industry and attract more and more people to enjoy cinema. Had the exemption been granted to the petitioner by the statutory authority at the relevant time, the cinema-goers could not be asked to pay the entertainment tax and they could have enjoyed the films at a much cheaper rate. The consequences of non-granting exemption had been that the cinema-goers had paid the entertainment tax and the petitioner being merely a trustee/collecting agent of the State received the entertainment tax from the cinema-goers and as he was under a legal duty to deposit the same with the Revenue. It is not the petitioners' case that in spite of the fact that no exemption had ever been granted to him, he did not charge the entertainment tax from the cinema-goers. Permitting the petitioner to pocket the tax collected by him would amount to unjust enrichment.

18. In *K. S. Satyanarayan v. V. R. Narayana Rao* AIR 1998 SC 2544, Hon''ble Supreme Court has held that juristic basis for such an order of recovery, even if not based on contract or tort, may fall on another category of quasi-contract or restitution. The Hon''ble Supreme Court, while deciding the said case, approved and followed two decisions of English Courts, namely, *Filbrosa v. Fairbairn* (1942) 2 All ER 122 and *Nelson v. Larholt* (1947) 2 All ER 751, which are quite illuminating and the relevant parts thereof, respectively, are reproduced as under :

".....any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quas-

contract or restitution.

It is no longer appropriate to draw distinction between law and equity. Principles have now to be stated in the light "of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not particular to equity or contract or tort, but falls naturally within the important category of cases where the Court orders restitution if the Justice of the case so requires."

19. For the same. reliance can also safely be placed on the Judgment in State of Madhya Pradesh Vs. Vyankatlal and Another, . wherein the Apex Court observed that "only the persons on whom lay the ultimate burden to pay the amount, would be entitled to get the refund of the same, and if it is not possible to identify the person on whom had the burden been placed for payment towards the fund, the amount of the fund can be utilised by the Government for the purpose for which the fund is created."

20. While deciding that case, the Hon"ble Supreme Court relied upon a large number of its earlier judgments, e.g., The Orient Paper Mills Ltd. Vs. The State of Orissa and Others, ; The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, ; The Newabganj Sugar Mills Co. Ltd. and Others Vs. The Union of India (UOI) and Others, and Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf, .

21. In Nawabganj Sugar Mills (supra), the Hon"ble Supreme Court devised a procedure to deal with a situation where equity demanded redistribution but procedural expensiveness and cumbersomeness effectively thwarted legal action by directing the Registrar of the High Court to receive and dispose of claim from the ultimate consumer for excess price paid on proper proof.

22. In Amar Nath Om Prakash and Others Vs. State of Punjab and Others, , the Hon"ble Apex Court observed that a mere declaration that the levy and collection of fee in excess of the required amount would automatically vest in the dealer, the right to get excess amount when in fact he did not bear the burden of it and the morale and equitable owner of it was the consumer public to whom burden had been passed on.

23. Similar view had been taken by the Supreme Court in Indian Oil Corporation Vs. Municipal Corporation, Jullundhar and others, .

24. In State of Rajasthan and Others Vs. Novelty Stores, etc., , the Apex Court observed as under:

The orders of the High Court in the impugned appeals are to be set aside on the sole ground that the respondents after paying octroi duty have passed on the burden to the consumers and collected from the consumers..... Therefore, the order of refund would be an unjust enrichment for them. This Court has

repeatedly held that such a refund should not be ordered..... since respondents are not entitled to the refund of the amount which is already collected and passed on the burden to the consumers, these appeals are to be allowed."

25. In Entry Tax Officer, Bangalore Vs. Chandanmal Champalal and Co. Etc. Etc., , the Hon''ble Supreme Court held that any direction for refund would amount to unjust enrichment of the respondents who were merely dealers and had passed on the burden to the consumers. The dealers had not suffered any loss, they had merely passed on the liability.

26. Similar view has been reiterated in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, M/s. Pawan Alloys and Casting Pvt. Ltd., Meerut etc, etc. Vs. U.P. State Electricity Board and others, Acqueous Victuals Pvt. Ltd. Vs. State of U.P. and Others, and Bhadrachalam Paperboards Ltd. and Another Vs. The Government of Andhra Pradesh and Others, .

27. In Shree Diguijay Cement Company Ltd. v. Union of India and Ors. AIR 2003 SCW 186, the Hon''ble Apex Court explained the scope of principle of unjust enrichment and held that before a claim is accepted, the claimant has to establish and satisfy the authority concerned that he has not passed on burden to any other person, i.e., consumer. In absence thereof, the money paid by somebody else cannot be claimed by him. While deciding the said case. the Court placed reliance upon its earlier judgment and held as under:

"Where the burden of duty has been passed on. the claimant cannot say that he has suffered any real loss or prejudice. Real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden, and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him, for one reason or the other, it is just and appropriate that amount is retained by the State, i.e., by the people. The doctrine of unjust enrichment is a Just and solitary doctrine. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State, for the State represent the people of the country. No one can speak of the people being unjustly enriched..... Beside the principle of unjust enrichment, on equitable principles which squarely apply here, the applicants are not entitled to claim refund of amount paid....."

28. Similar view has been reiterated in Flash Laboratories Ltd. Vs. Collector of Central Excise, New Delhi, ; Hindustan Metal Pressing Works Vs. Commissioner of Central Excise, Pune, ; Commissioner of Central Excise, Chandigarh-II Vs. Steel Strips Ltd., and Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., .

29. A Division Bench of this Court to which one of us (Dr. B. S. Chauhan, J.) was a member examined the similar issue while deciding the Writ Petition No. 651 of 1993, Manoj Chitra Mandir v. District Magistrate, Sonebhadra, vide judgment and

order dated 15.4.1996, wherein also a claim of refund of Rs. 27 lacs was rejected on the ground that petitioner therein had passed on the liability of entertainment tax to the cinema-goers. The said judgment was challenged before the Hon''ble Apex Court filing Special Leave to Appeal (Civil) Nos. 1469-1470 of 1996 and it was dismissed by their Lordships vide order dated 9.8.1996.

30. As the case is squarely covered by the judgment in Manoj Chitra Mandir (supra), petitioner cannot be granted the relief sought merely because he has staked the claim that he could have been entitled for the benefit of grant-in-aid scheme. It is not petitioner''s case that he did not recover the tax from the cinema-goers. Successive petitions have been filed in attempting the commission of robbery on public exchequer using the Court as a forum.

31. We fail to understand on what equitable principle he is successively approaching the statutory authorities and the Court. Filing of this kind of petitions amounts to abuse of process of the Court and such a practice deserves to be deprecated.

32. Determination of tax or the sale proclamation is not under challenge in the subsequent writ petition. More so, if the earlier writ petition had been filed showing it to be a miscellaneous writ petition, how the present writ petition has been filed as a tax petition. It appears that petitioner an ill-advised crafty fellow wants to cheat the public exchequer and for that purpose, he has no hesitation to abuse the process of the Court. Shri Khan learned counsel for the petitioner could not explain any reason whatsoever for filing the successive petition. He could not explain how the petition could be entertained. However, as the earlier petition has been called from the record of the Court, taken on board, heard, the second petition becomes meaningless.

33. It is surprising that petitioner has audacity to claim a share in the sovereign dues submitting before the writ court that he was entitled for benefit of the scheme, automatically, without any application/order and had a right to pass on the liability to the cinema-goers and pocket it as tax holiday meant for the dealers, and there was no obligation on his part to deposit the same with the Revenue. We are also shocked that Sri W. H. Khan, an advocate of a long standing, learned counsel for the petitioner, argued with vehemence that petitioner had a right to retain the sovereign dues collected by him as an agent of the State.

34. Petitions are devoid of merit and dismissed accordingly. It is a fit case for imposing an exorbitant cost, but as petitioner''s cinema hall has already been sold in auction, no cost is imposed.