

(1999) 10 PAT CK 0111
In the Patna High Court
Case No : CWJC No. 4016/90

Uma Talkies

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 12-10-1999

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g)
General Clauses Act, 1897 — Section 6

Citation : (2000) 1 PLJR 723

Hon'ble Judges : S.N. Jha, J;G.S. Sharma, J

Bench : Division Bench

Advocate : Pawan Kumar in 10129, 244, 4016 and 2581, M/s. Ramesh Kumar Agrawal, J.K. Sinha, R.K. Bhargav and Ranjit Tekriwal in 708 and 5776, M/s. Bhupendra Narain Sinha and Shailendra Kumar in 5273, for the Appellant; V.N. Sinha, Ashok Kumar Singh, A.P. Jittu, Satish Chandra Jha and Mukesh Kumar for the State, for the Respondent

Final Decision : Allowed

Judgement

S.N. Jha, J.—These writ petitions have been filed challenging the vires of the provisos to Section 3A and Section 3B of the Bihar Entertainments Tax Act, 1948. The challenge to the vires however, was given up at the time of hearing. Instead, the grievance was confined to the levy of tax in terms of the aforesaid provisos on different grounds. In order to understand the nature of the controversy, it would be apt to first notice the legislative history of the relevant provisions. The Bihar Entertainments Tax Act, 1948 (hereinafter called "the Act") has been enacted to make law relating to imposition of a tax on amusements and entertainments in the State of Bihar. Section 3 which contains the charging provision of the Act empowers the State Government to levy tax on entertainments and makes the proprietor of an entertainment liable to pay the same. By Bihar Ordinance 9 of 1985, Section 3A and Section 3B, amongst other sections, were inserted to provide for consolidated payment of the tax and compounding of the tax respectively. The said Ordinance was replaced by

Ordinance 18 of 1985 and later by Bihar Finance Act, 1985 (Act 4 of 1985). While continuing Sections 3A to 3F inserted by the said Ordinances, the Act introduced provisos in Sections 3A and 3B. By virtue of the said provisos, inter alia, the tax payable either u/s 3A or Section 3B for each show was not to be less than the highest amount or tax payable during any of the three preceding years. A new proviso was also added in Section 4 providing that where the tax is levied under Sections 3A and 3B, the proprietor shall not be entitled to collect any amount exceeding the tax calculated at the rate notified u/s 3(1) as tax from persons admitted to the entertainment. In order to make this judgment self-contained, it would be appropriate to notice the provisions of Section 3A and 3B so far as relevant, as they stood at the relevant time as hereunder:?

3A. Consolidated payment of Tax.?Notwithstanding anything contained in the Act, the State Government, by notification, may levy consolidated amount of tax not exceeding 45 per cent and not below 10 per cent of the gross collection capacity for every show and such amount of tax shall be paid by the proprietor of an entertainment to the State Government:

Provided that the State Government shall for the purpose of levy of consolidated amount of tax, classify places in categories for the fixation of such percentage and the rate of consolidated tax shall be uniform for a particular class of places. The State Government shall for the purpose of classification, take into account the type of place, its location, population, industrial growth and type of market:

Provided further that the consolidated tax payable under this Section shall not be less than the highest amount of the tax for every show payable by the proprietor of an entertainment during any of the three preceding years under Sub-section (1) or (5) of Section 3 or under this Section.

Explanation.?-"Gross collection capacity" shall mean the total amount calculated for total seating capacity of the theatre which shall include the admission fees, tax calculated on the basis of rate notified under sub-section (1) of Section 3 from time to time, surcharge or charge for any privilege, right, facility, service or thing combined with the right of admission to any entertainment.

3B. Compounding of Tax - (1) The State Government may, in lieu of tax payable u/s 3A on application of a proprietor, in the form prescribed under sub-section (2) of Section 3-F, on such conditions, as may be prescribed, permit him to pay a fixed amount or a fixed percentage of gross collection capacity for a specified number of shows in a specified period irrespective of actual number of shows which may be held in that period:

Provided that the fixed amount of the fixed percentage of gross collection capacity shall not be less than the highest amount payable by the proprietor of an entertainment during any of the three preceding years of the concerned period under sub-section (1) or (5) of Section 3 or Section 3A or under this section

2. The vires of Sections 3A and 3B was challenged in CWJC Nos. 2559 of 1985 (Syed Jamilur Rahman and ors. vs. State of Bihar and ors.) and analogous cases. A Division Bench of this Court vide judgement reported in 1986 PLJR 562 upheld the vires of the main provisions of Section 3A and 3B. However, the second proviso to Section 3A and the proviso to Section 3B were held to be ultra vires Articles 14 and 19(1) (g) of the Constitution of India. After the aforesaid judgement the said impugned provisos i.e. second proviso to Section 3A and the sole proviso to Section 3B were amended by Bihar Ordinance 21 of 1986. This was followed by successive Ordinances, and finally the Bihar Taxation Laws (Amendment and Validation) Act, 1990 (Act 2 of 1990).

3. The amended provisos read as follows:?

3A.....

Provided that the State Government shall for the purpose of levy of consolidated amount of tax, classify places in categories on the basis of latest census population figures, for the fixation of such percentage and the rate of consolidated tax shall be uniform for a particular class of places:

Provided further that the consolidated tax payable for a show under this Section shall not be less than the average amount of tax for one show calculated on the basis of tax payable during the preceding three years by the proprietor of an entertainment under sub-section (1) or (5) of Section 3 or Section 3B or under this Section.

3B. (1)

Provided that the fixed amount or the amount calculated on the basis of the fixed percentage of the gross collection capacity under this section shall not be less than average amount of tax of the preceding three years payable by the proprietor of an entertainment under sub-section (1) or (5) of Section 3 or Section 3A or under this Section.

(2)

4. In the meantime, in terms of the first proviso to Section 3A, the State Government had issued notification no. S.O. 774 dated 14.8.85 classifying the places in different categories. This was challenged by way of a writ petition before the Ranchi Bench of this Court. The challenge initially succeeded and the Government was directed to reconsider the matter relating to categorisation. The Commissioner, Commercial Taxes, Bihar passed an order reiterating the earlier categorisation classifying the places in 10 categories vide his order dated 12.5.87, The said order dated 12.5.87 was again challenged before the Ranchi Bench of this Court. The writ petition however, was dismissed summarily this time. The concerned petitioner Hari Krishna Lal moved the Supreme Court in Civil Appeal No. 1530 of 1980. The Supreme Court vide its judgement dated 20.4.88 reported in 1988 PLJR 73 (SC) held that as per the first proviso to Section 3A, the places are to be categorised taking into account five factors, namely, type of

place, its location, population, industrial growth and type of markets. But the places had been categorised only on the basis of population and that too taking into account not the population of the particular place but the entire block and the like. On the ground that the other relevant factors mentioned in the proviso had not been taken into account, the impugned order of the Commissioner dated 12.5.87 was quashed. The result was that the main notification no. S.O. 774 dated 14.8.85 also stood quashed by implication. While setting aside the order and allowing the appeal the Supreme Court directed the respondents to consider the matter again in the light of the observations made in the judgement. Unfortunately, no fresh notification was issued by the State Government. The matter again went to the Supreme Court in the case of M/s. Veena Talkies vs. State of Bihar in SLP (Civil) No. 10283 of 1988 giving rise to Civil Appeal No. 3107 of 1989. Vide order dated 21.7.89 the Supreme Court, reiterating its judgement and order dated 20.4.88 in Hari Krishna Lal's case (supra) directed that a decision in the matter after taking into account different factors mentioned in the first proviso to Section 3A, be taken by 31.12.89. Instead of the Government issuing any fresh notification, the State Legislature amended the first proviso itself by the Bihar Taxation Laws (Amendment and Validation) Act, 1990, referred to above. The State Government later issued notification vide S.O. 325 dated 1.7.91 fixing rates of tax in the light of the amended provisos to Section 3A and 3B on 1.7.91.

5. Now coming to the cases in hand, the controversy in CWJC Nos. 4016/90, 5776/86 and 708/87 (hereinafter referred to as "first group of cases") relates to compounding of tax on the basis of amount of tax payable during the preceding three years. As a matter of fact, in CWJC Nos. 4603/90, 5253/90 and 5264/90 also similar controversy has been raised. However, they have been separately mentioned on account of the fact that at the time of hearing none appeared on behalf of the concerned petitioners in those cases. However, we do not propose to draw any adverse inference on account of the non-appearance of the lawyers as common point of law is involved and the decision in the cases which have been argued, in all fairness, ought to be made applicable to those cases, as indeed to all other similar cases.

6. In CWJC Nos. 4063/88, 10129/89, 244/90 and 2581/91 (hereinafter referred to as the "second group of cases"), the challenge initially was as to vires of the first proviso to Section 3A relating to categorisation, but as indicated at the outset the challenge is now confined to levy of tax vide notification no. S.O. 325 dated 1.7.91 issued in the light of the amended proviso. I propose to deal with these two groups of cases separately in this judgement.

7. The salient feature of the amendment as regards the first group of cases, it would appear, is that the measure of consolidated tax instead of being the highest amount of tax payable by the proprietor during any of the three years preceding the concerned period, now is the average of the tax payable during the preceding three years. The argument advanced on behalf of the petitioners

however is that Section 3B contemplates compounding of tax on the basis of "gross collection capacity" determined on the basis of rate of admission fee to each class multiplied by the number of seats in that class(es) during the particular financial year, and not on the basis of the "average" of the preceding three years. The respondents are assessing tax on the basis of "average" as per the second proviso to Section 3A.

8. The material facts in this regard may be taken from CWJC No. 4016/90 which has been argued as the representative case on the point. From Annexure-12 and Annexure 13 series, it appears that the gross collection capacity of the petitioner-Cinema Hall for the financial year 1986-87 beginning from 1.4.86 was shown as Rs. 7118.95 on the basis of which compounding of tax was allowed by the Assessing Officer at Rs. 62,291.25 paise. During the next financial year beginning from 1.4.87, the gross collection capacity was assessed at Rs. 6660.96 paise in view of reduced number of seats from 1609 during the financial year 1986-87 to 1505. The compounding of tax however, was allowed at the same old rate i.e. 62,291.25 paise. During the next three financial years beginning from 1.4.87 1.4.88 and 1.4.89, the sitting capacity and the gross collection capacity remained the same and so was the amount on which the compounding of tax was allowed. For the next period beginning from 14.7.89, the compounding of tax was allowed at the same rate although the number of seats decreased to 1151 and consequently the gross collection capacity also decreased from Rs. 6660.95 to Rs. 5797.60.

9. As a matter of fact, this does not appear to be an inadvertent error on the part of the concerned Assessing Officer. From the letter of the Commissioner of Commercial Taxes, Bihar being no. 8617 dated 22.10.86, marked Annexure 10, it appears that all Assessing Officers were informed that the amount of compounded tax u/s 3B shall not be less than the average of the amount of tax payable during the preceding three years. There is a patent fallacy in the approach of the Department. The above direction contained in paragraph 6 of the letter is the result of a misunderstanding of the proviso to Section 3B(1). From a bare perusal of the proviso, which has been quoted above, it is clear that the fixed amount or the amount calculated on the basis of fixed percentage of the gross collection capacity under that Section "shall not be less than the average amount of tax of the preceding three years payable under Sub-section (1) or (5) of Section 3 or Section 3A or under this Section". It would appear that a similar provision is contained in the second proviso to Section 3A wherein it is laid down "that the consolidated tax payable under this section shall not be less than the average amount of tax payable during the preceding three years under sub-section (1) or (5) of Section 3 or Section 3B or under this Section."

10. From the scheme of the Act, it would appear that Section 3 creates a charge regarding levy of tax on entertainment worked out on the basis of the amount chargeable for admission (to the entertainment) as the State Government may fix not exceeding 150 percent of the amount chargeable. Sub-section (5) of

Section 3 provides for compounding of the tax payable u/s 3(1). The provisions of Section 3 however, were found to be onerous and administratively inexpedient. By Ordinance 9/85 which was finally replaced by the Bihar Finance Act, 1985, referred to above, a new mechanism was introduced for consolidated payment of tax at the rate not exceeding 45 percent and not below 10 percent of the gross collection capacity for every show. The said provision has already been quoted above. Apart from Section 3A providing for consolidated payment of tax, option was also given to the proprietor of the entertainment to pay compounded tax u/s 3B. From conjoint reading of the provisions of Sections 3, 3A and 3B of the Act, it would appear that while Section 3 contains charging clause, with the issuance of notification u/s 3A the provisions of Section 3 stand superseded, and the proprietor becomes liable to pay tax at the rates fixed u/s 3A in all cases. Where, however, option is allowed u/s 3B, the proprietor is required to pay at the rates in accordance with the provisions as contained therein. Section 3, nevertheless, remains the charging section and likewise, section 3A remains the actual levy Section. As would be seen hereinafter where the proprietor commits default in payment of compounded tax u/s 3B, he becomes liable to pay consolidated tax u/s 3A. It is for this reason that both in the second proviso to Section 3A and the proviso to Section 3B(1) it is laid down that the tax payable under those sections shall not be less than the tax payable under sub-section (1) or sub-section (5) of Section 3 or Section 3A or Section 3B, whichever is applicable. In other words, the tax shall not be less than the amount payable under any of the three sections. It is however, obvious that where a proprietor has opted for compounding and the same has been allowed by the Assessing Officer, he cannot be compelled to pay tax on the basis of average of the preceding three years. The words "or under this Section" appearing at the end of the proviso to Section 3B(1) is independent clause which leaves no room for doubt that if the amount of tax payable under that Section i.e. Section 3B is less than the amount payable u/s 3A, it is that amount which he can be asked to pay and not the amount payable u/s 3A the consolidated tax on the basis of the average of the preceding three years. In other words, "or" appearing in both second proviso to Section 3A or the proviso to Section 3B(1) has to be understood as "disjunctive" constituting separate clauses independent from each other. It is obvious that a person would like to pay compounded tax u/s 3B only when he finds the option more favourable. While u/s 3A he is liable to pay the consolidated amount of tax not exceeding 45% and not below 10% of the "gross collection capacity" for every show. When option u/s 3B is allowed, he is required to pay only a fixed amount determined on the basis of the sitting capacity during the particular financial year irrespective of the actual number of shows in that year.

11. Reference to the remaining part of Section 3B as well as Section 3F and Section 9 so far as relevant, and the prescribed formats of the application for permission to pay tax u/s 3B and the grant of permission. (Forms "B" and "C", respectively), would make the position still clear:?

3-B. (1)

(2) A proprietor intending to pay tax under sub-section (1) shall apply in the prescribed form to the Commissioner or any other officer, specially authorised by the Commissioner through the Deputy/Assistant Commissioner/Commercial Taxes Officer I/C of the Circle/Sub-circle not less than 15 days before the commencement of the period for which the proprietor intends to pay tax under sub-section (1).

(3) On receipt of application, the Commissioner or any other officer specially authorised by the Commissioner, shall, after making such enquiry as he may deem necessary, permit the proprietor in the form prescribed under sub-section (3) of Section 3F to pay fixed sum in accordance with sub-section (1).

(4) The option permitted under sub-section (3) shall continue to be in force till the end of the financial year in which such option is permitted.

3-F. Forms for weekly return and application for permission and permission to pay compound tax.?(1) Every proprietor of an entertainment liable to pay tax u/s 3-A or opting to pay tax u/s 3-B shall furnish to the Deputy/Assistant Commissioner/Commercial Taxes Officer of the Circle/Sub-Circle I/C. a duly signed weekly return in Form A or the Schedule before or latest by Wednesday following the week to which the return relates.

(2) Application for permission to pay tax u/s 3B shall be in Form B of the Schedule.

(3) The permission to pay tax u/s 3B shall be in form "C" of the Schedule.

9. Submission of returns and payment and recovery of entertainments tax.?

(A)

(2)

(3)

(4)

(5) Where the proprietor fails to make payment of the amount of consolidated or compounded tax u/s 3A or 3B or sub-section (5) or Section 3 or Section 3C or fails to make payment of the entertainment tax according to the return furnished under sub-section (1) of this section within the prescribed period, without prejudice to any action which is or may be taken under clause (b) of sub-section (1) of Section 16, the prescribed authority shall after giving such proprietor an opportunity of being heard, impose a penalty which may extend to three per centum of the amount of tax for each of the first three months following the due date and to six per centum for each subsequent month or part thereof.

(6).... ..

(7) Any penalty imposed under sub-sections (2), (5) or (6) shall be without prejudice to any punishment that may be imposed u/s 16.

(8) Any amount of tax or penalty which remains unpaid under this Act or any sum required to be paid under sub-section (5) of Section 3, which remains unpaid after the due date, shall be recoverable as an arrear of land revenue.

(9)....

FORM - B

Application for permission to pay tax under sub-section (1) of section 3-B of the Bihar Entertainments Tax Act, 1948.

I the proprietor situated at in the district of whose particulars are given below hereby signify my intention to opt for the payment of fixed amount of tax payable under sub-section (1) of Section 3-B in respect of the shows to be held in the said theatre. I hereby apply for permission to pay tax under the above mentioned section and agree to abide by the rules and conditions prescribed:

1. Name and address of the theatre in respect of which application made.
2. Registration number and date.
3. Number and date of licence granted under the Bihar Cinema (Regulation) Rules.
4. Date from which applicants opts to pay tax u/s 3-B.
5. (a) Name of the proprietor.
(b) Name of other partners, if any
6. (a) Category of theatre assigned in Section 3A
(b) Class of theatre 70 mm./35 mm./16 mm./A.C./Air Cooled/ordinary (delete which is not applicable).

7. Name of Classes.

Rate of admission.

Number of seats.

Gross collection.

1

2

3

4

Total:

8. Tax payable every week under sub-section (1) of Section 3-B with reference to gross collection capacity worked out in column 7 above..... .

I declare that to the best of my knowledge and belief the information furnished above are true and complete.

Place..... Signature of the applicant

Date..... Status and relation with the Proprietor.....

(To be filled in by the Incharge of the Circle/sub-circle)

I..... Deputy/Assistant Commissioner/Commercial Taxes Officer, Incharge..... Circle/sub-circle at.....certify that the information furnished above by the proprietor are true to the best of my knowledge and belief.

Signature Designation.

Place

Date

Official seal.

FORM-C

Permission to pay entertainment tax u/s 3-B of the Bihar Entertainments Tax Act, 1948.

Whereas Shri.....Proprietor of 70 mm./35 mm./16 mm./Air conditioned/Air cooled/ordinary theatre/known as..... situated at.... in the district of....has applied for compounding of tax under sub-section (1) of Section 3-B, I hereby permit the said proprietor to pay Rs. (in words) per week commencing from.....subject to the following conditions:-

1. The amount of tax payable has been determined on the following information furnished by the proprietor in the application and certified by the..... of. Circle/sub-circle :-

Name of classes

Number of seats

Rates of admission

Gross Collection

2. The amount of tax shall be deposited by the proprietor in advance for every week before the week begins and default in any payment shall invalidate this permission and in such case it shall be deemed that no permission has been granted.

3. This permission shall be valid from..... to
4. This permission may be revoked, suspended or cancelled at any time and no compensation shall be payable by the Government on account of any loss caused to the proprietor by reason of such revocation, suspension or cancellation.
5. The proprietor shall abide by the provisions of the Bihar Entertainments Tax Act, 1948 and the rules framed thereunder in so far as they are applicable to him.
6. A correct and complete statement shall be maintained by the proprietor in duplicate in respect of the number of tickets of each class issued and sold for each show and the amount received for, such tickets issued and sold by using double side carbon paper so as to make impressions on reverse side of the statement also. The entries in the statement shall be written up and the accounts closed within 60 minutes of interval of the show whichever falls earlier and shall be produced before the Inspecting Officer at the time of inspection.
7. The proprietor shall not make any alteration in the seats and rate of admission without prior written permission of the Commissioner.
8. The proprietor shall not admit any person in excess of seats and shall not realise any amount from any person in excess of the rates specified in (1) above, the contravention of which shall make the proprietor from the commencement of the permission liable to pay tax applicable to the gross collection capacity on the basis of excess persons and realisation of excess amount of admission fee. The proprietor shall also be liable to penalty u/s 13-A and 13-C.
9. The proprietor shall furnish to the Deputy/Assistant Commissioner/Commercial Taxes Officer of the Circle/Sub-circle a duly signed return prescribed in sub-section (1) of Section 3-F.

Signature Designation

Place

Date

Seal.

12. The aforementioned provisions came up for consideration in the case of M/s. Niwas Talkies & anr. vs. The State of Bihar & ors., 1998 (3) PLJR 833. The petitioners in that case had challenged a show cause notice in the matter of re-assessment of tax u/s 13B of the Entertainments Tax Act read with Section 19 of the Bihar Finance Act 1981 in the light of the audit objection. After referring to the provisions, this Court observed,

It would thus appear that provisions of Section 3B and related provisions of the Act provide a complete code for realisation and payment of entertainment tax where proprietor of an entertainment opts for compounding of the tax. The usual procedure relating to submission of returns, assessment etc. in such a case are not applicable. In other words, where the proprietor has opted for compounding

of his tax liability which he is otherwise liable to discharge u/s 3A (where no such notification as envisaged u/s 3A has been issued), and such option is allowed, he is not required to file the return as contemplated u/s 9 of the Act and therefore there is no question of assessment within the meaning of section 9B of the Act. Instead, he is required to file weekly returns in Form A in the manner laid down in Section 3F, and to pay the tax in the manner indicated in para 2 of Form C, that is to say, in advance for every weekly before the week begins. Any default in payment of the tax in the prescribed manner would result in invalidation of the permission and it would be deemed as if no permission had even been granted making him liable to pay the tax as per the provisions of Section 3 or Section 3A, where notification as mentioned therein has been issued and the State Government has levied as consolidated amount of tax.

This Court accordingly held that in case of default in payment of tax in accordance with the terms of permission indicated in form "C", the proprietor is liable to pay tax as per the provisions of Section 3A of the Act, but there is no question of re-assessment u/s 13-B of the Act.

13. The decision, it would appear, squarely covers the point. Section 3B along with the related provisions are a complete Code for realisation of the entertainment tax where the proprietor opts for compounding and such option is accepted by the Assessing Officer, if there is default on the part of the proprietor, he becomes liable to pay tax u/s 3A, but such eventuality arises only in case of default. Where there is no default on the part of the proprietor, the provisions of Section 3A cannot be applied and it is not open to the Assessing Officer to realise tax at the rates notified u/s 3A. The circular of the Commissioner of Commercial Taxes, Bihar dated 22.10.86 makes the provisions of Section 3B virtually redundant by directing the Assessing Officer to realise tax u/s 3B at a rate "not less than the average of the amount of tax payable during the preceding three years. The concept of "preceding three years average" is extraneous to the scheme underlying compounding of tax u/s 3B. Although the expression occurs in the proviso to Section 3B, as I have explained above, it is because second proviso to Section 3A, which is the actual levy clause which becomes applicable in case of default u/s 3B, mentions it. I have already explained the significance of the words "or under this Section" occurring in Section 3B above. The relevant part of the circular dated 22.10.86 and the consequential action including assessment of tax, demand notice and the realisation must be held to be arbitrary and illegal and fit to be quashed.

14. Now I take up the second group of cases, namely, CWJC Nos. 4063/88, 10129/89, 244/90 and 2518/91. The submission of the counsel for the petitioners in these cases, in substance, is that as per the first proviso to Section 3A, as it originally stood, the places where the Cinema houses are situated, had to be categorised on the basis of five factors, namely, the type of place, its location, population, industrial growth and type of market. However, in the notification that was issued vide S.O. 774 dated 14.8.85, the places were

categorised on the basis of population alone and that too taking into account the population of the entire block etc. and not the population of the "place". The notification having been struck down by the Supreme Court in Hari Krishna Lal's case, 1988 PLJR 73 (SC), as per the direction contained in the judgement, the State Government was required to issue a fresh notification. Instead of issuing fresh notification, they amended the first proviso to Section 3A only after the Supreme Court fixed the deadline of 31.12.89 in Veena Talkies" case (supra). It was submitted that while it was open to the Legislature to amend the proviso making the population as the sole basis of categorisation, the State Government was required to issue fresh notification in terms of the amended provision which was done only on 1.7.91 vide notification no. S.O. 325. It was submitted that although the Bihar Taxation Laws (Amendment and Validation) Act, 1990, made the amendment effective from 1.8.85 and validated all actions taken or things done under the preceding Ordinance/Act, in the absence of fresh notification fixing the rate of tax, which came into existence only in 1991 vide S.O. 325 dated 1.7.91, the actions taken under the unamended provision including collection of tax cannot be said to be valid. It was urged that there are four prerequisites for levy of tax namely, taxable event, object of tax, rate of tax, and measure or value of tax. Unless all these requisites are present, there cannot be levy of tax. Inasmuch as the rate of tax notified by S.O. 774 dated 1.4.85 was held to be not in accordance with law as it had been issued on the basis of population alone, the State Government was directed to issue a fresh notification in terms of the first (unamended) proviso to Section 3A of the Act. It was submitted that much after the amendment in the First proviso by the Bihar Taxation Laws (Amendment and Validation) Act, 1990, the State Government realised the lacuna and issued the notification fixing the rates of tax but only on 1.7.91. The notification being an executive order and effective from 1.7.91, collection of tax for the period prior to 1.7.91, therefore, cannot be said to be in accordance with law and saved by the Validation Act. It was submitted that unless the lacuna in an invalid Act is removed, the action taken and things done thereunder cannot be saved and validated even by a Validating Act of the Legislature.

15. Shri V.N. Sinha, learned Government Pleader appearing for the respondents, submitted that in the case of Veena Talkies vs. State of Bihar (supra), while directing the State of Bihar to issue a fresh notification in the matter of categorisation of the places by 31.12.89, the Supreme Court had directed that until then the present rate will continue to be payable by the petitioners. According to the counsel, as per the said order, the existing rate must be held to be effective till 30.6.91 i.e. until the notification no. S.O. 325 dated 1.7.91 was issued. Shri Sinha also placed reliance on Sub-section (4) of Section 21 A, inserted by the said Validation Act, as well as the savings clause contained in Section 22 of the Act in support of the submission that the levy, collection and payment of tax, in accordance with the provisions of the second proviso to Section 3A and the proviso to Section 3B(1) shall be deemed to have been

validly made and shall not be refundable notwithstanding any judgement, decree or order of any Court, Tribunal or Authority.

16. Shri Pawan Kumar learned counsel for the petitioners, dealing with the first part of the argument of the Government Pleader submitted that the order of the Supreme Court in the case of M/s. Veena Talkies cannot be extended beyond 31.12.89 in view of the clear words "until then" used by the Supreme Court. In other words, the existing rate was, to remain valid only upto 31.12.89. There being no rate of tax during the period from 1.1.90 to 30.6.91, the tax could not be validly levied or collected. Counsel urged that it is open to the legislature to validate the things done or action taken under an invalid Act enacting law but this can be done only after removing the lacuna in the Act. In the present case the Legislature amended the proviso but in the absence of rate of tax the levy under the amended provision could not be implemented and tax collected. Counsel pointed out that where amendment is made with retrospective effect, validity of things done and action taken earlier under the old amendment Act is to be considered on the basis of the amended provisions and not on the basis of general provisions of Section 6 of the General Clauses Act, 1897.

17. I find substance in the argument of the counsel for the petitioners that the order of the Supreme Court in the case of M/s Veena Talkies (supra), cannot be extended beyond 31.12.89. By its order dated 20.4.88, in the case of Hari Kishan Lal, 1988 PLJR 73 (SC), the Supreme Court had issued a clear direction to the State Government to make fresh notification regarding categorisation of places but the State Government did not comply with the order. When the dispute again went to the Supreme Court in the case of Veena Talkies (supra), on 21.7.89 it passed a peremptory order directing the State Government to take a decision by 31.12.89. The further direction contained in the said order to the effect that "until then the present rate will continue" was obviously issued to avoid a vacuum. In the absence of rate the tax could not be levied and that is why, apparently, the Supreme Court directed that the existing rates will continue till 31.12.89. The idea obviously was that within this period a fresh notification would be issued by the State Government. The notification was issued only on 1.7.91. There is no dispute for the period thereafter.

18. It is true that Validation Act (Bihar Act 2 of 1990) amended the first proviso to Section 3A, among other provisions, and made the amendment retrospective from 1.8.85. After the notification S.O. 774 dated 14.8.85 under the first proviso to Section 3A was struck down by the Supreme Court in Hari Kishan Lal's case (supra), the State Government was required to issue a fresh notification. It was certainly open to the State Legislature to intervene and amend the first proviso to Section 3A itself instead of the State Government issuing fresh notification as directed by the Supreme Court in Hari Kishan Lal's case, and make the same retrospective from 1.8.85 itself; nevertheless, the rate of tax had to be notified after re-categorisation of "places" in view of the amended first proviso to Section 3(1). The Supreme Court realising the consequences passed a rather unusual

order, if I may say so, directing that the existing rates will continue but a deadline was fixed. The existing rates remained operative by virtue of Supreme Court's order upto 31.12.89. There being no effective rate of tax, during the period from 1.1.90 to 30.6.91, levy of tax cannot be said to be legal. However, by Section 26 of the Validation Act inserting inter alia, sub-section (4) in Section 21A of the Act (referred to above), the Legislature has created an injunction restraining any court, tribunal or authority from passing order of refund. It would be useful at this stage to quote the provisions of sub-section (4) of Section 21A as inserted by Section 26 of the Validation Act as hereunder.

(4) (a) Notwithstanding any judgment, decree or orders of any Court, Tribunal or Authority any levy, collection and payment in accordance with the second proviso to Section 3-A or the proviso to sub-section (1) of Section 3-B shall be deemed always to have been validly made, and

(b) Notwithstanding any judgement, decree or order of any Court, Tribunal or authority any amount of entertainment tax levied, collected and paid in accordance with the second proviso to section 3-A or the proviso to the subsection (1) of Section 3-B of the Bihar Entertainments Tax Act, 1948 shall not be refundable and no Court, Tribunal or authority shall order for refund of any such amount.

19. From perusal of the above provisions it is clear that the validation Act not only validates the levy of tax but also validates its collection by the department and payment by the assessee i.e. proprietor and, as if this was not enough, restrains any court, tribunal, authority from making any order of refund. In other words, even if it is possible to find fault with the levy for tax or its collection/payment on the ground that in the absence of effective rates the tax could not be levied or collected/paid, it would not be possible for this court to pass any consequential order regarding refund of the amount. It however, must be clarified that while the department may not be made liable for refund of the amount of tax collected by it during the period of interregnum, equally, it would also not be entitled to collect further tax, nor the proprietors (assesseees) would be liable to pay further tax for the period in question i.e. from 1.1.90 to 30.6.91, if the tax has not already been paid by them and collected by the department. The respondents are accordingly restrained from making any fresh levy and/or collecting tax, if not already levied or collected, for the period between 1.1.90 and 30.6.91. The controversy in this group of cases is decided accordingly.

20. As regards the first group of cases, except levy already made or tax already collected prior to coming into force of the validation Act i.e. 30.1.90, all pending proceedings and demands are quashed and the respondents are directed to act in future in accordance with this judgement. In the result, these writ petitions are allowed to the extent and in the manner and terms mentioned above. There will be no order as to costs.

Gurusharan Sharma, J.

I agree.