(1980) 04 GUJ CK 0011

In the Gujarat High Court

Case No : Spl. Civil Applns. No''s. 1860, 1862 to 1864 and 1894 of 1975 and 412 of 1976

Umaji Bhuvan Dharmashala Trust and Others — APPELLANT

Vs

State of Gujarat and Others — RESPONDENT

Date of Decision : 02-04-1980

Acts Referred:

Bombay General Clauses Act, 1904 — Section 7
Constitution of India, 1950 — Article 226
Gujarat Education Cess (Amendment) Act, 1970 — Section 6
Gujarat Education Cess Act, 1962 — Section 12(1), 13(3)

Citation : AIR 1981 Guj 223 : (1981) 22 GLR 469

Hon'ble Judges : S.L. Talati, J;S.H. Sheth, J

Bench : Division Bench

Advocate : P.V. Hathi, for the Appellant; A.J. Patel, Asst. Govt. Pleader, instructed by Bhaishanker Kanga and Girdharlal, for the Respondent

Judgement

Sheth, J.—These six petitions have been filed by the Trustees of public charities. There are Jain Dharmashalas at Palitana in the District of Bhavnagar. They were called upon the Mamlatdar of Palitana to pay education cess for the, period commencing from 1st August, 1962 to 31st March, 1975. He also demanded from the petitioners penafty for not having paid education cess in time. Those notices of demand and levy of penalty are challenged by the petitioners in these petitions.

2. Before we proceed to deal with the merits of the case, it is necessary to state a few facts showing the state of these petitions. In each petition, several public charities have been joined together. The facts relating to each public charity are different. In our opinion, there could not have been a more heterogenous grouping of the petitioners in each of these petitions. If facts relating to each of. the petitioners are different, then it is always necessary for each of the petitioners to file a separate petition. They cannot join in a common petition and raise on different facts different questions some of which may be answered one

way and others may be answered in a different way. This unseemly state of affairs which each of these six petitions presents renders them liable to be dismissed in limine. However, we do not propose to do so because the public charities are the petitioners. To dismiss them in limine is to cause harm or injury to the public charities. Therefore, we proceed to decide the broad questions of the law in these petitions and leave the rest to be decided by the Mamlatdar on applications which the petitioners may make to him in that behalf.

3. The first question which has been raised is whether u/s 12 of the Gujarat Education Cess Act, 1962, education cess could have been levied on the petitioners with effect from 1st April, 1962. In that behalf, Mr., Hathi has relied upon sub-see. (1) of Section 12 which reads as follows:

"Subject to the provisions of this Act, there shall be levied and collected with effect from the Ist day of April, 1970 a tax on lands and buildings situated in an urban area at the following rates ... ..."

This sub-section was amended by Gujarat Act 8 of 1970. Prior to its amended by Gujarat Act 8 of 1970, the date which was mentioned was 1st of August, 1962. The unamended sub-section (1) of Section 12 read as under:

"Subject to the provisions of this Act, there shall be levied and collected with effect from the 1st day of August, 1962 ... ..". The argument which has been raised is that since it was by amendment made by Gujarat Act 8 of 1970 that 1st day of April, 1970 was inserted in sub-section (1) of S. 12, education cess which became payable for the period prior thereto could not now be recovered because, according to Mr. Hathi, there is no saving clause. Now, Section 6 of the Amending Act provides for savings. However, it provides for savings in respect of Ss. 19 and 20 only, It reads thus:

"Not withstanding the amendments made in Sections 19 and 20 of the principal Act by this Act, a person shall be entitled to recover the amount of tax under the said Section 19 or as the case may be, the amount of difference under the said Section 20, in relation to the tax levied for any period prior to the commencement of this Act whether the tax is paid before or after such commencement, as if this Act had not been passed."

Section 19 of the Act provides for the right of a person who has been held liable to pay tax to recover it from the occupier of the land or building. Section 20 provides for apportionment of liability for tax in respect of lands or buildings which have been let and in respect of which rateable value exceeds the amount of rent. Mr. Hathi has argued that since Section 6 does not save the levy and recovery of education cess which became due and payable prior to 1st April, 1970, it cannot now be recovered. It is true that Section 6 of the Amending Act does not come to the rescue of the taxing authority, However, Section 7 of the Bombay General Clauses Act, 1904, helps the taxing authority it provides thus :

"where this Act, or any Bombay Act or Gujarat Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

....

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder.

It is clear, therefore, that unless the Amending Act expresses a contrary intention, the liability to pay education cess which accrued for a period or periods prior to 1st April, 1970 is saved. We find nothing in the Amending Act which discloses such a contrary intention. Therefore, the previous operation of unamended Section 12 (1) of the Gujarat Education Cess Act, 1962, is not at all affected by Gujarat Act 8 of 1970. The first contention raised by Mr. Hathi, therefore, fails and is rejected. ,

4. The second contention which he has raised turns upon the construction of a notification which has been issued by the State Government u/s 13 (3), It provides as follows:

"The tax u/s 12 shall not be leviable in respect of the following, that is to say-

(3) any building or land or class of buildings or lands, which the State Government, if it considers it necessary to do so in the public interest, may by notification in the Official Gazette, exempt from payment of the tax u/s 12:"

Notification issued by the State Government has been annexed to the petition.'' it provides, inter alia, as follows:

"Lands and buildings or portions thereof solely used for public worship or for a public charitable purpose and held for a public trust registered under the Bombay Public Trusts Act, 1950, or for a society registered under the Societies Registration Act, 1860." The classes of lands and buildings described in the paragraph extracted above have been exempted from payment of education cess. There are two conditions which must be satisfied by them. It is nobody''s case that the properties which belong to public charities (which are the petitioners) are used solely for public worship. The question is whether they are used for public charitable purpose. Secondly, whether they are held by public trusts registered under the Bombay Public Trusts Act, 1950. It is not in dispute before us that all the public charities which are the petitioners before us have been registered under the Bombay Public Trusts Act, 1950. The first condition is, therefore, satisfied.

5. All the public charities are in respect of ''Dharmashalas'' which admit pilgrims who go to Palitana for religious purposes. To admit a pilgrim for a day or two or more, depending upon the situation in each individual case, indeed amounts to a charitable purpose. However, there are certain exceptions which have been laid down in the Explanation which has been appended to that notification. The Explanation says that the following buildings and lands or portion thereof shall

not be deemed to be solely occupied and used for public worship or for a public charitable purpose within the meaning of Clause 2, namely:-

(a) buildings or lands or portions thereof in which any trade or business is carried on; and

(b) buildings or lands or portions thereof in respect of which rent is derived, whether such rent is or is not applied solely to religious or charitable purposes.

Paragraphs 3 and 4 of the Notification are not relevant for the purposes of the present case. These two exceptions which have been made, in our opinion, mean this. If there is ''Dharmashala'' which admits pilgrims who go to Palitana for religious purposes and has let out a part of its buildings for any trade or 6usiness, then it is not exempt from payment of, education cess. In each case, the Mamlatdar will have to find out whether a part of any such ''Dharmashala'' has been let out for trade or business. It is not alleged in any case that the whole of any ''Dharmashala'' has been let out for trade or business: Therefore, we are not concerned with that aspect in this case. 6. Secondly, rent, in our opinion, has a commercial element in it. If the public charities are charging the pilgrims something which is in the nature of maintenance charge or service charge it is, in our opinion, not ''rent''. ''Rent'' is ordinarily something more than a maintenance charge or a service charge. Any ''Dharmashala'' in respect of which something more than a maintenance charge or a service charge is collected from the pilgrims, can be regarded as collecting rent. In each case, the Mamlatdar of Palitana shall have to find out whether what the petitioner charges in respect of a particular ''Dharmashala'' is a mere maintenance charge or a service charge or whether there ''is a commercial element in the amount which the pilgrims are charged. If he comes to the conclusion that what is collected ''from the pilgrims is, a maintenance charge or service charge or both and that there is no commercial element in such charges, they will be entitled under the said notification to exemption from payment of education cess, indeed subject to the fact that no portion thereof has been let out for business or trade. These very principles shall apply to ''Chhatralayas'' or students'' residential homes.

7. It is not possible for us to do anything more in these petitions than what we have stated because there are several petitioners whose facts are totally different and they have been joined together in each of the petitions.

8. Mr. Hathi has shown us in some of the petitions that some of the public charities have already been exempted by orders made in that behalf. If those orders are in force, they are certainly entitled to exemption and the Mamlatdar of Palitana cannot demand from them any education cess nor can he levy penalty on them for its nonpayment.

9. In the result, the petitions are partly allowed and it is declared that the public charities which have not let out the whole or a portion of their premises for trade or business and which are collecting from the pilgrims who are admitted to their permises only a maintenance charge or a service charge or both, not containing

an element of ''rent'' in commercial sense as stated above, are entitled to exemption from payment of education cess. It shall be open to each of the petitioners to make an appropriate application to the Mamlatdar, Palitana, seeking an exemption from payment of education cess in respect of the property held by it in terms of the construction which we have placed upon the exemption notification dated 24th December 1963. If they satisfy the requirements of the notification as interpreted by us, the Mamlatdar, Palitana, shall grant exemption from payment of education can in those cases. He shall not enforce the demand for education cess and penalty against those public charities in whose favour exemption has already been granted if such exemption is still in force. Rule is made partly absolute in each case with no order as to costs.

10.Order accordingly.