(2012) 04 BOM CK 0060

In the Bombay High Court

Case No : Writ Petition No. 4079 of 2006

Vimal Balbhim Nangane APPELLANT

Vs

The Collector Bombay Suburban District and Another RESPONDENT

Date of Decision : 25-04-2012

Acts Referred:
Bombay Entertainments Duty Act, 1923 — Section 4B, 4B(4), 9A

Citation : (2012) 6 ALLMR 82 : (2012) 4 MhLj 835

Hon'ble Judges : R.D. Dhanuka, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Milan Desai, instructed by Mr. Siddheshwar B. Kalel, for the Appellant; Vinay A. Sonpal, A Panel Counsel for Respondent Nos. 1 and 2., for the Respondent

Final Decision : Allowed

Judgement

Dr. D.Y. Chandrachud< /pjudge>, J.—The challenge in these proceedings is to the order passed by the State Government in revision, dated 15 May 2006, under the Bombay Entertainments Duty Act, 1923. By the impugned order, the State Government confirmed the dismissal of an appeal by the Commissioner, Konkan Division against an order of the Additional Collector calling upon the Petitioner to pay an amount of Rs. 6,21,830/- towards duty and Rs.12,43,660/- towards penalty u/s 9(A) (1) (a). A notice was issued to the Petitioner on 15 January 2004 by the Collector, unauthorizedly conducted the business of a cable operator since April 2000 and that she had 504 connections. The Petitioner was informed that before a prosecution could be launched u/s 5 and Section 7(2), an opportunity was being furnished to her to compound the offence which she was reasonably suspected of having committed, u/s 9(A). The Petitioner submitted replies on 5 February 2004 and 11 February 2004 and denied that she had 504 cable connections. The Petitioner did not deny that she had been conducting the business of a cable operator, but stated that initially since April 2000 she had 50 connections in which there was an increase of another 50 connections in July

2002. The Petitioner expressed her readiness and willingness to pay the entertainment duty, but disputed the quantum of the connections as alleged in the notice. In the meantime, on 15 July 2004, a communication was addressed by the Additional Collector, Mumbai Suburban District among others to the Petitioner pointing out that a survey had revealed several unauthorized connections in the Bandra Assembly Voters'' Constituency, resulting in a loss of revenue to the State Government. The letter pointed out that the actual number of cable connections for which the entertainment duty was being recovered was far less than those found in actual fact. The Petitioner was informed that this may result in criminal prosecution. The Petitioner was also required to furnish a full disclosure. On 21 May 2005, an Order was passed by the Additional Collector by which the Petitioner was directed to pay an amount of Rs. 6,21,830/- towards entertainment duty and a penalty of Rs. 12,43,660/- u/s 9A(1)(a). The order of the Additional Collector relied on a survey conducted on 5 March 2005 which showed that there were 628 cable connections with the Petitioner. This order was challenged by the Petitioner initially in an Appeal before the Commissioner, Konkan Division and thereafter, in revision before the State Government, both of which came to be dismissed respectively on 28 June 2005 and on 15 May 2006.

2. Counsel appearing on behalf of the Petitioner submits that the proceedings were initiated u/s 9A, which is a provision for compounding of offences, in the present case, but there was no occasion to compound any alleged offence. In any event, it was urged, the power u/s 9A which is in the nature of a power to compound could not have been exercised without a prosecution having been launched or without the Petitioner being reasonably suspected of having committed an offence, as stipulated in Section 9A. Moreover, it was submitted that no assessment has been made u/s 4B. In these circumstances, it is urged that the entire action is vitiated.

3. Counsel appearing on behalf of the State of Maharashtra submitted on the other hand that the action which was initiated is lawful and that the Additional Collector has exercised the power of adjudication, which must be regarded in the nature of an assessment u/s 4B. In the present case, it is urged that the Petitioner has no licence or registration and is unauthorizedly carrying on cable business without maintaining any books of account.

4. The proceedings against the Petitioner were initiated on the basis of a notice dated 15 January 2004 of the Collector, Mumbai Suburban District. The notice makes it clear that the Petitioner was, before instituting a prosecution u/s 5 and Section 7(2) called upon to state as to whether she was willing to compound within the meaning of Section 9(A). Section 9A of the Bombay Entertainments Duty Act, 1923 provides as follows :-

9A. Compounding of offences.- (1) Any officer authorised by the State Government in this behalf may recover from any person who has committed or is reasonably suspected of having committed an offence against this Act or the rules made thereunder, by way of composition of such offence-.

(a) where the offence consists of the failure to pay, or the evasion of, any duty payable under this Act, in addition to the duty so payable, a sum of [two hundred rupees] or double the amount of the duty payable, whichever is greater; and

(b) in other cases, a sum of [not less than five hundred rupees but not more than two thousand rupees].

[(2) Where an offence against this Act or rules made thereunder is compounded by an officer authorised by the State Government in that behalf, the amount of composition sum fixed by him shall become payable by the proprietor within a period of 30 days from the date on which the composition sum is so fixed, and in the event of failure on the part of the person liable to pay the amount of composition sum within the aforesaid period, it shall be recoverable as an arrear of land revenue.]

5. The jurisdictional condition before Section 9A can be applied is that a person has committed or is reasonably suspected of committing an offence under the Act or the rules. Evidently, the notice in the present case referred to the fact that a prosecution would be instituted against the Petitioner in future and it was stated that the Petitioner was reasonably suspected of having committed an offence. In reply to the notice, the Petitioner did not accept the charge that she had 504 unauthorised cable connections as alleged since April 2000. Though the Petitioner expressed her readiness and willingness to pay the entertainment duty, she stated that the quantum and extent would have to be appropriately decided but that she was not willing to pay any penalty. In these circumstances, there would have been no occasion for the Additional Collector to exercise the power u/s 9A by way of compounding and to make a unilateral determination. For that, a regular assessment would have to be carried out.

6. In the present case, there has been no assessment u/s 4B of the Act. Sub-section 4 of Section 4B provides sufficient power to the Additional Collector to carry out an assessment in a situation where the proprietor of any entertainment does not furnish a return. Sub-section 4 of Section 4B reads as under :-

(4) If a proprietor does not furnish returns in respect of any entertainment referred to in sub-section(1) within the time prescribed in that behalf, the State Government shall, after giving the proprietor a reasonable opportunity of being heard [and after considering the amount of duty paid by the proprietor during the period of one year immediately before the non-submission of the returns, the monthly expenses for running the place of entertainment and any other relevant factors required to be considered in that behalf,] assess to the best of its judgment, the entertainments duty due from him, and may also direct that the proprietor shall pay, by way of penalty, in addition to the amount of duty so assessed a sum not exceeding one and a half times that amount.

7. Sub-section 4 of Section 4B allows the State Government to assess to the best of its judgement, the entertainments duty due from a person who has not furnished a return, and it may also direct that the proprietor shall pay, by way of

penalty, in addition to the amount of duty so assessed a sum not exceeding one and a half times that amount. Thus, while we are of the view that the Additional Collector exceeded his jurisdiction in exercising the power u/s 9A in the present case, we grant liberty to the Department to proceed to make an assessment u/s 4B. The Petitioner had admittedly not filed any return and hence, it would be open to the competent authority to exercise power under sub-section 4 of Section 4B.

8. We accordingly allow the petition and pass the following order:

(a) The order of the Additional Collector dated 21 May 2005, the order of the Commissioner dated 28 June 2005 and of the revisional authority dated 15 May 2006 are quashed and set aside;

(b) The direction in (a) above will not preclude the competent authority from making an assessment u/s 4B of the Bombay Entertainments Duty Act, 1923 in accordance with law;

(c) We record the statement of the Petitioner, who is personally present in Court, that the Petitioner is not carrying on any business of providing cable connections at the present time and undertakes not to do so until the assessment is completed and thereafter without complying with the requirements of the Bombay Entertainments Duty Act, 1923;

(d) The assessment u/s 4B(4) would be completed within a period of three months from today and the Petitioner shall co-operate in completing the assessment;

(e) The assessment shall be completed after furnishing an opportunity to the Petitioner of producing such evidence as the Petitioner may seek to produce on the record;

(f) The amount that has been paid by the Petitioner to the State Government shall be adjusted against the dues assessed upto date.

8. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.