

(2011) 04 GUJ CK 0038

In the Gujarat High Court

Case No : Special Civil Application No. 1222 of 1993

Zanjhar Cinema

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 13-04-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Gujarat Entertainment Tax Act, 1977 — Section 13, 13(1), 13(2), 3, 3(1)

Citation : (2011) 43 VST 161

Hon'ble Judges : Harsha Devani, J;B.M. Trivedi, J

Bench : Division Bench

Advocate : Yogesh S Lakhani, for the Appellant; Ms. Maithili Mehta, Additional Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—By this petition under article 226 of the Constitution of India, the petitioner has challenged the notice dated July 1, 1981 issued by the Deputy Secretary, Information and Broadcasting Department (annexure F to the petition) as well as the order dated February 6, 1993 (annexure H to the petition) passed by him in exercise of powers u/s 13 of the Gujarat Entertainments Tax Act, 1977 ("the Act").

2. The facts as appearing in the petition shorn of unnecessary facts are that the petitioner established a cinema by the name of "Zanjhar Cinema" at village Hasanpur and obtained a cinema performance licence for running the said Cinema. Under the provisions of the Act, entertainment tax is liable to be paid under the provisions of section 3 of the Act. However, the proprietor can make an application u/s 6 of the Act whereupon he can be allowed to make consolidated payment of tax by compounding tax as per the provisions of the said section.

3. According to the petitioner, the theatre of the petitioner was located in the designated area as contemplated u/s 6 of the Act. It, therefore, applied on December 31, 1988 for allowing it to make consolidated payment of tax instead

of payment u/s 3(1) of the Act by compounding the tax payable in respect of the entertainment for fixed sum by calculating as per the provisions of section 6 of the Act. Subsequently, the Act came to be amended on December 23, 1988 pursuant to which, the petitioner made another application on January 4, 1989 to the respondent No. 2 for allowing the petitioner to make consolidated payment of tax as per section 6 as amended by the Amendment Act which came into force from December 23, 1988. Respondent No. 2-the mamlatdar and prescribed officer decided the first application made by the petitioner without considering the amended provisions thereof and passed an order dated January 5, 1989 holding that the petitioner's cinema is in the designated area and consolidated payment of tax and fixed sum of compound tax is payable in respect of the entertainment in the cinema of the petitioner by working out and calculating as per section 6 of the Act.

4. Since respondent No. 2 had failed to consider the application of the petitioner in the light of the amended provisions of the Act and the request made by the petitioner by application dated January 4, 1989 to fix the sum of compound tax payable in respect of the entertainment in the petitioner's cinema as consolidated payment of tax, the petitioner preferred an appeal to the Collector, Rajkot which came to be registered as Appeal No. 12 of 1989 on January 18, 1989. The Collector after hearing the parties allowed the appeal preferred by the petitioner and directed respondent No. 2-mamlatdar and prescribed officer to calculate the fixed sum of consolidated payment of tax as per the amended provisions of the Act.

5. Pursuant to the aforesaid directions issued by the Collector, respondent No. 2 issued notice dated 2nd March, 1989 to the petitioner calling upon it to show-cause as to why its application dated January 4, 1989 should not be rejected on the ground that the cinema of the petitioner was situated within a distance of 5 k.ms from Wankaner city and as such, the same was not falling within the designated area.

6. The petitioner challenged the said show-cause notice before the learned civil judge (S. D.), Morbi in Regular Civil Suit No. 76 of 1989 which came to be dismissed. Being aggrieved, the petitioner preferred an appeal before the learned Assistant Judge at Morbi which came to be registered as Regular Civil Appeal No. 18 of 1989. The said appeal came to be partly allowed by setting aside the judgment and decree passed by the learned Civil Judge (S. D.) in Regular Civil Suit No. 76 of 1989 and declaring that the impugned show-cause notice dated March 2, 1989 issued by the respondent No. 2 was ultra vires his powers, mala fide, motivated by political and extraneous considerations and was also illegal, null and void. The court also restrained respondent No. 2 from reopening or revising or reviewing his own finding that Zanjhar cinema is in the designated area.

7. Against the aforesaid order, respondent No. 1-State has preferred second appeal before this High Court which appears to be still pending.

8. Thereafter, by the impugned notice dated July 1, 1991, respondent No. 1, in exercise of powers u/s 13(1) of the Act took the order dated January 5, 1989 passed by respondent No. 2 in revision. After hearing the petitioner, respondent No. 1 passed an order dated February 6, 1993 setting aside the order dated January 5, 1989 passed by respondent No. 2 and holding that the petitioner's cinema did not fall within the designated area and as such, the petitioner had wrongly availed of the benefit of consolidated entertainment tax.

9. Being aggrieved, the petitioner has approached this court challenging the notice issued u/s 13(1) of the Act as well as the order passed pursuant thereto.

10. Mr. V. J. Dave, learned advocate appearing on behalf of the petitioner has assailed the impugned order submitting that sub-section (2) of section 13 of the Act provides that no order shall be revised under sub-section (1) after the expiry of two years from the date of such order. The State Government is thus, empowered to exercise jurisdiction if at all it wants to do so within the prescribed period of limitation. If the State Government attempts to exercise powers u/s 13(1) of the Act after the expiry of the prescribed period of limitation of two years, it would amount to exercise of powers in excess of jurisdiction. It was submitted that such exercise of powers would be contrary to the statutory provisions within the four walls of which the State Government has to function as revisional authority u/s 13(1) of the Act. It was submitted that in the present case, the show-cause notice u/s 13(1) of the Act is dated July 1, 1991, whereas the order of the prescribed officer is dated January 5, 1989 hence, on the face of it, the show-cause notice has been issued beyond the period of two years from the date of the order of the prescribed officer. It was submitted that in computing the period of limitation, the Explanation to section 13(2) as well as the proviso to section 13(1) of the Act are required to be taken into consideration. The proviso to section 13(1) of the Act says that no record of any proceeding of the prescribed officer shall be called for in a case where an appeal from the order passed therein has been made, when such appeal is pending and secondly in a case where an appeal has not been made from such order, before the expiry of the time prescribed for making such appeal. It was pointed out that in the present case Appeal No. 12 of 1989 was preferred before the Collector of Entertainment Tax, Rajkot and the same was decided on February 21, 1989. Thus, the period of limitation has to be calculated from February 21, 1989. It was submitted that even considering the period of limitation from February 21, 1989, the show-cause notice dated July 1, 1991 has been issued beyond a period of two years from the date of the order of the prescribed officer.

11. Inviting the attention to the Explanation to section 13(2) of the Act, it was submitted that Explanation (a) would not be applicable to the facts of the present case and that Explanation (b) would also not apply as the proceeding u/s 13(1) was never stayed by injunction of any civil court. It was submitted that there being no order or injunction of any civil court against the State Government regarding taking any proceeding u/s 13(1) by way of suo motu revision, the

show-cause notice is apparently and evidently beyond the period of two years from the date of the order of the prescribed officer, that is, January 5, 1989 or from the date of the order in appeal of Collector of Entertainment Tax, Rajkot, that is, February 21, 1989. The learned advocate further submitted that sub-section (2) of section 13 of the Act prescribes the outer-limit for deciding the revision application and not for initiation of revisional proceedings and that in the present case, even the initiation of revisional proceedings is beyond the period of limitation. It was submitted that in the circumstances, on this ground alone, the impugned order passed by the revisional authority deserves to be quashed and set aside.

12. On the other hand, Ms. Maithili Mehta, learned Assistant Government Pleader, vehemently opposed the petition submitting that in the present case, initially the order dated January 5, 1989 passed by the prescribed officer was subject-matter of appeal before the Collector, who by an order dated February 21, 1989, allowed the appeal and remanded the matter to the mamlatdar and prescribed officer. It was submitted that thereafter, pursuant to the notice dated March 2, 1989 issued by the mamlatdar, the petitioner had preferred Regular Civil Suit No. 76 of 1989 in the court of the learned Civil Judge (Senior Division) at Morvi, wherein the court had passed an order directing the defendant No. 2 therein, namely, the prescribed officer and mamlatdar, Wankaner to maintain status quo regarding Zanjhar Cinema being in the designated area as per its order dated March 30, 1989 and that the order had been continued till the final disposal of the suit. It was submitted that in the light of the aforesaid order passed by the learned civil judge, respondent No. 1 could not have taken the matter in revision till the said order of status quo was operating. It was submitted that in the circumstances, the period during which the order of status quo was operating, namely, the period from March 30, 1989 to September 24, 1990 when the suit was dismissed, is required to be excluded while computing the period of limitation u/s 13(2) of the Act. It was further submitted that against the order passed in Regular Civil Suit No. 76 of 1989, the petitioner had gone in appeal before the learned Assistant judge, Morvi being Regular Civil Appeal No. 18 of 1990. It was submitted that thus, the appeal proceedings were pending and as such, it was not possible for the revisional authority to call for the record of the proceeding during the pendency of the appeal. The said appeal came to be partly allowed by an order dated March 30, 1991, whereby respondent No. 2 herein was permanently restrained from re-opening or revising or reviewing his own finding that the Zanjhar Cinema is in the designated area. It was submitted that in the circumstances, till March 30, 1991 when the order came to be passed in the regular civil appeal, respondent No. 1 could not have initiated revisional proceedings in respect of the order passed by the prescribed officer. It was further submitted that it was only after the order was passed in the Regular Civil Appeal No. 18 of 1990 on March 30, 1991, that the State Government could take the matter in revision u/s 13 of the Act by issuing notice on July 1, 1991. The learned Assistant Government Pleader invited the attention

of the court to the fact that against the notice issued u/s 13(1) of the Act, the petitioner had instituted proceedings being Civil Suit No. 153 of 1991 wherein the court had passed an order restraining the respondents from implementing and executing the final order which may be passed on the basis of the notice dated July 1, 1991. It was submitted that the injunction application, exhibit 5, filed in the said civil suit came to be dismissed vide order dated November 14, 1991 and as such, till then the revisional authority could not have passed any order in the revision proceedings. It was, accordingly, submitted that the entire period as aforesaid is required to be excluded while computing the period of limitation as prescribed u/s 13(2) of the Act and as such, it cannot be said that the impugned order is barred by limitation.

13. Having regard to the submissions advanced by the learned advocates for the respective parties, it is apparent that the main ground on which the impugned order has been challenged is that the proceeding u/s 13 of the Act was barred by limitation. It would, therefore, be necessary to refer to the provisions of section 13 of the Act which makes provision for "revision of orders" and insofar as the same is relevant for the purpose of the present petition, reads as under :

13. (1) The State Government may, of its own motion or on application of any aggrieved proprietor made within ninety days from the date of order call for and examine the record of any proceeding under this Act for the purpose of satisfying itself as to the legality or propriety of any order passed therein by the prescribed officer, or, as the case may be, the appellant authority and if it shall appear, to it that any order passed therein requires to be modified, annulled, or reversed, it may, after giving the proprietor affected by such order an opportunity of being heard and after making, or causing to be made, such inquiry as it deems necessary, pass such order thereon as the circumstances of the case justify :

Provided that no record of any proceeding of the prescribed officer shall be called for--

(i) in a case where an appeal from the order passed therein has been made, when such appeal is pending, and

(ii) in a case where an appeal has not been made from such order, before the expiry of the time prescribed for making such appeal.

(2) No order shall be revised under sub-section (1) after the expiry of two years from the date of such order.

Explanation.--In computing the period of limitation (for the purpose of sub-sections (2) and (3))--

(a) any period during which the record of any proceeding shall not be called for under the proviso to sub-section (1), and

(b) any period during which any proceeding under this section is stayed by an order or injunction of any civil court, shall be excluded.

14. On a plain reading of section 13 of the Act, it is apparent that sub-section (1) thereto empowers the State Government on its own motion to call for and examine the record of any proceeding under the Act for the purpose of satisfying itself as to the legality or propriety of any order passed therein by the prescribed officer, or, as the case may be, the appellate authority. Insofar as an application made by any aggrieved proprietor is concerned, sub-section (1) provides for a limitation of 90 days from the date of the order for making an application whereas insofar as revisional proceedings initiated by the State Government on its own motion is concerned, sub-section (1) does not prescribe any time-limit for initiation thereof.

15. The proviso to sub-section (1) lays down that no record of any proceeding of the prescribed officer shall be called for, (i) in a case where an appeal from the order passed therein has been made, when such appeal is pending, and (ii) in a case where an appeal has not been made from such order, before the expiry of the time prescribed for making such appeal. In other words, it is not permissible for the revisional authority to call for the record of any proceeding wherein an appeal is pending against the order of the prescribed officer or till the time-limit prescribed for filing an appeal has expired. Sub-section (2) of section 13 of the Act, which is relevant for the purpose of the present petition, lays down that no order shall be revised under sub-section (1) after the expiry of two years from the date of such order. From the language employed in the provision, it is apparent that the same provides for an outer-limit for passing an order u/s 13 of the Act inasmuch as the same says that no order shall be revised under sub section (1) after the expiry of two years from the date of such order. The said provision does not say that no notice shall be issued u/s 13 of the Act after the expiry of two years from the date of the order of the prescribed officer. The aforesaid intention of the Legislature to circumscribe the outer time-limit for revising an order becomes more clear when one reads the Explanation to sub-section (2) of section 13 of the Act which lays down that in computing the period of limitation for the purpose of sub-sections (2) and (3) of section 13, (a) any period during which the record of any proceeding shall not be called for under the proviso to sub-section (1), and (b) any period during which any proceeding under this section is stayed by an order or injunction of any civil court, shall be excluded. Thus, for the purpose of computing the period of limitation, the period during which the record of any proceeding of the prescribed officer cannot be called for is required to be excluded. Over and above the aforesaid period, any period during which any proceeding u/s 13 of the Act is stayed by an order or injunction of any civil court is also required to be excluded. Under the circumstances, had it been the intention of the Legislature to prescribe the time-limit for initiation of proceedings u/s 13 of the Act, there would be no necessity of making any provision as provided under clause (b) of the Explanation, viz., for excluding the period during which any proceeding u/s 13 is stayed by an order or injunction of any civil court. In the circumstances, it is apparent that limitation of two years is the outer-limit for deciding the revision and not for initiation of

revisional proceeding. The period of limitation for exercising revisional powers is, therefore, required to be computed accordingly.

16. The facts of the present case are, therefore, required to be examined in the light of the aforesaid legal position.

17. As already noted earlier, the order which was subject-matter of revision, viz., the order of the mamlatdar and prescribed officer and is dated January 5, 1989. The said order was subject-matter of appeal before the Collector, who by an order dated February 21, 1989, allowed the appeal of the petitioner and remanded the matter to the mamlatdar. Thus, the period from January 5, 1989 to February 21, 1989 has to be excluded while computing the period of limitation in the light of the clear provision of clause (a) of the Explanation to sub-section (2) of section 13 of the Act. Thereafter, the petitioner preferred an appeal against the notice dated March 2, 1989 issued by the prescribed officer and mamlatdar calling upon the petitioner as to why the cinema of the petitioner should not be held to be not within the designated area. Being aggrieved, the petitioner approached the civil court and filed Regular Civil Suit No. 76 of 1989 challenging the said notice. In the said proceedings, the learned Civil judge (Senior Division), Morvi, by an order dated March 30, 1989 directed defendant No. 2, the prescribed officer and mamlatdar to maintain status quo regarding Zanjhar Cinema being in the designated area as per its order dated January 5, 1989 up to April 3, 1989. Subsequently, by an order dated April 18, 1989, the status quo was directed to be continued till the final disposal of the suit. The suit, ultimately came to be dismissed by an order dated September 24, 1990. On behalf of the petitioner, it has been contended that the order of status quo was directed against the prescribed officer and mamlatdar and not against respondent No. 1 and as such respondent No. 1 was in no manner restrained from taking the order dated January 5, 1989 passed by the prescribed officer and mamlatdar in revision. Hence, respondent No. 1 is not entitled to the exclusion of the said period during which the order of status quo was operating while computing the period of limitation. On the other hand, on behalf of the respondents, it has been contended that in the light of the order of status quo, it would not have been proper for respondent No. 1 to initiate the revision proceedings.

18. After the aforesaid civil suit came to be dismissed on September 24, 1990, the petitioner preferred an appeal against the said order on October 10, 1990, which came to be partly allowed on March 30, 1991. During the pendency of the said proceedings which were in respect of the notice dated March 2, 1989, there was no stay operating insofar as the order dated January 5, 1989 made by the prescribed officer is concerned. Respondent No. 1 initiated revision proceedings by the impugned notice dated July 1, 1991 and ultimately passed the impugned order on February 6, 1993. On behalf of the respondent it has been contended that the petitioner had challenged the impugned notice dated July 1, 1991 in Civil Suit No. 153 of 1991 wherein interim relief had been granted in favour of the petitioner and that the said civil suit came to be dismissed only on November

14, 1991. Hence, in view of clause (b) of the Explanation to sub-section (2) of section 13 of the Act the said period is also required to be excluded while computing the period of limitation. In this regard, it may be significant to refer to the nature of injunction granted by the court in the said civil suit. The learned Civil Judge (Senior Division), Morvi by an order dated July 17, 1991 had restrained defendant No. 2 and/or his servants, agents, etc., from implementing and executing the final order which may be passed by him on the basis of the impugned notice dated July 1, 1991 if the final order is passed adverse to the plaintiff up to August 2, 1991. The said interim relief came to be extended from time to time till the final disposal of the suit. Thus, it is apparent that respondent No. 1 was only restrained from implementing and executing the final order which may be passed by him on the basis of the impugned notice dated July 1, 1991 and that there was no prohibition against him from passing the final order. In the circumstances, it cannot be said that respondent No. 1 was in any manner restrained from proceeding further u/s 13 of the Act so as to fall within the ambit of clause (b) of the Explanation to sub-section (2) of section 13 of the Act.

19. From the aforesaid facts, it is apparent that from September 24, 1990, when the Regular Civil Suit No. 76 of 1989 came to be dismissed, there was no order of status quo or any other order operating against the respondent No.1 restraining it from exercising powers u/s 13 of the Act. Computing the period of limitation of two years from September 24, 1990 till the date of passing of the impugned order, that is, February 6, 1993, evidently the same has been passed much after the expiry of period of two years from the date of the order of the prescribed officer, as prescribed under sub-section (2) of section 13 of the Act. The impugned order dated February 6, 1993 passed by respondent No. 1 is, therefore, clearly barred by limitation and as such cannot be sustained. In the circumstances, without going into the merits of the impugned order, the same is required to be set aside on the ground of being barred by limitation alone.

20. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned order dated February 6, 1993 passed by the Deputy Secretary, Information, Broadcasting and Tourism Department, in exercise of powers u/s 13 of the Act is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.