

State of West Bengal and Another

Vs

Rash Behari Sarkar and Another

Civil Appeal No. 37 of 1985

(R.M. Sahai, B.P. Jeevan Reddy JJ)

04.12.1992

JUDGMENT

R. M. SAHAI, J.

1. Whether the notification issued on March 31, 1984 by the Government of West Bengal, in exercise of power conferred under Section 8 of the Bengal Amusements Tax Act, 1922 (Bengal Act V of 1922) (hereinafter referred to as the Act) as amended in 1981, exempting any performance organised by a bona fide group theatre, amateur theatre or amateur jatra, formed exclusively for purposes of cultural activities and not for monetary gains, by engaging artists who are not paid any regular or contractual fees from payment of entertainment tax was beyond the power to grant exemption for social, educational and scientific purpose, thus violative, of Article 14 of the Constitution is the question which arises for consideration in this appeal filed by the State of West Bengal against the judgment and order of a Division Bench of the Calcutta High Court.

2. Section 8 of the Act prior to its amendment read as under :

"8 Exemptions. - (1) The entertainments tax (and the show tax) shall not be charged on payments for admission to any entertainment where the State Government is satisfied -

(a) that the whole of the takings thereof are devoted to philanthropic, religious or charitable purposes without any charge on the takings for any expenses of the entertainment; or

(b) that the entertainment is of a wholly educational character (any question on that point to be determined in the case of difference by the State Government in the department of education); or

(c) that the entertainment is provided for partly educational or partly scientific purposes by a society, not conducted or established for profit; or

(d) that the entertainment is provided by a society which is established solely for the purpose of promoting the interest of the industry of agriculture, or the manufacturing industry, or some branch thereof, or the public health, and which is not conducted for profit, and consists solely of an exhibition of the products of the industry, or branch thereof for promoting the interests of which the society exists or of materials, machinery, appliances, or foodstuffs, used in the production of those products, or of

articles which are of material interest in connection with the questions relating to the public health, as the case may be.

(2) The State Government may, by general or special order, exempt any entertainment or class of entertainment from liability to the entertainments tax (and the show tax)."

The State Government in 1975 issued a notification under Section 8(2) of the Act exempting, from the liability of entertainment tax, dramatic performance including Jatra by professional or other organisations subject to the condition that the exemption was not available if the same was being exhibited directly or indirectly as Cabre (sic cabaret). In 1977 the notification issued in 1975 was amended and it was provided that entertainment tax was chargeable and livable where the admission fee exceeded Rs. 15. These notifications were amended twice in March and October 1979 reducing the limit of the amount on which the tax was chargeable. From 1977 onwards, therefore, there was a partial exemption related to rate of admission fee. In 1981 Section 8 of the Act was substituted by the West Bengal Taxation Laws Amendment Act and the substituted section reads as under:

"8 Exemptions - The State Government may, for social, educational or scientific purposes, by general or special order, exempt fully or partly the entertainments tax, show tax, surcharge or additional surcharge payable under this Act for any entertainment or class of entertainments, subject to such conditions as may be laid down in such order."

In March 1984 the impugned notification was issued:

"In exercise of the power conferred by Section 8 of the Bengal Amusements Tax Act, 1922 (Bengal Act V of 1922), the Governor is pleased hereby to rescind, with effect from the April 1, 1984 this Department order Nos. 1279 F.T. dated March 31, 1979 and 1404 F.T. dated April 10, 1979 and Notification No. 1084 F.T. dated March 23, 1983 and all previous orders exempting payment of entertainment Section 8 of the said Act provided that no entertainment tax shall be charged, levied and paid in respect of any performance organised by a Group Theatre, Amateur Theatre or Amateur Jatra subject to the condition that the organisers of such performance shall obtain necessary certificate from the appropriate authority declaring them as bona fide Group Theatre, Amateur Theatre or Amateur Jatra.

Explanation - (a) 'Group Theatre' or 'Amateur Theatre' or 'Amateur Jatra' means a registered or unregistered society or a group of persons formed exclusively for the purposes of cultural activities and not for monetary gains by engaging artists who are not paid any regular or contractual fees 'Amateur Theatre' also includes any amateur organisations engaged in dance and music"

3. On a writ petition filed by one of the professional theatres assailing exemption granted to those groups who were engaged in cultural activities, only without monetary gains, the High Court held that the classification made on basis of engagement of a paid artists was not reasonable as it did not serve the legislative objective sought to be achieved by Section 8 of the Act and consequently it was ultra vires. It was held that Section 8 empowered the Government to grant exemption to any entertainment or class of entertainment if it was for social or educational or scientific purpose and since dramatic performance given by a professional group on public stages could not be said to be

devoid of any social values, the classification made by the Government between the amateur and professional group was arbitrary. The High Court found that dramatic performance for social, educational or scientific purposes from a class by themselves and, therefore, any further classification on profit motive and engagement of artists on contractual or regular basis was not permissible in law.

4. Equality means equality in similar circumstances between same class of persons for same purpose and objective. It cannot operate amongst unequals. Only likes can be treated alike. But even amongst likes the legislature or executive may classify on distinction which are real. A classification amongst groups performing shows for monetary gains and cultural activities cannot be said to be arbitrary. May be that both the groups carry out the legislative objective of promoting social and educational activities and, therefore, they are likes but the distinction between the two on monetary gains and otherwise is real and intelligible. So long the classification is reasonable it cannot be struck down as arbitrary. Likes can be treated differently for good and valid reasons. The State in treating the group performing theatrical shows for advancement of social and educational purpose, differently, on basis of profit-making from those formed exclusively for cultural activities cannot be said to have acted in violation of Article 14.

5. In *Orient Weaving Mills (P) Ltd. v. Union of India* a classification differentiating between goods produced in big establishment and smaller establishment was held to be a valid classification permissible under the Constitution. Similarly, in *Gopal Narain v. State of U.P.*, distinction made between the old city and the new city for purposes of levying higher and lower rate of tax was upheld as it did not infringe Article 14 of the Constitution.

6. Dramatic performance for monetary gains and otherwise are different and stand on different footing. The test is not if, even, the professional group by its performance is serving social or educational purpose but if the two groups can reasonably stand on their own. If the classification is valid, of which there appears no doubt, then the executive action of exempting one and not the other does not violate Article 14. The High Court erroneously understood that distinction between professional and amateur group has been made only on engagement of paid artist. The basic distinction is on the nature and purpose of activities performed by the two. A commercial or profit-making venture has always been coincided to be a class different than the one engaged in non-commercial activities. Classification based on such distinction is well recognised and is accepted as valid for purposes of revenue. Under the impugned notification a group giving amateur performance is first to be registered as such and then granted a certificate that it was giving amateur performances. Whereas a professional theatre is not required to do so. The distinction between two groups being rational and in keeping with the objective of Section 8 the High Court was not justified in striking down the notification as being ultra vires.

7. Even the infirmity found by the High Court in the notification, on absence of power in the amended Section 8 of the Act, for granting exemption to any theatre or jatra on giving performance and shows not for monetary gains is not well founded. According to the High Court such power was specifically provided for under clauses (a) and (c) of the unamended Section 8 but the same having been omitted from the amended section the State Government could not bring it back by exercise of executive power. The finding appears to proceed on misconception about the amendment brought about in Section 8 in 1981. In fact a reading of the amended and unamended section does not warrant such conclusion.

8. Section 8 as it stood prior to amendment visualised certain exemptions as a matter of law, such as

those specified in clauses (a) to (d) of subsection (1), and sub(2) empowered the State Government to, "exempt any entertainment or class of entertainments" by general or special order. The notifications which were issued in 1975 and onwards were under sub-section (2) of Section 8 of the Act. A bare perusal of the sub section indicates that it did not provide for any guideline to the State Government for exercise of power for granting exemption from tax. It could be exercised in respect of any entertainment. When the section was amended in 1981 the defect, if any, was cured by the Legislature by omitting the subsection altogether but the objective of exempting any entertainment from tax if it was for social, educational and scientific purpose, was retained. To this extent there is little difference between the amended and unamended section. But the conditions or the circumstances on existence of which the exemption was available earlier as a matter of law has now been left to be specified by the State Government in the order or notification granting exemption. From this it cannot be inferred that the State Government while granting exemption is debarred from specifying those conditions on which exemption was available earlier. What was done earlier by the Legislature has now been left to be done by the State Government. That by itself does not render either the power bad or action invalid. Any exercise of power or specification of conditions has to be tested on the section as it stands and not on assumption that since the section has been amended the State is precluded from granting exemption on one of those conditions on which it was available earlier. So long the Government exercising the delegated power of the legislature does not contravene the legislative field carved out for it the exercise of power cannot be held to be bad for extraneous reasons or irrelevant considerations. Since the classification between groups performing for monetary gains and otherwise has been held to be valid the impugned notification cannot be struck down for granting exemption on those very grounds on which it could be granted under unamended section.

B. P. JEEVAN REDDY, J. (concurring) -

I agree with my learned brother Sahai, J. That this appeal ought to be allowed. The reasoning-rather oversimplified-adopted in the judgment under appeal, however, impels me to say a few words.

10. The Bengal Amusements Tax Act, 1992 was enacted to provide for levy of tax upon entertainments. Section 2(4) defines the expression 'entertainment'. It includes any exhibition, performance, amusement, game or sport to which persons are admitted on payment. Section 3 is the charging section. It provides that there shall be charged, levied and paid to the State Government, a tax on all payments for admission to any entertainment. Section 8 confers upon the Government the power to exempt any entertainment or class of entertainment.

11. Section 8 of the Bengal Amusements Act as substituted by West Bengal Taxation Laws Amendment Act, 1981 reads as follows:

"8. Exemptions. - The State Government may, for social, educational or scientific purposes, by general or special order, exempt fully or partly the entertainments tax, show tax, surcharge or additional surcharge payable under this Act for any entertainment or class of entertainments, subject to such conditions as may be laid down in such order."

12. Section 8 prior to its amendment has been set out in the judgment of my learned brother. It is not necessary for me to reproduce the same over here again.

13. On March 31, 1984, the Government of West Bengal issued the following notification under

amended Section 8:

"Government of West Bengal Finance Department Taxation No. 1042-F.T. Calcutta, March 31, 1984. Notification###

In exercise of the power conferred by Section 8 of the Bengal Amusements Tax Act, 1922 (Ben. Act V of 1922), the Governor is pleased hereby to rescind, with effect from the April 1, 1984, this Department order Nos. 1279 F.T. dated March 31, 1979 and 1404 F.T. dated April 10, 1979 and Notification No. 1084 F.T. dated March 23, 1983 and all previous orders exempting payment of entertainment tax on performances other than cinematograph exhibition, issued under Section 8 of the said Act provided that no entertainment tax shall be charged, levied and paid in respect of any performance organised by a Group Theatre, Amateur Theatre or Amateur Jatra subject to the condition that the organisers of such performance shall obtain necessary certificate from the appropriate authority declaring them as bona fide Group Theatre, or Amateur Jatra.

Explanation. - (a) 'Group Theatre' or 'Amateur Theatre' or 'Amateur Jatra' means a registered or unregistered society or a group of persons formed exclusively for the purposes of cultural activities and not for monetary gains by engaging artists who are not paid any regular or contractual fees. 'Amateur Theatre' also includes any amateur organisations engaged in dance and music.

(b) 'Appropriate authority' means the Department of Information and Cultural Affairs, Government of West Bengal, who shall issue certificates to be renewed every year on the basis of papers and returns as may be required by that department from time to time.

(c) 'Profession Theatre' or 'Professional Jatra' means any theatrical or histrionic performance including musical recitals organised by a proprietary or partnership concern or public limited company or any proprietor or lessee of a public show house, engaging artists on payment of regular or contractual fees.

By order of the Governor, sd/- N. P. Bagchee Spl. Secy. to the Govt. of West Bengal"###

14. A reading of the impugned notification shows that it repeals three notifications issued earlier under Section 8 (both before and after its amendment). The only exemption from tax now provided is "in respect of any performance organised by a Group Theatre, Amateur Theatre or Amateur Jatra subject to the condition that the organiser of such performances shall obtain necessary certificate from the appropriate authority declaring them as bona fide group theatre, amateur theatre or amateur jatra". The Explanation appended to the notification contains three clauses. Clause (a) defines Group Theatre/Amateur Theatre/Amateur Jatra Whereas clause (c) defines Profession Theatre/Professional Jatra. Clause (b) defines the expression 'appropriate authority' referred to in the body of the notification. Clause (a) of the Explanation says that a Group Theatre/Amateur Theatre/Amateur Jatra means a registered or unregistered society or a group of persons "formed exclusively for the purposes of cultural activities and not for monetary gains by engaging artists who are not paid any regular or contractual fees". In contradistinction to this, clause (c) of the Explanation defines Profession Theatre/Professional Jatra to mean "any theatrical or histrionic performance including musical recital organised by a proprietor or a partnership concern or a public limited company or proprietor or lessee of a public show house engaging artists on payment of regular or contractual

fees." There is no exemption in favour of the entertainment provided by Professional Theatre/Professional Jatras.

15. The respondents who are running Professional Theatres filed a writ petition in the Calcutta High Court questioning the validity of the Notification dated March 31, 1984. According to them it was discriminatory and therefore, violative of Article 14 of the Constitution of India. The writ petition was admitted and an injunction granted as prayed for by the respondents/writ petitioners. The State of West Bengal filed an appeal against the Interlocutory Order. The Division Bench took up the main writ petition itself for hearing with the consent of the parties and allowed the same. The reasoning of the Division Bench, condensed by me runs thus:

Dramatic performances for social, educational or scientific purposes form a class by themselves; if so, further classification among that class is not permissible in law. Profit motive and engagement of artists on contractual or regular remuneration basis have no rational relationship to the object sought to be achieved by the Act. Group theatres, amateur theatres and amateur jatras as well as the profession theatres provide entertainment. Both of them aim at social reformation. Indeed, some of the performances by amateur theatres are highly intellectual and beyond the comprehension of a common man, whereas the Professional Theatres provide fare suited to a common man. The classification between the two categories of theatres can not be reasonably regarded as based upon some differentia which distinguishes group theatres, amateur theatres or amateur jatra from the professional theatres. The twin tests enunciated in the decision of the Supreme Court have not been satisfied in this case. There is nothing on the face of the notification nor any circumstances have been brought to the notice of the Court-to justify the said classification. Due regard must also be had to the amendment of Section 8. There is a qualitative difference between the unamended and amended Section 8. The unamended Section 8 expressly stipulated that exemption can be granted only in the case of entertainment which is not conducted or established with a profit motive whereas the mended Section 8 does not stipulate any such condition. The change must be deemed to be deliberate. In such a situation, the impugned notification which again stipulates the aforesaid condition (absence of profit motive) is outside the ambit of amended Section 8.

16. Correctness of the above view is questioned in this appeal.

17. Section 8 confers the power upon the Central Government to exempt, fully or partly, the entertainment tax for any entertainment or class of entertainment subject to such conditions as may be specified in its order. The entertainment to be exempted should, however, be designed to serve social, education and scientific purposes. So long as the power is exercised for achieving the said ends, the exercise is unobjectionable.

18. The impugned notification says that no entertainment tax shall be levied on performances organised by a Group Theatre/Amateur Theatre/Amateur Jatra subject to the condition that the organisers of such performances shall obtain the necessary certificate from the appropriate authority declaring them as bona fide Group Theatre/Amateur Theatre /Amateur Jatra. Group Theatre/Amateur Theatre/Amateur Jatra is defined as one formed exclusively for purpose of cultural activities and not for monetary gain and where the artists are not paid any regular or contractual fees. This is in contrast to the Professional Theatre/Profession Jatra which is run with a profit motive and wherein artists are engaged on payment of regular or contractual fees. The distinction is

two fold: firstly, between commercial and non-commercial theatres and secondly, the purpose for which they are formed; Group Theatre/Amateur Theatres are formed exclusively for the purpose of cultural activities, whereas the Professional Theatres may be formed for that or any other purpose. This is the real distinction between the two. The definitions contained in clauses (a) and (c) of the Explanation mention yet another distinction viz., nature of engagement of artists and the mode in which they are paid. In the case of Group Theatres, the artists are not paid any regular or contractual fees whereas in the case of Professional Theatres they are engaged on regular or contractual fees. Thus, there is a clear and discernible distinction between both groups of theatres. If so, they can be reasonably classified into two different groups for the purpose of Section 8 of the Act. Section 8 says that the Government may exempt any entertainment from the tax so long as such entertainment is held for promoting social, educational and scientific purposes. Promoting cultural activities certainly falls within social and education purposes. In other words, the distinction made between the two groups of theatres is not only reasonable but has a close and proximate nexus with the object underlying Section 8.

19. It is true that the theory of classification should not be carried too far, least it denude the very concept of equality of its true substance, as pointed out by Chandrachud, J. in *State of J.& K. v. T. N. Khosla*. The learned Judge said: (SCC p. 40, para 51)

"... let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: What after all is the operational residue of equality and equal opportunity?"

20. But this does not and should not mean invalidation of a proper classification designed to achieve the objective underlying enactment.

21. Power of exemption has been described as 'conditional legislation' by a Constitution Bench of this Court in *Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Union* and not in the nature of delegated legislation. Whether this power is treated as conditional legislation or as a species of delegated legislation, the test is whether the power is exercised for the purpose (s) indicated. In this case, it is. I am, therefore, unable to agree that the impugned notification makes an invidious discrimination or unreasonable classification between theatres similarly situated. True it is that even a profession theatre/professional jatra may also provide dramatic performances to promote social, educational and scientific purposes. Even so, the distinction remains viz., while one is held with a profit motive, the other is not. From the point of view of levy of entertainment tax, which ultimately is passed on to the public (audience), the distinction is a relevant one. It is not possible to agree that profit motive has no relevance or rational relationship to the object underlying Section 8. Generally speaking, for a commercial theatre profit motive is more important than promotion of social, cultural or educational purposes; they tend to cater to the baser instincts of men. Not so in the case of a group or society formed with the sole object of serving/promoting the said purposes without any profit motive. It is this latter category that needs and deserves support and encouragement at the hands of the State.

22. Employment of artists on regular/contractual basis too is indicative of a professional theatre working with a profit motive. This test cannot, therefore, be said to be irrelevant.

23. I am equally unable to appreciate the argument based upon the language of the repealed Section

8. True it is that repealed Section 8 specifically spoke of absence of profit motive but that doesn't necessarily mean that the said element is excluded altogether from the amended Section 8. So long as the power to exempt is exercised by the Government for promoting any or all of the purposes mentioned in Section 8, no objection can be taken to its validity. The notification is designed to promote and encourage entertainments having social and educational value. The Government presumes that Group Theatres/Amateur Theatres/Amateur Jatras formed with the exclusive object of promoting cultural activities, without any profit motive will provide such entertainment. The Government is justified in so presuming. There is no unreasonableness in it.

24. It may be noted that conferment of power of exemption has become common feature of present-day legislation, particularly in taxing enactments and enactments dealing with social and economic regulation. The prime example is the Central excises and Salt Act, 1944, where the number and volume of exemption notifications, and the frequency with which they are issued, modified, repealed and re-issued are the despair of even the experts in the field. It is in essence, what C. K. Allen calls, legislation by executive. Unpleasant as it is, it has its own defenders. Be that as it may, so far as the present case is concerned, the Legislature has provided clear guidelines in the matter of exercise of power under Section 8. Where, similar power is conferred without any limiting words like those contained in Section 8, the conferment has yet been upheld. Reference in this connection may be made to *P. J. Irani v. State of Madras*. Section 13 of the Madras Buildings, Lease and Rent Control Act, 1949 empowered the State Government to exempt any building or class of buildings from all or any of the provisions of the Act. It was argued that the said section confers unguarded and uncontrolled discretion upon the State Government and, therefore, amounts to excessive delegation. The argument was repelled. It was held that the very policy and scheme of the Act furnishes adequate guidance to the Government in the exercise of its power. It was held at the same time that where such power is exercised for purposes, not germane to the purpose or policy of the enactment or where it is found to be discriminatory, the action can always be questioned.

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