BOMBAY HIGH COURT

Ramesh

Vs.

State of Maharashtra

Writ Petns. Nos. 38 and 240 of 1984

(Chandurkar, C.J. and Jahagirdar, J.)

28.02.1984

JUDGEMENT

Jahagirdar, J.

1. The petitioners in Writ Petition No. 38 of 1984 are the owners of what has been described as touring cinemas whereas the petitioner in Writ Petition No. 240 of 1984 is a person who is carrying on the business of running a hotel in the name and style of Hotel Kavita in Thane. In the said hotel he is exhibiting video cassettes. The petitioners in both the petitions are aggrieved by certain provisions contained in Bombay Entertainments Duty (Amendment) Ordinance, 1983, hereinafter referred to as "the Ordinance". The petitioners are so aggrieved because, according to them those provisions make them subject to a tax which is illegal and *ultra vires* the Constitution. The challenge is to those provisions of the Ordinance which seek to impose taxes on the ground that the petitioners are engaged in entertainment business. The Ordinance itself has come into force with efftct from Ist Jan., 1984 and it seeks to amend the provisions contained in the Bombay Entertainments Duty Act, 1923, hereinafter referred to as "the Principal Act".

2. The provisions in the Ordinance seek to make large scale amendments in the Principal Act and in particular Sections 3 and 4 of the Principal Act. Section 4 of the Ordinance makes amendments in Section 3 of the Principal Act. By the said amendment consolidated sum of money is being sought to be recovered from the petitioners in Writ Petition No. 38 of 1984 by way of entertainment duty; by the same provision again certain amount by way of lump sum is also sought to be recovered from the petitioner in Writ Petition No. 240 of 1984. Details of the provisions in Section 4 of the Ordinance by which Section 3 of the Principal Act is amended will be mentioned (a) little later in this judgment. Before we do that, it would be necessary to examine what the position was before the amendment.

3. Before the amendment, Section 3 of the Principal Act provided for the levy by the State

Government on all payments "for admission to any entertainment a duty called 'entertainment duty'". Broadly there were two classes of entertainment which were covered by the provisions of subsection (1) of Section 3 of the Principal Act. The first class of entertainment on which duty was payable was in clause (a) of Section 3 (1) of the Principal Act. That entertainment was a race-course licensed under the Bombay Race-courses Licensing Act, 1912, or under the Maharashtra Dog Race-courses Licensing Act, 1976. The other form of entertainment on which entertainment duty was livable was to be found in clause (b) of Section 3 (1) of the Principal Act and this entertainment was general and was not included in clause (a). Clause (b) itself provided for different rates of entertainment duty depending upon the place of entertainment - whether it was within the limits of Greater Bombay and of the cities and Cantonments of Poona, Sholapur and Nagpur or whether it was in any other areas. It is not necessary for us to refer to the details of the duty which was payable under the said provision. It is, however, necessary to note that Section 3 provided for levy and payment of entertainment duty only on one basis, namely on payment for admission to entertainment. Those were the opening words of Section 3 (1) of the Principal Act. If, therefore, there were no payment for admission to entertainment, there could not be a tax livable or payable under Section 3 of the Principal Act. The very basis of the levy of the tax and of the payment of the same to the State Government was the payment for admission to entertainment.

4. Clause (b) of Section 2 as it stood before the amendment, defined "payment for admission" to include any payment made by a person who, having been admitted to one part of a place of entertainment is subsequently admitted to another part thereof; any payment for seats or other accommodation in a place of entertainment; any payment for a programme of synopsis of an entertainment; any payment made for the loan or use of any instrument or contrivance which enables a person to enjoy an entertainment in a more effective manner as described in sub-clause (iii-a) of Section 2 (b) of the Principal Act; and any payment for any purpose whatsoever connected with an entertainment which a person is required to make for attending or continuing to attend the entertainment. From this definition of "payment for admission" as given in Section 2 (b) of the Principal Act, we easily notice that the fact of entertainment was envisaged first and then the fact of a person being admitted to that entertainment was envisaged and it is only after this that the question of payment for admission arose. In the first place, there was entertainment; in the second place there was a person who was admitted to that entertainment; and in the third place there was payment by the person who was so admitted to that entertainment. It was only on such payment being made that the question of levying the tax and paying the same to the state Government as entertainment duty arose, If there was no entertainment, therefore, there could not have been a tax under Section 3 of the Principal Act.

5. Now we turn to the provisions contained in the Ordinance which is Maharashtra Ordinance No. XXII of 1983. This Ordinance has been promulgated by the Governor of Maharashtra in exercise of the powers vested in him under Article 213 of the Constitution. It is referable to Item 62 in List II of the Seventh Schedule of the Constitution, hereinafter referred to as "the State

List". It is so because the Ordinance purports to levy a tax on entertainment which is within the competence of the State Legislature. One must, therefore, find out whether it is a tax on entertainment. If it is a tax on entertainment, it is valid; if it is not a tax on entertainment, naturally it would not be valid.

6. As already mentioned above, by Section 4 of the Ordinance, Section 3 of the Principal Act is amended on a large scale. We have already noted earlier that sub-section(1) of Section 3 of the Principal Act envisaged two types of entertainment. One was entertainment as race-course mentioned in clause (a) thereof and the other was entertainment other than the one as race-course, This distinction has been maintained by the amendment that is made by Section 4 of the. Ordinance though, however, different rates for the same have been prescribed. By the Ordinance, however, three new types of entertainment have been introduced in Section 3 of the Principal Act. Among the three new types of entertainment that are sought to be embraced by the amended Section 3, the first one is what is called touring cinema. The term "touring cinema" itself has not been defined either in the Principal Act or in the Ordinance. We have been shown Maharashtra Cinemas (Regulation) Rules, 1966. Rule 2 of the said rules defines "touring cinema" to mean an outfit comprising the cinematograph apparatus and plant and enclosures taken from place to place for giving cinematograph exhibition or for giving cinematograph exhibition in local theatres or halls. Surprisingly, neither in the Principal Act nor in the Ordinance the definition of "touring cinema" to be found in the abovementioned rule has been incorporated.

7. The second type of entertainment which is now being sought to be covered by Section 3 of the amended Act is what is called video exhibition. Video exhibition has been defined in clause (i) inserted in Section 2 of the Principal Act. It is defined to mean, among other things, exhibition of cinematograph film or moving pictures or series of pictures organized for financial gain by playing or replaying a pre-recorded cassette by means of video cassette player. This exhibition to be covered by the definition of "video exhibition" may be at residential or non-residential places of entertainment, other than a club or a hotel or public vehicle.

8. The third of the three types of new entertainment to be covered by the amending Ordinance is "video games parlour" which means a place of entertainment where persons, are required to make payment for the purpose of working a machine installed therein. This definition is to be found in clause (j) which is to be inserted in Section 2 of the Principal Act.

9. As far as the two, types of entertainment which were already there in the Principal Act, namely race-courses and other type of entertainment as mentioned in clauses (a) and (b) of Section 3 (1) of the Principal Act, the basis of the levy of the entertainment duty remains the same though the rates have been varied by the Ordinance. In the case of touting cinema what is sought to the levied is not a tax on payment for admission to the entertainment but a tax by way of consolidated sum of money as an entertainment duty and surcharge, at be rate equal to 25 per cent, of any such sum of money not exceeding 40 per cent as the State Government may by

notification in the Official Gazette specify. The percentage of the consolidated sum of money has to be assessed with reference to the entertainment duty and surcharge assessed on the gross collection capacity on the maximum number of shows per day which are permitted to be conducted under a permit issued by the prescribed officer on an application made by the proprietor to the prescribed officer in that behalf. "Gross collection capacity" itself has been explained to mean, in relation to a touring cinema, a sum equal to the aggregate of all payments for admission to a show, if all the seats and accommodation available and provided for the audience in such cinema are occupied. A further provision has been made for the purpose of calculating the aggregate of all payments for admission for a month in two types of touring cinemas the details of which need not detain us. It is sufficient to note that in the case' of touring cinema, a case which is now introduced in clause (c) of Section 3 (1) of the Principal Act by the Ordinance, the basis of levy of entertainment duty is not payment for admission to the entertainment but gross collection capacity on the maximum number of shows which the owner of a touring cinema is permitted to conduct; it is not even on the number of shows which he is actually able to conduct or actually conducts. Notional basis has been fixed. This basis is the gross collection capacity on the maximum number of shows which the owner of a touring cinema is permitted to hold. This is again on the basis that all the seats and the accommodation available in the touring cinema are occupied. In other words, the total amount which the proprietor of a touring cinema collects, if all the seats ;in the said cinema are, occupied, is made the basis of levy of the entertainment duty. It does not take into account the possibility of the owner of a touring cinema not being able to hold the number of shows which he is permitted to conduct; it does not take into account the possibility that no cinema shows at all may be held on certain occasions; and it does not take into account actual payments made for admission of the persons visiting touring cinemas.

10. Similar is the basis which has been adopted in the case of video exhibition which is embraced by clause (d) introduced in Section 3 (1) of the Principal Act. In the case of video exhibition conducted in a place of entertainment provided in a restaurant; it is stipulated that lump sum entertainment duty at the rate of Rs. 3 per seat per show in respect of 75 per cent of the total number of seats provided in such a place of entertainment shall be paid. The aggregate of the number of shows which the proprietor is permitted to conduct under a permit issued by the prescribed officer is made the basis of calculating the total number of seats. In the case of video cassette conducted in a place of entertainment other than a restaurant, lump sum duty is at the rate of Rs. 2 per seat per show in respect of 75 per cent of the total number of shows in such a place of entertainment which proprietor is permitted to conduct. In both these cases the provision totally ignores the possibility of exhibition not being held on certain occasions and also the possibility of the owner of a video exhibition not conducting shows which such owner is permitted to conduct under the permit issued by the prescribed officer. In other words, the basis of the levy of entertainment duty in the case of video exhibition is the same as it is in the case of touring cinema except that in the case of touring cinema consolidated sum of money equivalent to the figure mentioned therein is leviable whereas in the case of video exhibition the

entertainment duty is by way of lump sum as provided in clause (d).

11. The third type of entertainment which is embraced by the amendment is the case of video games. Before us however, no owner of such entertainment has appeared and, therefore, we need not refer to the same.

12. Mr. P.M. Pradhan, the learned Advocate, appears in support of the petition No. 38 of 1984 while Mr. N.H. Gursahani, the learned Senior Advocate, appears for the petitioner in Petition No. 240 of 1984. We have heard both the learned Advocates in support of the respective petitions. We will not refer to their arguments separately. We will refer to the arguments made by both of them. The first line of attack made by the petitioners on the new levy is that the entertainment tax as livable under Section 3 of the Principal Act can only be levied if there, is a payment for admission to entertainment. The learned advocates have relied upon the opening words of Section 3 (1) which are as follows :-

> "There shall be levied and paid to the State Government on all payments for admission to any entertainment ."

These were the words prior to the amendment by the Ordinance. After the amendment Section 3 (1) opens as follows:-

> "There shall be levied and paid to the State Government on all payments for admission to any entertainment a duty (hereinafter referred to as "entertainment duty") at the following rate or consolidated sum of money, or as the case may be, lump sum namely .."

13. It is the contention of the petitioners that the consolidated sum of money or lump sum which is sought to be recovered by the owner of a touring cinema and video exhibition can only be recovered on the payments for admission to any entertainment, According to the learned advocates the basis for the levy of entertainment duty can be only payments for admission made by the person claiming admission to the entertainment and no other basis. According to them, the concept of entrainment duty is inseparable from the payment that is made by the person claiming admission to the entertainment. No other basis for levying of entertainment duty can be used by the Legislature for levying entrainment duty. The learned advocates are linking the words "on all payments for admission to any entertainment duty" to "the consolidated sum of money or as the case may be lump sum" which are to be found in Section 3 (1) of the Act. If this is so, clauses (c) and (d) under which entertainment duty on touring cinema and video exhibition are sought to be levied are inconsistent with the concept of entertainment duty which is to be found in the opening part of Section 3 (1) of the Principal Act. Therefore, it is contended that the levy envisaged in clauses (c) and (d) of Section 3 (1) cannot be levied at all.

14. It is difficult to accept these submissions. The argument in sum means that me part of Section 3 is inconsistent with another part of the Act. Therefore, the first part should prevail over the

other. Though one may not be happy about the drafting of the relevant provisions, one cannot fail to notice that with the amendment the Legislature has adopted three bases for levying the entertainment duty. Returning to the opening words of Section 3 (1) of the Principal Act one will notice that there is in the first place the payment for admission to any entertainment as the basis for the levy of entertainment duty. This has been so even before the amendment. The second basis which has been adopted is the consolidated sum of money in the case of touring cinemas while the third basis is the lump sum which is applicable to the entertainment of video exhibition. As long as entertainment levy is on entertainment one cannot see why the Legislature cannot adopt different bases for the said levy. In the case of race-courses the levy is on the basis of payments for admission made by a person seeking entertainment. So also is the case of entertainment other than touring cinemas; video exhibition and video games. These are provided in clauses (a) and (b) of Section 3 (1) of the Act. In the case of touring cinemas and video exhibitions by the amending provision different bases for the levy of entertainment duty have been adopted. We do not see why such different bases cannot be adopted for the levy of entertainment duty if the duty in substance is on entertainment. Neither the Constitution nor any other provision of law prohibits the adoption of a basis other than the "payment for admission to entertainment" for levying entertainment duty. It is conceivable, for example, that entertainment duty could be levied on the number of shows held in a place of entertainment. It is, therefore, not possible for us to accept the contention urged on behalf of the petitioners that the provisions contained in clauses (c) and (d) of Section 3 (1) as amended by the Ordinance are invalid on the ground that they do not adopt "payments for admission to entertainment" as the basis for levy of entertainment duty.

15. The second ground of attack on the said duty, however, is stronger and must be considered by us in some details. It has been urged, and with sufficient justification in our opinion, that what is sought to be levied by way of entertainment duty in clauses (c) and (d), as amended, is not entertainment duty at all in the sense that it is not duty on entertainment. We have already noticed earlier the provisions contained in clauses (c) and (d) of Section 3 (1) which relate to touring cinema and video exhibition. We have noticed that the basis of calculation of the consolidated sum in the case of a touring cinema is not the number of shows held in a touring cinema nor is it the number of persons who are admitted to the cinema; it is not even the number of seats actually occupied on a particular day or in a particular month. The basis for calculating the consolidated sum of money is the gross collection capacity on the maximum number of shows per day which are permitted to be conducted by the owner of a touring cinema. If the permission issued by the prescribed officer permits an owner of a touring cinema to conduct two shows in a day and for 30 days in a month the total gross collection capacity will be calculated on the basis that the owner of the touring cinema has in fact conducted 60 shows in a month. The gross collection capacity is calculated on the notional basis of all the seats and accommodation available in every show of every day of the month being occupied. The aggregate of all payments that has to be hypothetically made by persons seeking admission is the gross collection capacity.

16. Similar is the position in the case of video exhibition where lump sum duty is to be paid on the basis that the owner of a video exhibition conducts all the shows which he is permitted to conduct and that for those shows all the seats in the place of entertainment are occupied. In our opinion, this is not a tax on entertainment at all which the State Legislature is entitled to levy under item 62 of the State List. In order that the entertainment duty should amount to a tax on entertainment it should be levied on entertainment which is actually held and not on entertainment which is theoretically capable of being held. Looking to the provisions which have been examined in details it is clear to us that the said provisions do not take into account entertainment that is actually held by the owner of the touring cinema or the owner of the video exhibition. The basis on which tax can be validly levied is the fact of entertainment. The taxing event is the entertainment. If there is no entertainment at all, the question of levying entertainment tax in exercise of the legislative powers conferred upon the State Legislature does not arise at all. If the Act purports to levy tax on notional entertainment, then the exercise of that taxing power must be held to be *ultra vires* the Constitution. This is exactly what has happened in the instant case.

17. It is no answer to this position to contend, as it has been sought to be contended by the learned Advocate General appearing for the State, that by appropriate definition payments which are to be made by way of consolidated sum or by way of lump sum can be treated as payments for admission to entertainment. This argument of the learned Advocate General was also partly in reply to the first contention which had been raised on behalf of the petitioners and which we have rejected. The learned Advocate General invited our attention to the amendment in the definition clause wherein it has been mentioned, among other things, that payment for admission in relation to the levy of entertainment duty includes "any payments for seats or other accommodation in a place of entertainment". The learned Advocate General wants us to read the new definition in link with the explanation to be found in clause (c) (i). This explanation mentions that for the purposes of the said clause the expression "gross collection capacity" in relation to touring cinema means a sum equal to the aggregate of all the payments for admission to a show if all the seats and accommodation available are occupied. In other words, if the payment for admission includes payments for seats or other accommodation in a place of entertainment as mentioned in definition section, then the gross collection capacity calculated on the basis of the number of seats in a cinema must be taken to be payment for admission. The question is whether what is sought to be levied under clauses (c) and (d) of Section 3 is a tax on entertainment at all. For certain purposes the Legislature may resort to legal fictions but by legal fiction you cannot create "entertainment" and then levy tax upon the same. The basic question whether there is any entertainment on which Clauses (c) and (d) levy entertainment duty has necessarily to be answered in the negative looking to the manner of calculation of tax and the basis on which the said tax is levied. It has not been shown to us on behalf of the State that any other interpretation of the provisions contained in clauses (c) and (d) of Section 3 is possible or on any other construction of the said provisions it is possible to hold that the levy is essentially on entertainment that actually takes place. It is clear to us, therefore, that the provisions of clauses

(c) and (d) in Section 3 (I) which have been introduced by the amendment do not deal with entertainment at all and the levy of entertainment duty envisaged under the said clauses is not permissible under law. These clauses must, therefore, be held to be *ultra vires* the Constitution and, therefore, invalid.

18. A brief reference may now be made to the judgment of the Supreme Court in *Western India Theatres Ltd. v. Cantonment Board, Poona*[1], The following observations though made in a different context are apt even in the context of the provisions of law which we are called upon to interpret. The Supreme Court was dealing with the entry relating to entertainment tax and it was held as follows (at p. 585) :-

> "The entry, as we have said, contemplates a law with respect to these matters regarded as objects and a law which imposes tax on the act of entertaining is within the entry whether it falls on the giver or the receiver of that entertainment. Nor is the impugned tax a tax imposed for the privilege of carrying on any trade or calling. It is a tax imposed on every show, that is to say, on every instance of the exercise of the particular trade, calling or employment. If there is no show, there is no tax."

19. In the result, each of these petitions is allowed. It is hereby declared that clauses (c) and (d) of Section 3 (1) of the Bombay Entertainments Duty Act, 1923, as amended by the Maharashtra Ordinance No. XXII of 1983, are *ultra vires* the Constitution, and, therefore, are invalid. There will be no order as to costs.

20. It has been mentioned to us that some of the petitioners, who are owns of the touring

[1] AIR 1959 SC 582

cinemas, have in the meantime paid certain amounts under clause (c) of Section 3 (1) of the Act. It has also been mentioned to us that certain video exhibitors have also paid by way of entertainment duty certain amounts under clause (d) of the Act. If this is so, they are entitled to the refund of the same.

Petitions allowed.