Kerala Film Exhibitors Federation Vs State Of Kerala

Court: High Court Of Kerala

Date of Decision: Feb. 12, 2025

Acts Referred: Constitution of India. 1950 â€" Article 14, 19, 245, 246, 254
Kerala High Court Act, 1958 â€" Section 5
Kerala Local Authorities Entertainments Tax Act, 1961 â€" Section 2(6), 3, 3A, 3B, 3C
Kerala Cultural Activists' Welfare Fund Act, 2010 â€" Section 2(d), 2(e), 3, 7, 8
Kerala Fishermen's Welfare Fund Act, 1985 â€" Section 2(d), 4, 4(2)

Hon'ble Judges: Nitin Jamdar, CJ; S. Manu, J

Bench: Division Bench

Advocate: K. Ramakumar, S. M. Prasanth, K. Gopalakrishna Kurup, K.R.Deepa, P.K.Radhika, M.Santhi, A.Sudhi Vasudevan, M.Paul Varghese, G.Ranju Mohan, P.Vijayakumar, S.Sindhu, S.Sharan, M.M.Monaye

Final Decision: Dismissed

Judgement

Nitin Jamdar, C. J.

1. The Appellants Ã¢â‚¬" Petitioners questioned the constitutional validity of Section 3C of the Kerala Local Authorities Entertainments Tax Act. The

learned Single Judge dismissed the writ petition. Challenging the judgment, the Appellants have filed this appeal under Section 5 of the Kerala High

Court Act, 1958.

2. Appellant No. 1 is the President of the Kerala Film Exhibitors Federation. Appellant No. 2 is a theatre owner. Respondents are the State of Kerala,

Ministry of Culture, Department of Cultural Affairs, Kerala Cultural ActivistsÃ¢â‚¬â„¢ Welfare Fund Board, the local authorities, Kerala Poorakkali Kala

Academy, Kerala Drama WorkersÃ¢â‚¬â„¢ Welfare Association, Pallassana Social Development Society, National Association of Malayalam Artists; and

Kerala Cine Exhibitors Association.

3. The Kerala Local Authorities Entertainments Tax Act, 1961 (Act of 1961) received the assent of the Governor on 1 July 1961. The Act of 1961

unifies and amends the law relating to the imposition and collection of taxes on amusements and other entertainments by the local authorities in the

State of Kerala. Section 3 is the charging provision for the levy of tax and the rate of tax. Under this provision, a local authority, as defined under

Section 2(6) of the Act of 1961, may levy entertainment tax at the prescribed rate. Section 3A of the Act of 1961 levies entertainment tax on seating

capacity and Section 3B for amusement parks.

4. Under the Kerala Cultural Activists' Welfare Fund Act, 2010 (Act of 2010), a Fund is constituted to grant relief to cultural activists, promote their

welfare, and pay pensions to those who engage in various forms of arts, literature, and cultural activities in the State of Kerala. The Act of 2010 also

constitutes a Board known as ""the Kerala State Cultural Activists' Welfare Fund Board"" for the administration and management of the Fund.

5. The impugned provision, Section 3C, was inserted into the Kerala Local Authorities Entertainments Tax Act, 1961, by the State of Kerala through

the Kerala Local Authorities Entertainments Tax (Amendment) Act, 2013, for levy of a Cess on the cinema tickets. The proceeds of this Cess have

to be remitted by the Secretary of the local authority to the account of the Kerala Cultural ActivistsÃ¢â‚¬â„¢ Welfare Fund Board constituted under the

Act of 2010. This amendment to insert Section 3C into the Act of 1961 was published in the Official Gazette on 25 April 2013.

6. The Appellants Ã¢â‚¬" Petitioners filed W.P.(C) No.4195 of 2013 seeking a declaration that the incorporation of Section 3C in the Act of 1961 is

unconstitutional, void and inoperative. Relief was also sought to issue a writ of mandamus restraining the Respondents from implementing the Act of

2013 in the State of Kerala with respect to any of the cinema theatres in the State. A further declaration that the Act of 2010, to the extent

inconsistent with the Cine Ã¢â‚¬" Workers Welfare Fund Act, 1981, is void, inoperative and unconstitutional.

7. Along with the subject writ petition, W.P.(C) Nos. 5465 of 2013 and 12705 of 2013 were filed by the film viewers. The learned Single Judge heard

these writ petitions together and dismissed the challenge by judgment dated 12 October 2015. The learned Single Judge held that the State of Kerala

had the legislative competence to enact Section 3C of the Act of 1961, and the challenge was without merit. Being aggrieved, the Petitioners in W.P.

(C) No. 4195 of 2013 have preferred this Appeal.

8. This Appeal was admitted on 21 October 2015, and by interim order, it was directed that no prosecution shall proceed in compliance with the

Amendment Act, 2013. This interim order was modified by an order dated 6 January 2016, recording that the Court had not restricted the theatre

owners from collecting the cess amount of â‚¹3/- and even the authorities from recovering the said amount from the concerned theatre owners. This

order was challenged by the Petitioners in Special Leave to Appeal No. 12797 of 2016, and the Hon'ble Supreme Court disposed of the appeal with a

direction to take up the pending writ appeal early.

9. When the present Appeal, along with W.A. Nos. 2311 of 2015 and 2661 of 2015 filed by the Petitioners/viewers had come up before the Division

Bench on 27 June 2019; Appellant Ã¢â‚¬" film viewer in W.A. No.2661 of 2015 sought time to take instructions as to whether the impugned levy on

cinema ticket was subsumed into Goods and Services Tax (GST) regime. Thereafter, the Division Bench, by order dated 27 June 2019 in W.A.

No.2311 of 2015, recording the statement of the learned counsel Mr. V.A. Vinod appearing for the Appellant therein that in view of the imposition of

the GST regime, the Appellant was not interested in pursuing the matter, dismissed the appeal as not pressed.

10. Since one of the appeals was disposed of with reference to the GST regime, we called upon the learned Advocate General to explain the position.

The learned Advocate General pointed out that after the Constitution (One Hundred and First Amendment) Act, 2016, a new regime of Goods and

Services Tax was introduced, and Entry 62 in List II Ã¢â‚¬" State List of Schedule VII to the Constitution of India was amended. However, the power of

a Panchayat or a Municipality to levy taxes on entertainment and amusements has been retained. He submitted that, under a mistaken impression, a

Government order was issued on 24 June 2017, contrary to the legal position, indicating that the tax levy under the Act of 1961 stood subsumed in the

GST regime. This position, however, was clarified and restored on 31 January 2024 by recalling the earlier Government order. These subsequent

developments have been placed on record by way of an affidavit. It is not necessary to refer to all the details, as pointed out by the learned Advocate

General and agreed upon by the learned Senior Advocate appearing for the Appellants that the challenge to the impugned provision would remain

unaffected.

11. We have mentioned these developments because one of the appeals by a film viewer bearing No. 2311 of 2015 was withdrawn on the erroneous

premise that the impugned provision is subsumed in the GST regime. This withdrawal was between the dates of the two Government orders as above.

That being the position, we called upon the learned counsel for the Appellant in W.A. No. 2311 of 2015 to inform the stand of the State that the legal

premise given by him for withdrawal of the Petition was erroneous, and the Court was ready to restore the Petition and hear the challenge. The

learned counsel for the Appellant therein took time to take instructions, and the matter was adjourned. Upon taking instructions, the learned counsel

informed the Court that this Appellant was not interested in prosecuting the appeal and that the order withdrawing the appeal need not be recalled.

Another appeal filed by a film viewer, W.A. No. 2661 of 2015, was simplictor withdrawn by the Appellant on 20 January 2025. Thus, only Petitioner

No. 1 Ã¢â‚¬" the Kerala Film Exhibitors Federation, and Petitioner No. 2 Ã¢â‚¬" a theatre owner, are prosecuting the challenge through this Appeal.

12. We have heard Mr. K. Ramakumar, learned Senior Advocate appearing for the Appellants, Mr. Sudhi Vasudevan, learned Senior Advocate

appearing for Respondent No. 3 Ã¢â‚¬" Board, Mr. K. Gopalakrishna Kurup, learned Advocate General along with Ms. K. R. Deepa, learned Special

Government Pleader for the State, and Mr. M. M. Monaye, learned counsel for Respondent No. 10.

13. Section 3C of the Act of 1961, which is the subject matter of challenge in this Appeal, reads as follows:

Ã¢â‚¬Å“3C. Levy and collection of cess.Ã¢â‚¬"(1) There shall be levied and collected a cess for the purposes of the Kerala Cultural ActivistsÃ¢â‚¬â„¢ Welfare Fund

constituted under the Kerala Cultural ActivistsÃ¢â‚¬â„¢ Welfare Fund Act, 2010 (6 of 2011) at such rate not exceeding three rupees on each admission to cinema, the

price of admission to which exceed twenty five rupees, as the Government may, by notification in the Gazette, specify, from time to time.

(2) The cess levied under sub-section (1) shall be collected by the local authority along with the tax on each price for admission to cinema and the proceeds of

the cess, less collection charges at such rate as may be specified by the Government by notification in the Gazette from time to time shall be paid to the Kerala

Cultural ActivistsÃ¢â‚¬â„¢ Welfare Fund Board constituted under the Kerala Cultural ActivistsÃ¢â‚¬â„¢ Welfare Fund Act, 2010.

(3) The proceeds of the cess collected under sub-section (2) for each calendar month shall be remitted by the Secretary of the local authority to the account of the

Kerala Cultural ActivistsÃ¢â‚¬â„¢ Welfare Fund Board on or before the last working day of the succeeding month.

(4) Where the proceeds of the cess collected by the local authority is not paid within the time limit specified in sub-section (3), the local authority concerned shall

pay the said amount to the Kerala Cultural ActivistsÃ¢â‚¬â„¢ Welfare Fund Board together with penalty at the rate of one and a half per cent per mensem from the

said time limit.

(5) The Secretary and the President or the Chairperson of the local authority concerned shall be jointly responsible for all belated payments and any amount

paid to the Kerala Cultural ActivistsÃ¢â‚¬â„¢ Welfare Fund Board by way of penalty shall be realised from such Secretary and President or Chairperson of the local

authority.

(6) The provisions of Sections 5, 6, 7, 7A and Sections 8 to 10 shall apply in respect of cess on tickets for admission to cinema and the word Ã¢â‚¬Ëœtaxâ€™ therein

shall be construed as to include Ã¢â‚¬Ëœcessâ€™ also.Ã¢â‚¬â€‹

Under this Section, a cess is levied and collected for the purposes of the Kerala Cultural Activists' Welfare Fund constituted under the Act of 2010, at

such rate not exceeding three rupees on each admission to the cinema, the price of admission to which exceeds twenty-five rupees, as specified

therein, from time to time. This Cess is to be collected by the local authority along with the tax on each price for admission to the cinema and has to be

paid to the Kerala Cultural Activists' Welfare Fund Board. The proceeds of the Cess collected for each calendar month have to be remitted by the

Secretary of the local authority to the account of the Kerala Cultural Activists' Welfare Fund Board. Other sections of the Act of 1961, which provide

for composition and consolidated payment of tax, the manner of payment of tax, exemptions, etc., are not relevant to the present controversy.

14. The Cess collected under Section 3C of the Act of 1961 has to be remitted to the Fund constituted under the Kerala Cultural Activists' Welfare

Fund Act, 2010 (Act of 2010).

15. The Fund constituted under the Act of 2010 provides relief to cultural activists, promotes their welfare and pays pensions to those who engage in

various forms of arts, literature, and cultural activities in the State of Kerala. The definition of cultural activist under Section 2(d) of the Act of 2010,

reproduced later, includes various artists engaged in the field of cinema, electronic media, drama, music, kathakali, ganamela, mimics, literature,

painting, sculpture, folklore, ritual arts, semi classical arts, folk songs, makeup, percussion arts, magic, circus, margamkali, chavittu nadakam, cartoon,

poetic story presentation. They include those who recite Holy Books, Bible recitation, Koran recitation and Mappilakalakal. All these include the ones

engaged in stage decoration, light and sound, costume design, art of advertising, painting, compeering, photography or any person working as a librarian

or any person working in connection with any such other form of art, literature, culture, or cultural speech. Section 2(e) of the Act of 2010 defines

cultural activity as an activity performed by a cultural activist and recognised by the respective Academy or Organisation. Under Section 3 of the Act

of 2010, the Kerala Cultural Activists' Welfare Fund Scheme is framed. The sources to be credited to the Fund under the schemes are specified in

this Section. These include contributions to the Fund, specified in Section 6 of the Act. Those are grants, loans, advances or donations made by the

Central or State Government; amount borrowed by the Board constituted under Section 14 of the Act; fees, etc. The Fund has to be utilised as per

Section 3(4) for implementing welfare schemes. It is utilised to pay pensions to any person who has completed 60 years of age and opted for

membership as per Section 7 of the Act and other financial assistance. This provision is elaborated later in this judgment. Under Section 8 of the Act

of 2010, the State has constituted a Board known as the ""Kerala State Cultural Activists' Welfare Fund Board"" for the administration and management

of the Fund.

16. With this prefix, we now turn to the challenge in this Appeal.

17. Firstly, it has to be kept at the forefront that while considering a challenge to the constitutionality of legislation, the Court has to presume its

constitutionality and the burden lies heavily on those who challenge the constitutional validity. The basic principles governing the legislative power in

the context of the present case can be culled out from the dicta of the Hon'ble Supreme Court in the case of Hoechst Pharmaceuticals Ltd. v. State

of Bihar (1983) 4 SCC 45 and in the decision of the Constitution Bench in the case ofS tate of West Bengal v. Kesoram Industries Ltd. and Others

(2004) 10 SCC 201. The main article in the Constitution of India dealing with legislative power is Article 245. Article 246 of the Constitution of India

separates the legislative fields between the Parliament and the Legislature of any State. Parliament can exclusively make laws with respect to any of

the matters enumerated in List I Ã¢â‚¬" Union List in the Seventh Schedule. The Legislature of any State can make laws with respect to any of the

matters enumerated in List III Ã¢â‚¬" the Concurrent List, subject to the power of the Parliament. Subject to the above, the Legislature of any State has

exclusive power to make laws with respect to any of the matters enumerated in List II Ã¢â‚¬" the State List. The various entries in the three Lists are

fields"" of legislation. The entries in the Lists have to be interpreted liberally and not in a narrow or pedantic sense. A power to legislate as to the

principal matter specifically mentioned in the Entry shall also include the legislation touching incidental and ancillary matters.

18. Though in the Counter filed by the State before the learned Single Judge, various entries in the List under Schedule VII to the Constitution of India

are referred to, the learned Advocate General primarily has traced its legislative competence to enact Section 3C of the Act of 1961 to Entries 62 and

66 of List II, Schedule VII to the Constitution of India. Firstly, we take up the aspect of Entry 62, a tax on entertainment, of List II, VII Schedule to

the Constitution of India.

19. Entry 62 of List II, VII Schedule to the Constitution of India relied upon by the State prior to its amendment by the Constitution (One Hundred and

First Amendment) Act, 2016 reads as follows:

Ã¢â‚¬Å“62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.Ã¢â‚¬â€‹

After the amendment, the Entry reads as follows:

Ã¢â‚¬Å“62. Taxes on entertainments and amusements to the extent levied and collected by a Panchayat or Municipality or a Regional Council or a District

Council.Ã¢â‚¬â€‹

As pointed out by the learned Advocate General, though there is a substantial change in the language of Entry 62 of List II, VII Schedule to the

Constitution of India, this change is not relevant to the legislative power of the State. In view of the advent of the GST regime, the levy of taxes was

fundamentally altered, and the tax on entertainment collected by local bodies has been retained in the State List. In the matter at hand, we are only

concerned with the entertainment tax, which has remained constant even after the change.

Appellants contend that the Cess levied under the impugned provision for a fund created by the State Government being unconnected with cinema and

entertainment is not valid in law. The Appellants submitted that the State does not have legislative competence to enact the impugned provision. It is

contended that, as stated in the Counter of the State, the impugned provision will not fall within Entry 33 of List II, Schedule VII to the Constitution of

India. It is not provided under any entry in the State List. The impugned legislation cannot fall under Entry 5 of List II, as stated in the Counter, as

there are already enactments, such as the Kerala Panchayat Raj Act, the Kerala Municipalities Act, and the Kerala Local Authorities Entertainment

Tax Act, regulating the position. The learned Senior Advocate has relied upon the decisions of the Hon'ble Supreme Court in the cases of Koluthara

Exports Ltd. v. State of Kerala (2002) 2 SCC 459, M/s. Vijayalakshmi Rice Mill and Others v. The Commercial Tax Officers, Palakol and

Others (2006) 6 SCC 763, and the decision of the learned Single Judge of this Court in the case ofP admanabhan v. Corporation of

Thiruvananthapuram 2006 (2) KLT 603. The learned Advocate General has relied upon the decision of the HonÃ¢â‚¬â„¢ble Supreme Court in the case

of the State of Karnataka and Others v. Drive-in Enterprises (2001) 4 SCC 60 to contend that the impugned levy is on entertainment.

21. In the case of Drive-in Enterprises, the appeal before the Hon'ble Supreme Court arose from the decision of the Karnataka High Court striking

down the provisions of the Karnataka Entertainments Tax Act, 1958, as beyond legislative competence. The State of Karnataka had levied

entertainment tax for admission of cars in drive-in-theatres. The argument of the petitioners therein was that the State Legislature could levy an

entertainment tax on human beings but not on inanimate objects. The Supreme Court invoked the doctrine of pith and substance to find out the real

character of the levy. It was held that when the vires of enactment are impugned, the Court is required to ascertain the true nature and character of

the enactment. The Court has to examine the whole enactment, its object, scope and effect of its provision. What is to be found out is the real nature

of the levy, its pith and substance, and it is in this light that the competency of the State Legislature is to be adjudged. After expounding the concept of

pith and substance, the Supreme Court, while examining Entry 62 of List II in Schedule VII to the Constitution of India, held that the incidence of the

tax was on entertainment itself, and since entertainment necessarily implies the persons entertained, the incidence of the tax was on the persons

entertained. The observations from this judgment, relevant to this case, are as follows:

Ã¢â‚¬Å“13. Entry 62 List II of the Seventh Schedule empowers the State Legislature to levy tax on luxuries, entertainment, amusements, betting and gambling. Under

Entry 62, the State Legislature is competent to enact law to levy tax on luxuries and entertainment. The incidence of tax is on entertainment. Since entertainment

necessarily implies the persons entertained, therefore, the incidence of tax is on the person entertained. Coming to the question whether the State Legislature is

competent to levy tax on admission of cars / motor vehicles inside the drive-in-theatre especially when it is argued that cars / motor vehicles are not the persons

entertained. Section 3 which is the charging provision, provides for levy of tax on each payment of admission. Thus, under the Act, the State is competent to levy

tax on each admission inside the Drive in Theatre. The challenge to the levy is on the ground that the vehicle is not a person entertained and, therefore, the levy is

ultra vires. It cannot be disputed that the car or motor vehicle does not go inside the drive-in-theatre of its own. It is driven inside the theatre by the person

entertained. In other words the person entertained is admitted inside the drive-in-theatre along with the car / motor vehicle. Thereafter the person entertained

while sitting in his car inside the auditorium views the film exhibited therein. This shows that the person entertained is admitted inside the drive-in-theatre along

with the car / motor vehicle. This further shows that the person entertained carries his car inside the drive-in-theatre in order to have better quality of

entertainment. The quality of entertainment also depends on with what comfort the person entertained has viewed the cinema films. Thus, the quality of

entertainment obtained by a person sitting in his car would be different from a squatter viewing the film show. The levy on entertainment varies with the quality of

comfort with which a person enjoys the entertainment inside the drive-in-theatre. In the present case, a person sitting in his car or motor vehicle has luxury of

viewing cinema films in the auditorium. It is the variation in the comfort offered to the person entertained for which the State Government has levied entertainment

tax on the person entertained. The real nature and character of the impugned levy is not on the admission of cars or motor vehicles, but the levy is on the person

entertained who takes the car inside the theatre and watches the film while sitting in his car. We are, therefore, of the view that in pith and substance the levy is on

the person who is entertained. Whatever be the nomenclature of levy, in substance, the levy under heading ""admission of vehicle"" is a levy on entertainment and

not on admission of vehicle inside the drive-in-theatre. As long as in pith and substance the levy satisfies the character of levy, i.e. ""entertainment,"" it is wholly

immaterial in what name and form it is imposed. The word ""entertainment"" is wide enough to comprehend in it, the luxury or comfort with which a person

entertains himself. Once it is found there is a nexus between the legislative competence and subject of taxation, the levy is justified and valid. We, therefore, find

that the State Legislature was competent to enact sub clause (v) of Clause (i) of Section 2 of the Act. We accordingly hold that the impugned levy is valid.Ã¢â‚¬‹

(emphasis supplied)

Thus, the Supreme Court, applying the doctrine of pith and substance, held that the entertainment tax is on the person entertained. Thus, Entry 62 in

List II, as regards entertainment, pertains to tax on the person being entertained Ã¢â‚¬" in the case at hand, the film viewer.

22. Turning now to the decision of the Constitution Bench relied upon by the Appellants in the case of Koluthara Exports Ltd. This decision is

distinguished by the learned Single Judge and held not applicable. In this case, the appeal before the Hon'ble Supreme Court arose from the decision of

the Division Bench of the Kerala High Court upholding the constitutional validity of Section 4(2) r/w. Section 2(d) of the Kerala Fishermen's Welfare

Fund Act, 1985. Section 4 of the impugned enactment provided that the dealer shall contribute 1% of the sale proceeds to the Fund every year. Levy

on the annual income of purchaser and exporter of the fish for fishermen's welfare fund was challenged. The Appellant had contended that the

Appellant, being a purchaser and exporter of fish, has no employer-employee relationship with the fishermen, and therefore, the State could not have

imposed a contribution on it. The State had contended that the Act and the Scheme framed thereunder were welfare measures traceable to Entry 23

of List III of the VII Schedule to the Constitution of India. It was contended that these measures require one set of persons to pay a contribution to

another set of persons and there need not be a relationship of employer and employee. In this context, the Constitution Bench of the Supreme Court

considered the question as to whether the impugned impost levied under Section 4(2), read with Section 2(d) of the Kerala Fishermen's Welfare Fund

Act, 1985, was unconstitutional for want of legislative competence. The Constitution Bench held that Entry 23 of List III did enable the State

Legislature to enact laws for social security, but the State could not, under Entry 23, place the burden of an impost scheme for social security and

social welfare upon someone who is not an employer. It was with this reasoning, the impugned levy was declared unconstitutional. In our respectful

opinion, the dicta in this decision cannot be made applicable to declare the impugned levy unconstitutional. The facts of the case and the observations

in the case of Koluthara Exports Ltd. would show that the case involved a compulsory extraction from the dealers' annual proceeds towards the

welfare of fishermen. The present position is different. There is no compulsory extraction from any proceeds, only a cess on the tickets purchased by

cinema viewers as a tax on entertainment. Therefore, the learned Single Judge rightly distinguished this decision and held that it does not apply to the

case at hand.

23. Based on the decision of the learned Single Judge of this Court in the case of Padmanabhan, it was contended by the Appellants that the Act of

1961 defines the expression ""admission fee,"" and the theatre owners cannot charge anything more than admission fee. It was submitted that without

amending the definition of admission fee, no charge on the admission is sought to be levied through the impugned Cess. There cannot be contradictory

statutory provisions. The decision in the case of Padmanabhan also cannot be of any assistance to the Appellants. The learned Single Judge was

considering a limited question as to whether the amount received for advance reservation of seats is liable to be included in the price of tickets on

which tax is leviable under the Act of 1961. The learned Single Judge held that tax can only be levied on the price of admission and that advance

reservation charges cannot be included. The argument before the learned Single Judge was solely based on the definition of the price of admission for

the purpose for which the amount was liable to tax. Therefore, this decision is not relevant to the case at hand.

24. It is clear that the impugned levy is on entertainment. The Cess levied under Section 3C of the Act of 1961 and collected is for the Kerala Cultural

Activists' Welfare Fund, established under the Act of 2010. This Cess shall not exceed â‚¹3/- per cinema admission where the ticket price is more than

â‚¹25/-. The local authority has to collect the Cess along with the tax on cinema admission and, after deducting the collection charges at a rate specified

by the Government, has to transfer the proceeds to the Kerala Cultural Activists' Welfare Fund Board. The Cess is levied on the cinema viewers and

not on the theatre owners. The impugned provision seeks to levy a cess on the ticket purchased by cinema viewers for the purpose of entertainment,

and, therefore, it is clearly relatable to entertainment under Entry 62 of List II, VII Schedule to the Constitution of India.

25. The Appellants then contended that under Entry 62 of List II, Schedule VII to the Constitution of India, only tax can be levied, and a cess cannot

be levied.

26. In the case of M/s. Vijayalakshmi Rice Mill, the Hon'ble Supreme Court, had an occasion to consider the term ""Cess"". In this case, a cess under

the Andhra Pradesh Rural Development Act, 1986, which was in addition to the purchase of sales tax, was the subject matter of challenge. The

contention was that the enactment does not fall in any of the entries in List II or List III of Schedule VII to the Constitution of India. The Supreme

Court considered the question of whether the said impost was a fee or a tax. In that context, the Supreme Court elaborated on the term ""Cess"" and

held that ordinarily, Cess is also a tax but is a special kind of tax. The observations of the Supreme Court in the said decision are as follows:

Ã¢â‚¬Å“12. Ordinarily, a cess means a tax which raises revenue, which is applied to a specific purpose. Thus in Guruswamy and Co. v. State of Mysore (AIR 1967 SC

1512), Hidayatullah, J. in his dissenting judgment observed:

The word 'cess' is used in Ireland and is still in use in India although the word Ã¢â‚¬Ëœrate Ã¢â‚¬â„¢ has replaced it in England. It means a tax and is generally used when

the levy is for some special administrative expense which the name (health cess, education cess, road cess, etc.) indicates. When levied as an increment to an

existing tax, the name matters not, for, the validity of the cess must be judged of, in the same way as the validity of the tax to which it is an increment.

The aforesaid observations have been referred to by the Constitution Bench decision of this Court in India Cement Ltd. and Others v. State of Tamil Nadu and

Others [(1990) 1 SCC 12], vide para 19.

13. Hence ordinarily a cess is also a tax, but is a special kind of a tax. Generally tax raises revenue which can be used generally for any purpose by the State. For

instance, the Income Tax or Excise Tax or Sales Tax are taxes which generate revenue which can be utilized by the Union or State Governments for any purpose,

e.g. for payment of salary to the members of the armed forces or civil servants, police, etc. or for development programmes, etc. However, cess is a tax which

generates revenue which is utilized for a specific purpose. For instance, health cess raises revenue which is utilized for health purposes e.g. building hospitals,

giving medicines to the poor etc. Similarly, education cess raises revenue which is used for building schools or other educational purposes.

14. However, in such matters nomenclature is not very important and we have to see the nature of the levy. Hence, what is called a cess may be in reality a fee

depending on its nature.Ã¢â‚¬â€¹

(emphasis supplied)

In the case of Union of India and Another v. Mohit Mineral Private Limited (2019) 2 SCC 599, the Supreme Court elaborated on the levy of Cess

and its meaning. The Supreme Court observed in paragraph 36 as follows:

Ã¢â‚¬Å“36. P. Ramanatha Aiyar, Advanced Law Lexicon, 3rd Edition defines cess as follows: -

Cess"" is ""An assessment tax; levy; specifically:

(a) A rate or local tax...(b) In Scotland, the land tax. (c) in India, a tax for a special object; as, a road cess"". (Webster)

The word ""cess"" is used in Ireland and is still in use in India although the word rate has replaced it in England. It means a tax and is generally used when the levy

is for some special administrative expense which the name (health cess, education cess, road cess, etc.) indicates. When levied as an increment to an existing tax,

the name matters not for the validity of the cess must be judged of in the same way as the validity of the tax to which is an increment. Shinde Bros. v. Commr.,

Raichur, AIR 1967 SC 1512, per dissenting judge and India Cement Ltd. v. State of T.N., AIR 1990 SC 85.

The word Ã¢â‚¬Å“cessÃ¢â‚¬â€ means a tax and is generally used when the levy is for some special administrative expense which the name (health cess, education cess, road

cess, etc.) indicates. Shinde Bros. v. Commr., Raichur, AIR 1967 SC 1512, at p.1525.

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(emphasis supplied)

Therefore, it is clear that the Cess can also mean a tax levied for a special purpose or as an increment to the existing tax and, in given circumstances,

a fee. In the case at hand, entertainment tax is already levied under the Act of 1961 and the Cess under Section 3C is an additional levy. Thus, the

contention of the learned Senior Advocate for the Appellants that under Entry 62 of List II of Schedule VII to the Constitution of India, only tax can

be levied, and Cess cannot be levied is without merit. The Cess is another term for the tax that is levied, which is a special kind of tax. The levy of

impugned Cess is traceable to Entry 62 of List II, VII Schedule to the Constitution of India.

27. The State has contended that its legislative competence can be traced to Entry 66, read with Entry 62 of List II of Schedule VII to the Constitution

of India. Entry 66 reads as follows:

Ã¢â‚¬Å“66. Fees in respect of any of the matters in the List, but not including fees taken in any court.Ã¢â‚¬â€

Entry 66 of List II permits the levy of a fee in respect of any of the matters in the List, but it does not include the fees taken in the Court. The fee can

be in respect of any of the matters in the List, which would include Entries 5, 33, and 62 of List IIÃ¢â‚¬"the State List. The reliance placed by the State is

more on Entry 66, read with Entry 62 of List II of the VII Schedule to the Constitution of India.

28. The main contention of the Appellants in this regard is that the impugned Cess cannot be justified as a fee under Entry 66 of List II of the VII

Schedule to the Constitution of India, as there is no quid pro quo between the payment of Cess by cinema viewers and any corresponding benefits.

There is no quid pro quo, and a direct nexus between the person from whom the Fund is collected and the person who is intended to benefit from the

Fund must be established. The Appellants contend that charging Cess from the cinema viewers through theatre owners has no nexus to the welfare

measures of cultural activists, whose definition is broad and sweeping. It was contended that this definition includes even those who recite holy books

such as the Bible and Quran recitations, which are religious activities and have nothing to do with cinema. It is submitted that since a cess or a fee can

be charged only if there is a quid pro quo and no corresponding service is provided to any of the cinema viewers who purchase tickets. The cinema

viewers cannot be forced to pay a certain amount as contribution to the welfare fund of the cultural activist without receiving any corresponding

service, and thus, this levy cannot be traced to Entry 66 read with Entry 62 of List II, Schedule VII to the Constitution of India.

29. Per contra, the learned Advocate General submitted that the quid pro quo need not be proximate. It was submitted that there exists a nexus

between the contribution made by cinema viewers to the Fund for all cultural activities, as the promotion of arts in the State will lead to artistic

appreciation in the society through which the cinema viewers themselves would benefit. The Respondents Ã¢â‚¬" Welfare Fund Board and the

Malayalam Artists' Association, contended that the welfare of all types of artists will, in fact, lead to better quality cinema, which, in turn, will benefit

the viewers as well. It is also stated that cinema combines various arts covered in the definition of ""Cultural activist"". The Respondents also contended

that the Appellants are not the ones on whom the impost is levied, and they are not entitled to raise this contention.

30. On the requirement to establish quid pro quo to justify a levy of fee, the earlier view was that some specific service must be rendered to the

particular individual from whom the fee is sought to be realised. However, the legal concept of quid pro quo to justify impost of fee has undergone a

substantial change as noted by the HonÃ¢â‚¬â„¢ble Supreme Court in various decisions. In the case of M/s. Vijayalakshmi Rice Mill, the Hon'ble Supreme

Court, reviewed the earlier position of law and laid down the principles governing the quid pro quo in the impost of a fee. The distinction between a tax

and a fee is that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege. The specific advantage is

secondary to the primary motive of regulation in the public interest. If the revenue is for the general purpose of the State, the levy becomes a tax. The

Supreme Court held that there is no generic difference between a tax and a fee, and both are compulsory exaction of money by public authorities. The

legal position is also that there need not be any direct relation to the actual service rendered. It is sufficient if there is a reasonable relationship

between the levy of fees and the services rendered. Establishing that those who pay the fee receive a direct or special benefit or advantage is not

necessary. If the one who is liable to pay the fees receives a general benefit, the element of quid pro quo is satisfied. Thus, the contention of the

Appellants that there must be a direct nexus between the fee levied and the benefits rendered is incorrect. Services rendered are not a condition

precedent nor confined to the contributors alone. A broad co-relation is all that is required.

31. At this stage, a reference to the relevant provisions of the Act of 2010 is necessary. As referred to earlier, the Act of 2010 constitutes a Fund to

grant relief to cultural activists, to promote their welfare and to pay pensions to those who engaged in various forms of arts, literature and cultural

activities in the State of Kerala and for matters connected therewith or incidental thereto. The definition of ""Cultural activist"" under the Act of 2010 is

wide. The definition reads as follows:

Ã¢â‚¬Å“(d) ""Cultural activist"" means any person engaged in any of the activities relating to the field of cinema, electronic media, cable and Direct to Home network,

drama, music, kathakali, ganamela, mimics, literature, painting, sculpture, folklore, ritual arts, semi classical arts, folk songs, make up, percussion arts, magic,

circus, margamkali, chavittu nadakam, cartoon, poetic story presentation, recitation of Holy Books, Bible recitation, Koran recitation, Mappilakalakal, stage

decoration, light and sound, costume design, art of advertising, painting, compeering, photography or any person working as librarian in libraries approved by

the State Library Council or any person working in connection with any such other form of art, literature, culture cultural speech or any such other activities for

their livelihood or any person who was engaged or is being engaged in such other activities as declared by Government, by notification in the Gazette, for the

purposes of this Act.Ã¢â‚¬â€‹

Cultural activist"", as defined under Section 2(d) of the Act of 2010, will include those involved in the field of artistic expressions such as cinema,

electronic media, drama, music, traditional art forms in Kerala, mimics, literature, painting, sculpture, folklore, ritual arts, semi classical arts, folk songs,

percussion arts, magic, circus, cartoon, poetic story presentation, including recitation of Holy Books, Bible recitation, Koran recitation, Mappilakalakal.

These will include those assisting in artistic endeavours and background work of the exhibitors of Arts such as stage decoration, light and sound,

costume design, the art of advertising, painting, compeering, photography, etc.

32. The definition of the Ã¢â‚¬Å“cultural activistÃ¢â‚¬â€‹ under Section 2(d) of the Act of 2010 has to be read with the definition of Ã¢â‚¬Å“cultural activityÃ¢â‚¬â€‹, which

is defined under Section 2(e) as follows:

Ã¢â‚¬Å“(e)""cultural activity"" means an activity performed by a cultural activist and recognized as such by the respective Academy or Organisations or trade or such

other Body or Association approved by Government for the purposes of this Act, in which the activist is a member.Ã¢â‚¬â€‹

Thus, cultural activist means the one performing activities recognised by the respective Academy or Organisation or Trade or such other Body or

Association approved by the Government for the purposes of the Act of 2010, in which the activist is a member. The Act of 2010 also recognizes art

institutions such as, Chalachithra Academy, Folklore Academy, Kalamandalam, Lalithakala Academy, Nadaka Academy, and Sahithya Academy.

Thus, the State has included all those within the ambit of Section 2(d) of the Act of 2010 engaged in artistic expression and those instrumental in

bringing about a culture of appreciation for arts in the State.

33. It is for the benefit of these Cultural Activists that Section 3 of the Act of 2010 constitutes the Kerala Cultural Activists' Welfare Fund Scheme.

Section 3(2) provides the sources to be credited to the Fund under the Schemes. These include contributions made to the Fund, specified under

Section 6 of the Act; grants, loans, advances or donations made by the Central or State Government; amounts borrowed by the Board constituted

under Section 14 of the Act; fees, etc. Section 3(4) of the Act of 2010 provides for utilising the Fund to implement the welfare schemes. The Welfare

Fund has to be utilised to pay pensions to a Cultural Activist who has completed 60 years of age and opted for membership as per Section 7 of the

Act, as well as other financial assistance. The relevant portion of Section 3 reads as follows:

Ã¢â‚¬Å“3. The Kerala Cultural Activists' Welfare Fund Scheme.- (1) The Government shall by notification in the Gazette, frame a Scheme to be called the Kerala

Cultural Activists' Welfare Fund Scheme for the welfare of the cultural activists coming under this Act and thereafter, as soon as, constitute a Fund in accordance

with the provisions of this Act.

(2) xxxxxxxx

Ã, (3) The Fund shall vest in the Board and be administered by the Board in accordance with the provisions of the Act or the Rules or the Scheme,

(4) The Fund shall be utilized for the implementation of the Welfare Schemes framed under sub-section (2) of section 4, particularly for all or any of the following

purposes, namely:-

(a) for the payment of pension to any person who has completed sixty years of age and obtained membership under the provisions of section 7,

(b) for the payment of all benefits including pension to the members who have completed sixty years of age and contributed to the Fund for a period not less than

five years continuously or as one time payment,

(c) for the payment of family pension on the death of a member who had remitted contribution for a period of not less than two years,

(d) for providing financial assistance to meet the expenses towards medical treatment of the members suffering from chronic diseases,

(e) for payment of financial assistance and pension to a member who suffers from permanent physical disability or physical infirmity which incapacitated him to

do any work for his livelihood,

(f) for payment of financial assistance to women members, for maternity benefits, miscarriage, medical termination of pregnancy and sterilization, who had

remitted contribution to the Fund continuously for more than three months,

(g) for payment of financial assistance for the marriage of women members and their daughters who had remitted contribution to the Fund continuously for at

least one year,

(h) for payment of financial assistance to the family on the death of a member,

(i) for the payment of loans or advances and scholarship for educational purposes to the children of members, who had remitted contribution to the Fund for a

period of five years,

(j) for providing loans or advances or maintenance fund to members for the promotion of cultural activity,

(k) for implementing any other purposes as may be specified in the Scheme,

(5) xxxxx

(6) xxxxx

(7) xxxxxÃ¢â‚¬â€‹

Thus, this Kerala Cultural Activists' Welfare Fund, managed by the Board, is used for welfare schemes, including pensions for cultural activists aged

sixty and above, family pensions, financial aid for medical treatment, disability benefits, maternity assistance, marriage assistance, death benefits,

educational loans for members' children, and loans for cultural activities. The conditions for these payments are specified in the Scheme, which has to

be presented before the Legislative Assembly for approval.

34. Now, we turn to the aspect of co-relation between the impugned Cess levied on entertainment and the utilisation of the Fund. The Hon'ble

Supreme Court in the case of Municipal Committee, Patiala v. Model Town Residents Assn. and Others(2007) 8 SCC 669 has held that, to

sustain the presumption of constitutionality, the Court can consider matters of common knowledge and that the Legislature understands and correctly

appreciates the needs of its people.

35. To demonstrate the lack of quid pro quo, the Appellants relied upon the definition of cultural activist to stress that it includes even those reading

holy books. It was contended that this activity is solely related to religion and has nothing to do with art or entertainment. The Appellants contended

that this would show the disparity between the object of the levy and the benefit received. There is no merit in this contention. The reading of holy

books can be both religious and artistic expression. The Respondent Ã¢â‚¬" Association of Malayalam Artists pointed out that many traditional performing

arts, such as Thottampattu, Ayyappan Pattu, and Bhagavatha Parayanam, are based on holy books. Also, reading holy books can be more than just

vocalisation for religious purposes. Many traditional forms of recitation combine melody, movement, and theatrical elements. Each recitation can be a

unique art form. Intonation and the manner of presentation can themselves become instruments of artistic expression.

36. If the levy of the impugned Cess on entertainment improves the quality of entertainment, then a broad correlation will be established. We find a

correlation between the Cess on entertainment levied on the cinema viewers as a fee and the utilisation of the Fund for the welfare of cultural

activists. That is because the levy on cinema viewers contributes to the welfare of cultural artists in the State and the overall development of cultural

and artistic ethos. When cultural activities relatable to art are supported and valued, it fosters a culture that appreciates art. This then creates a

positive cycle of creativity and appreciation. When society encourages and supports artists, the overall artistic ethos strengthens, leading to quality

artistic output. When overall artistic expression qualitatively improves, the effect will cascade to enhance the quality of cinema. Conversely, neglecting

artists leads to a negative spiral where artistic expression diminishes due to a lack of support and recognition. Cinema cannot be viewed in isolation, as

the quality of films is inherently linked to the overall artistic environment in society. Art forms are interlinked and share the same artistic ethos. A

thriving artistic community in society will result in better-quality cinema. The impugned levy on cinema viewers which supports cultural activists across

different disciplines enriches the culture of arts in the State. This, in turn, will boost artistic expression in all forms, including cinema, benefitting the

cinema viewers by enhancing the quality of entertainment. Thus, the welfare of cultural activists for which impost is being levied by way of Cess has

a connection with the benefit received by the cinema viewers in the form of better entertainment. As stated earlier, the legal position is that it is not

necessary to establish a direct benefit, but a general benefit is sufficient to establish a correlation. This test is satisfied in the present case.

37. Therefore, we hold that the impugned Cess can be traced to the legislative power of the State Government to Entries 62 and 66 of List II,

Schedule VII to the Constitution of India, and the levy of this Cess is relatable to the benefits received by the cinema viewers on whom the Cess is

levied.

38. The Appellants then contended that the field of legislation, that is, the welfare of the artists, is already occupied by the Central legislation, the Cine

Ã¢â‚¬" Workers Welfare Fund Act, 1981 (Act of 1981), which provides for the welfare of Cinema workers. It is submitted that since the Parliament has

already legislated with respect to cine-workers under Entry 23 of List III Ã¢â‚¬" Concurrent List, the State is deluded of its powers to that extent. It is

contended that Article 246 of the Constitution of India provides that Parliament may make law in regard to the entries in the State List, and as laid

down under Article 254, in case of inconsistency between the laws made by the Parliament and the State, the former shall prevail. Therefore, the

CineÃ¢â‚¬"Workers Welfare Fund Act of 1981 would have an overriding effect over the State Act. The learned Advocate General has drawn our

attention to Section 2(b) of the Act of 1981 to point out that the Cine-workers Welfare Fund is only in respect of a very limited class of workers. He

submitted that the pith and substance of the impugned Cess will have to be examined. He also submitted that even if the levy is traceable to Entries 23

and 24 of the Concurrent List, and even if there is any incidental encroachment, it will have to be ignored.

39. Entries 23 and 24 of the of List III Ã¢â‚¬" Concurrent List of the Constitution of India read as follows:

Ã¢â‚¬Å“23. Social security and social insurance; employment and unemployment.

Ã¢â‚¬Å“24. Welfare of labour including conditions of work, provident funds, employersÃ¢â‚¬â„¢ liability, workmenÃ¢â‚¬â„¢s compensation, invalidity and old age pensions

and maternity benefits.Ã¢â‚¬â€‹

Since the three Lists contain a large number of entries, there can be some overlap. In such a situation, as held by the HonÃ¢â‚¬â„¢ble Supreme Court in

the case of Drive-in Enterprises, the doctrine of pith and substance has to be applied to determine which Entry a given piece of legislation relates. The

Court has to look at the substance of the legislation. Regard must be had to the enactment as a whole, its main objects, and the scope and effect of its

provisions. Incidental and superficial encroachments are to be disregarded. The real nature of the levy has to be found out to adjudge the competency

of the State Legislature. The nomenclature of the levy is not conclusive for determining its true character and nature.

40. The Parliament enacted the Central Act of 1981 to provide for the welfare of a certain class of cine-workers. Section 3 of the Act of 1981

constitutes a fund called the ""'Cine-Workers Welfare Fund"", whose contributions are through such amounts as the Central Government may provide.

The other sources are any grants made to the Fund by the Central Government, any donations received and income from investment of the amounts in

the Fund. Section 4 lays down the measures and facilities, which according to the Central Government, are necessary to promote the welfare of cine

workers, such as defraying the cost of such welfare measures or facilities, providing assistance in the form of grants or loans, sanctioning money in aid

of any scheme, etc. This Fund under the Central Act is for certain cine Ã¢â‚¬" workers who are defined under Section 2(b) of the Act of 1981. Section

2(b) defines cine Ã¢â‚¬" workers as follows:

Ã¢â‚¬Å“(b) Ã¢â‚¬Å“Cine-workerÃ¢â‚¬â€‹ means an individualÃ¢â‚¬¬

(i) who has been employed, directly or through any contractor or in any other manner, in or in connection with the production of not less than five feature films to

work as an artist (including actor, musician or dancer) or to do any work, skilled, unskilled, manual, supervisory, technical, artistic or otherwise; and

(ii) whose remuneration with respect to such employment in or in connection with the production of each of any five feature films, not being less than the monthly

remuneration or lump sum remuneration stipulated prior to the commencement of the Cine-workers Welfare Fund (Amendment) Act, 2001, does not exceed such

sum, whether monthly or by way of lump sum or instalments, as may be specified by the Central Government by notification in the Official Gazette;Ã¢â‚¬â€‹

Thus, only the Cine Ã¢â‚¬" workers who have acted as artists in at least five feature films and whose remuneration is less than the sum specified are

eligible for the benefits. The Central Act of 1981 was enacted primarily with the production of feature films in mind, unlike the State Act of 2010,

which encompasses a wide spectrum of cultural activists.

41. Further, when a levy is challenged, its validity has to be adjudged with reference to the competence of the State Legislature, and it is necessary to

find out the real character and nature of the levy. The Central Act of 1981, applying the doctrine of pith and substance, is enacted for social security

and social insurance, employment, and unemployment of certain cine-workers. On the other hand, the pith and substance of the impugned levy by the

State is on entertainment. It can be justified as a fee levied to improve the quality of entertainment by promoting the welfare of cultural artists. There

is, therefore, no repugnancy to declare the invalidity of the State levy. The learned Advocate General has alternatively contended that the impugned

levy can/if to be traced to Entries 23 and 24 of List III Ã¢â‚¬" Concurrent List, and that any entrenchment, if at all, is extremely minimal, and if there is

any overlap, the same is merely marginal and incidental. There is, therefore, no merit in this challenge of the Appellants on this ground as well.

42. The Appellants have also challenged the levy of impugned Cess on the grounds of violation of Articles 14 and 19 of the Constitution of India. It

was contended that the impugned levy would affect the business of the members of the AppellantÃ¢â‚¬"Federation. The Appellants stated that if they do

not collect the welfare cess from cinema viewers, their licenses will be cancelled, and tickets will not be sold, and as a result, the members could be

forced to close down their businesses. The learned Senior Advocate for Respondent No. 3 Ã¢â‚¬" the Board submitted that the AppellantÃ¢â‚¬"Federation

cannot be considered an aggrieved party, as the Cess is collected not from the theatre owners but from the viewers. The Board also contended that

the AppellantÃ¢â‚¬"Federation, not a registered body, cannot maintain a petition on behalf of its members, especially since the List has not been provided,

nor have such members paid the requisite court fee. We find no merit in the contentions of the Appellants. The Cess impugned is to be collected by

the local authority. The proceeds of the Cess have to be remitted by the local authority to the account of the Kerala Cultural Activists' Welfare Fund

Board. There is no role for the theatre owners, and the levy does not fall on them. No data has been provided to demonstrate how this levy amount

per ticket has affected the functioning of the theatre owners' business. This argument is not supported by adequate pleadings and cannot be accepted.

43. As a result of this discussion, there is no merit in the challenge. There is no error in the view taken by the learned Single Judge.

44. The Appeal is dismissed.