

(1984) 02 BOM CK 0062

Bombay High Court

Case No: Writ Petns. No"s. 38 and 240 of 1984

Ramesh Waman Toke
and Others

APPELLANT

Vs

The State of
Maharashtra and
Others

RESPONDENT

Date of Decision: Feb. 28, 1984

Acts Referred:

- Bombay Entertainments Duty Act, 1923 - Section 3(1)

Citation: AIR 1984 Bom 345 : (1984) 2 BomCR 268

Hon'ble Judges: Chandurkar, C.J; Jahagirdar, J

Bench: Division Bench

Advocate: P.M. Pradhan, N.H. Gursahani and S.P. Kanuga, for the Appellant; A.V. Sawant, Advocate General and D.P. Hegde Addl. Govt. pleader, for the Respondent

Judgement

Jahagirdar, J.

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 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 bBombay Entertainment 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 petitioners are engaged in entertainment business. The ordinance itself has come into force with effect from 1 ST. JAN A 1984 and it seeks to amend the provisions contained in the b Bombay entertainment duty act, 1923, hereinafter referred to as "the principal act.

2. The provision in the ordinance seek to make large scale amendments in the principal act and in particular ss. 3 and 4 of the ordinance makes amendments in s. 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 provisions in 240 of 1984. Details of the provisions in section 4 of the ordinance by which s. 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, S. 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 on all payment for admission to any entertainment duty Broadly there were covered by the provision of sub-section [1] of S. 3 of the principal Act. the first class of entertainment on which duty was payable was in clause [a] of S. 3[1] of the Principal Act. that entertainment was a race-courses Licensing Act, 1976. The other form of entertainment on which entertainment duty was leviable 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 Nagpur or whether it was in any other areas. It is not that duty which was payable under the said provision. It is however, necessary to note that S. 3 provided for levy and payment entertainment duty only on one basis namely on payment for admission to entertainment. Those were the opening words of S. 3[1] of the Principal Act. if therefore. There were no payment for admission to entertainment. There could not be a tax leviable or payment of the same to the State Government was the payment for admission to entertainment.

4. Clause [b] of S. 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 any payment for a programme of synopsis of an entertainment any payment made fir 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 S. 2[b] of the principal Act: and any payment for any purpose whatsoever connected with an entertainment which a person is required to made 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 if entertainment was envisaged and it is only after this that the question of payment for admission arose. 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 hat the same to the State Government as entertainment duty arose. If there could not have been a tax under S. 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 power vested in him under Art. 213 of the Constitution. It is referable to Item 62 in List II of the seventh Schedule of the constitution. 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. 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 S. 3 of the Principal Act is amended on a large scale. We have already noted earlier that sub-sec. [1] of s. 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 the 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 Sec. 3 of 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 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 3 of the Principal Act. it is defined to mean among other things. Exhibition of cinematograph film or moving pictures or series of pictures or series of pictures 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 place 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 purposes of working a machine installed is to be found in clause [I] which is to be inserted in Sec. 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 S. 3[1] of the Principal Act, the basis of the levy of the ordinance in the case of touring cinema what is sought to be 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 the rate equal to 25 per cent or 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 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 payment 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 which is now introduced in clause [c] of S. 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 seat and the a 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 being able to hold the number if shows which he take into account the possibility that no cinema shows at all may be held on certain occasions and it dose not take into account actual payment 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 sec. 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 shows in respect of 75 per cent of the total number of seats provided in such a place of entertainment shall be paid. The aggregate if 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 if seats. In the case of entertainment other than a restaurant, lamp sum duty is at the rate of Rs. 2per seat peer 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 provisions 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 bu 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 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.tion No.38 of 1984 which 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 leviable u/s 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 S. 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 Ordinance. After the amendment S. 3[1] opens as follows;-

There shall be levied and paid to the State Government on all payment for admission to any entertainment a duty c 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 payment for admission to any entertainment. According to the learned advocates the basis for the levy of entertainment duty can be only payment for admission made by the person claiming admission to the entertainment and no other basis. According to them the concept of entertainment duty is inseparable from the payment that is made by the person claiming admission to the entertainment duty can be used by the Legislature for levying entertainment duty. The learned advocates are linking the words on all payment for admission duty. The learned advocates are linking the words on all payment for admission to the any entertainment duty to the consolidated sum which are to be found in Sec. 3[1] of the Act. if this is so clauses [c] and [d] under which entertainment duty on touring cinema of 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 S. 3[1] of the principal Act. therefore it is contended that the levy envisaged

14. It is difficult to accept these submissions. The argument in sum means that one part of S. 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 opening words of S. 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 one entertainment one cannot adopt different bases for the said levy. In the case of Race-courses the levy is on the basis of payment 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 clause [a] and [b] of section 3[1] of the Act. in the case of touring cinemas and video different bases for the levy of entertainment duty have been 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 S. 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 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 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. If the permission issued by the prescribed officer permits an owner of a touring cinema has in fact conducted 60 shows in a 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 provision which have been examined in details it is clear to us that the said provision 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 tax in exercise of the legislature dose not arise at all. If the Act purports to levy tax onentertainment 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 payment 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 party in reply to the for at contention which had been raised on behalf of the first contention which has been mentioned, among other things, that payment for admission in relation to the levy of entertainment duty includes "any payment for the purposes of the said clause the expression expression "gross collection capacity" in relation to touring cinema means a sum equal to the aggregate of all the payment for admission to a show if all the seats and accommodation available are occupied . in other words if the payment for seats or other accommodation in a place of entertainment as mentioned in definition section then the gross collection 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 levy tax upon the same. The basic question whether there is any entertainment duty has negation of tax and the basis on which the said tax is levied. It has not been shows to us on behalf of the State that any other interpretation of the provisions contained in clauses [c] and [d] of s. 3 is possible or on any other construction of the said provisions it is possible to hold that the levy is essentially on entertainment thatclear to us, therefore that the provisions of clauses [c] and [d] in S. 3[1] 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 [The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment,](#) The following observations thought made in the context of the provision 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 entertainment is within the entry whether it falls on the giver or the receiver of that entertainment. Nor is the impugned tax 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. in the result each of these petitions is allowed. It is hereby declared that clauses [c] and [d] of S. 3[1] of the Bombay Entertainment 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.

19. In has been mentioned to us that some of the petitioners, who are owners of the touring cinemas have in the meantime paid certain have in the meantime paid certain amounts under clause [c] of S. 3[1] of the Act, it has also been men honed to us that certain video exhibition 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.

20. Petitions allowed.