

(1984) 06 MAD CK 0029

In the Madras High Court

Case No : Writ Petition No. 753, 1189 and 1587 of 1984

Entertaining Enterprises, Madras and Others

APPELLANT

Vs

State of Tamil Nadu and Another

RESPONDENT

Date of Decision : 21-06-1984

Acts Referred:

Constitution of India, 1950 — Article 134A

Copyright Act, 1957 — Section 2

Tamil Nadu Exhibition of Films on Television Screen Through Video Cassette Recorders (Regulation) Act, 1984 — Section 10(2), 9(2)

Citation : AIR 1984 Mad 278

Hon'ble Judges : Ratnam, J;Ramanujam, J

Bench : Division Bench

Advocate : V.P. Raman, K.K. Venugopal for Jayanthi Natarajan, P. Chidambaram and S. Navaneethan, for the Appellant; Advocate General for Govt. Pleader, for the Respondent

Judgement

Ramanujam, J.—Since the writ appeals arise out of the interim orders passed in the interlocutory applications filed in the writ petitions, they

need not be dealt with separately, as we are disposing of the writ petitions themselves. Since the facts and circumstances which gave rise to the

filing of the writ petitions are substantially the same, it is not necessary to deal with the facts in each of the writ petitions and it will suffice to, deal

with the facts in Writ Petition No. 1587 of 1984. The first petitioner in that case is one Entertaining Enterprises carrying on the business of running

a video cassette library in Door No. 310, Mount Road, Madras-600 018. The object of the petitioners' business is-to make avail-, able on a fixed

hire, video cassettes to its members to enable the members to view these cassettes in the Privacy of their homes, through a video cassette player

attached to a television unit. The first petitioner has with him pre-recorded cassettes which he hires out to the members of his library and these cassettes are returned by the hirers after viewing them in their homes. The 1st petitioner has with him several such prerecorded cassettes and the other Petitioners are also having varying number of such pre-recorded cassettes for the common purpose of being lent to their members on payment of fixed hire charges. The said business of hiring out video cassettes is of comparatively recent origin. As a result of the growth of the video industry, the growth of the video viewing public in India is in keeping with the growth of video viewing all over the civilized world. It is said that the Union of India has also been encouraging the viewing of video cassettes in homes through such machines and the Government, in keeping with the policy, has also drastically reduced the import duty on these units. On a rough estimate, there are nearly five lakhs of video cassette units, throughout the country and about one lakh units in the State of TamilNadu alone. As it is neither economically practicable nor otherwise possible any person owning a video player cannot be expected to own sufficient number of cassettes by making idle and wasteful investment in the purchase of several hundreds of video cassettes for their own use. It is here the video cassette libraries come into the picture and these video libraries invest money in purchasing cassettes and in hiring recorded cassettes to their members. The petitioners claim to be running the said video libraries for the past few years to the entire satisfaction of the public and" without creating any problems.

2. While so, the Government of the State of Tamil Nadu introduced the Tamil Nadu Exhibition of Films on Television Screen through Video

Cassette Recorders (Regulation) Ordinance No. 2 of 1984. The said Ordinance seeks to provide for the regulation of exhibition of films through

video cassette records. It provides for regulating the exhibition of films by requiring licences to be taken out by an intended exhibitor. The

Ordinance excludes exhibition of films for domestic purposes to the members of one's family belonging to the household. Section 4 of the

Ordinance requires persons like the petitioners to take out a licence to run a video library. The Licencing authority is required to have regard to the

interests of the general public before granting or refusing the licence to keep a video library. Section 9 of the Ordinance requires every person

giving an exhibition of films on television screen through a video cassette recorder to keep and produce on demand a letter of consent for each of the films exhibited from the first owner of the copyright of the cinematograph film or from his assignee. This section appears to cover even exhibition of cassettes for domestic purposes and to the members of the household. Every video library is also required to keep such letters of consent in respect of each film. Section 10 of the Ordinance provides for certification of films for exhibition through a videocassette recorder and only films so, certified are permitted to be hired out by the owner of any video library. The Ordinance also provides for other incidental matters including penalty, confiscation, powers of search and seizure and rule making power. While Section 19 makes offences under the Ordinance cognizable, Sec. 23 requires every person keeping a video library to obtain a licence within four weeks from the date of the commencement of the Ordinance, i. e., before the 14th February, 1984. The said Ordinance has been replaced by the TamilNadu Exhibition of Films on Television Screen through Video Cassette Recorders (Regulation) Act 7 of 1984. By virtue of the rule making power granted under the provisions of the said Act, the State Government has framed a set of rules called the TamilNadu Exhibition of Films on Television Screen through Video Cassette Recorders (Regulation) Rules, 1984. The petitioners have chosen to challenge the constitutional validity of the said Ordinance which has been replaced by the Act (substantially the same as the Ordinance itself) in these writ petitions on the following grounds, namely, (1) Entry 33 of List II to Schedule VII of the Constitution of India refers to "Cinemas" subject to the provisions of Entry 60 of List I. This expression. "Cinemas" used in Entry 33 of List II does not take in video cassettes. Therefore, the State Legislature had no legislative competence to legislate an video cassettes under Entry - 33 of List II to, Schedule VII and that it is -only the Parliament acting under Entry 97 of List -1 in Schedule VII to the Constitution which could make a law regarding the video "cassettes; (2) Section 10(2) of the Act forbids sale, hire, distribution, exchange or circulation by any video library of any video cassette which has not been certified as suitable for public exhibition by the Board of Film Censors u/s 3 of the Cinematograph Act, 1952, and this provision is ultra vires as being beyond the competence of the State Legislature. Even if S. 10(2) is held to be

valid, it cannot be given effect to as the necessary machinery for certification of video cassettes is yet to be set up, and without it~ the business of video library cannot be carried on, and as such Section 10(2), as on date, cannot be validly enforced, (3) Section 9 of the Act providing that in respect of each cassette, a video library should produce on demand a letter of consent from the owner of the copyright is also ultra vires, as it is not open to the State Legislature to add to, amend or modify any provision of the Copyright Act., which is a Central enactment, made in exercise of the powers conferred by Entry 49 in List I to Schedule VII of the Constitution of India; (4) Section 15(2) read with Section 9(2) of the Act is also ultra vires as infringing Article 20 sub-section (1) of the Constitution of India, in that, they amount to making an act an offence, when it was not so at the time of commission of the act At the time when the video libraries came into possession of any video cassette, it was no offence to be in such possession without a letter of consent, But the provisions of Section 9(2) of the Act now make it a punishable offence if the persons running the video library does not have a consent letter as contemplated by Section 9(2) (5) In any event, the provisions of the Act amount to a violation of the petitioner's fundamental right under Article 19(1)(g) and it is not saved by Article 19(5) as amounting to a reasonable restriction imposed in the course of regulation of the trade in pre-recorded video cassettes; (6) The stage for enforcement of Sec. 9(2) and Sec. 10(2). had not reached yet and hence no prosecution for infringing those sections is possible; and (7) One month's time granted for compliance of Section 4 as provided in the Act is inadequate and the imposition of a liability before such compliance is bad in law.

3. As against these contentions, the State has filed a counter-affidavit stating that the Act in question is valid both from the points of view of the legislative competence and the contravention of fundamental rights that the impugned Act falls squarely within Entry 33 of List II of Schedule. VII of the Constitution, and that in any event, the entries cannot be strictly construed as they had to be treated as Heads of Legislation and as such wide meaning should be given to each entry. According to them the distinction sought to be made between the public exhibition of the video and the hiring of the same by the video cassette libraries is not warranted, and that both the Public exhibition of video and the hiring out of the video

cassettes by the libraries are matters requiring regulation. In the counter-affidavit, it has been denied that the petitioners are circulating video

cassettes for private exhibition only and therefore even video cassettes kept for public exhibition are to be separately certified under the

Cinematograph (Certification) Rules, that S. 9(2) read with Section 15(2) of the impugned Act and Section 63 of the Copyright Act, 1957

constitute different offences, and therefore Section 20 which makes an offence under the Act cognizable one cannot be said to be ultra vires, that

even if the video cassettes cannot come under the term ""Cinemas"" occurring in Entry 33 of List II of Schedule VII, the videocassettes will clearly

fall under the term ""Entertainment"" occurring In the same entry According to them, the Act is not violative of the petitioners' fundamental rights

under Article 19(2) and the so-called restrictions cannot be said to be unreasonable and beyond the scope of Article 19(6).

4. The counter-affidavit filed by the South Indian Film Chamber of Commerce (hereinafter referred to as the Film Chamber) which has been

impleaded as a respondent at its own instance is also to the same effect. According to, the Film Chamber, the Cinematograph Act, 1952 falls

under Entry 60 of List I and the Cinemas (Regulation) Act would fall under Entry 33 in List II. The regulatory statute like the Cinemas (Regulation)

Act would also fall under Entry 1, Entry 6 and Entry 26 of List II. The video cassette being a recent technological invention, it was erroneously

thought that exhibition of films through video cassette recorders (V. C. Rs.) was not regulated by TamilNadu Act 9 of 1955, and as such, there has

been it proliferation of exhibition of films recorded on video cassette tapes and through the means of video cassette recorders. Such exhibition, if

wholly unregulated, would directly affect the interests of the film industry, particularly, producers, distributors and exhibitors, whose original rights

under the Copyright Act ate likely to be infringed. The State also loses considerable revenue by way of entertainment tax. The morality of the

public is also affected because of exhibition of uncensored films and interpolation of excised portions in censored films. To remove all the said evils,

the State- Government brought in originally the Ordinance, which has been replaced by the Act.

5. In the reply affidavit filed by the petitioners, some of the averments in the counter-affidavits filed by the State and the Film Chamber have been

noted and they are met. Thus, the first and foremost question to be considered by us is as to whether the State Government had the legislative

competence to enact the, impugned Act under Entry 33 of List II of Schedule VII as contended by the State.

6. According to the learned counsel for the petitioners, a video tape is not a cinematograph at all, and therefore, the State Legislature has no power

to enact the impugned law under Entry 33 of List 11 of Schedule VII of the Constitution and the impugned legislation will fall only under the

residuary Entry 97 of List 1. The learned counsel submits that if the video, tape comes within the expression "cinematograph", the impugned Act is

quite unnecessary and the existing law relating to cinematograph is quite sufficient to, regulate the exhibition through video tapes. The further

submission made by the learned "counsel is that the expression "cinematograph, found in Entry 33 of List II of Schedule VII to the Constitution

framed in 1950 could not be taken to comprehend a video tape which is a recent innovation which could not have been even contemplated In the

year 1950, and therefore, the expression ""cinematograph"" used in the Constitution framed in 1950 should be understood in the sense in which it

was capable of being understood in the year 1950. In support of this submission, the learned counsel refers to the decisions of the Supreme Court

in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., and R.S. Nayak Vs. A.R. Antulay,

7. The question as to whether the video tape will fall within the expression ""cinematograph"" has been dealt with by some of the Courts recently. In

Restaurant Lee v. State of Madhya Pradesh, AIR 1983 MP 146, the question arose as to whether the exhibition of prerecorded movies on video

cassette recorder (VCR) and television sets in restaurants is covered by Entries 16 and 33 of List 11 of Schedule VII and the regulatory provisions

of the Madhya Pradesh Cinema (Regulation) Act. The Court held that the exhibition of movies by playing back pre-recorded cassettes in

restaurants falls within the ambit of "cinemas" in Entry 33 of List II of Schedule VII and is governed by the regulatory provisions of the Madhya

Pradesh Cinemas (Regulation) Act, that when a video cassette recorder is used for playing pre-recorded cassettes of movies on the television

screen, it is certainly used as an apparatus for the representation of moving pictures or series of pictures and comes within the definition of

cinematograph", that similarly the activity of exhibiting movies by playing pre-recorded cassettes in V. C, Rs., in their restaurants comes within the

ban contained in Sec. 3 of the Madhya Pradesh Cinema (Regulation) Act and that consequently the petitioners before them cannot indulge into

such activity unless they obtain a licence for their restaurant under the said Act. The Court also held that the requirement of licensing of such places

under the provisions of the Madhya Pradesh Cinema (Regulation) Act apart from coming under Entry 32 of List II also falls within Entries 1 and 6

of List II which deal with public order and public health. In that case, a contention similar to the one placed before us was raised stating that the

expression "cinematograph" in Section 2 (a) of the Madhya Pradesh Cinema (Regulation) Act, 1952 on its own terms will not cover video

cassette recorders and the television sets. But the Court rejected the contention and held that any apparatus for the representation of moving

picture or series of pictures will come within the expression "cinematograph" and when a video cassette recorder is used for playing back pre-

recorded cassettes of movies. it will fall within the expression "cinematograph" as defined by the Madhya Pradesh Cinema (Regulation) Act, 1952.

The said decision of the Madhya Pradesh High Court has been approved and followed by the Nagpur High Court in Dineshkumar

Hanumanprasad Tiwari Vs. State of Maharashtra, . in that case, the question arose as to whether the video cassette recorder and the television

sets are "cinematograph" as defined in Section 2(c) of the Bombay Cinemas (Regulation) Act, 1953 and whether they will come within the ban

contained in Section 3 of that Act. The Court took the view that when a VCR is used for playing pre-recorded cassettes of movies on the

television screen it is certainly used as an apparatus for the representation of moving pictures or series of pictures and comes within the definition of

cinematograph" as defined under the Cinematograph Act (1952) and therefore, exhibiting movies, by playing pre-recorded cassettes in VCR in

cafes and restaurants, comes within the ban contained in Section 3 of the Bombay Cinemas (Regulation) Act, 1953 which prohibits the exhibition

by means of a cinematograph elsewhere than in a place licensed under the Act. While rejecting the contention raised on behalf of the petitioners

therein that the expression "cinematograph" used in the Bombay Cinemas (Regulation) Act, 1953 should be understood only in the sense in which

it was used in 1953, the Court pointed out that in fast developing society, it would not be correct to confine the intention of Legislature to the meaning attributable to the word used at the time of enactment, that in a scientific age, the Legislature must be presumed to be aware of an enlarged meaning of the word which it may attract with the advance of science and technology, and that there is no reason as to why the word "apparatus" used in the definition of "cinematograph" be given restricted meaning so as to, mean only a sheet or ribbon of celluloid or the like prepared with the coating for ordinary photographs.

8. The Karnataka High Court in W. P. No. 8932 to 8936 of 1983 batch has agreed with the view expressed by the Madhya Pradesh High Court

in the case of Restaurant Lee v. State of Madhya Pradesh, AIR 1983 M P 146. According to the Karnataka High Court, the exhibition of films on

televisions through VCRs. is nothing but a representation of moving pictures or series of pictures, that the television and VCR used for exhibition of

films are undoubtedly apparatuses used for the representation of moving pictures or series of pictures, and therefore, the exhibition of films on

television through VCR in hotels falls within the meaning of "cinematograph", and therefore, it comes "within the regulatory provisions of the

Karnataka Cinemas (Regulation) Act 1964 and the Rules framed there under. It is no doubt true that these decisions dealt with cases of exhibition

of films on television sets through VCRs. in hotels, restaurants and parlours which were admittedly places as defined in the Cinemas Regulation

Acts. However, incidentally, they have dealt with the question as to, whether a television and the VCRs. are apparatuses used for exhibition of

films so as to bring them within the definition of "cinematograph", and they have answered the question in the affirmative. Though those decisions

do not deal with the private exhibition of films through television screen through VCR, still those decisions proceed on the basis that the televisions

and the VCRs will come within the expression "apparatus" so as to attract the definition of "cinematograph". Therefore, the said decisions should

be taken to lay down that the television sets and the VCRs will come within the scope of the expression "cinematograph" used in the concerned

Statutes. If the expression "cinematograph" used in an ordinary statute is taken to comprehend the television screen and a VCR, which is a modern

innovation, the expression ""cinema"" used in Entry 33 of List II of Schedule VII of the Constitution will undoubtedly comprehend the television and

VCR. It is well established that a legislative entry in any of the lists should be given the widest amplitude and it is not possible to give a restricted

meaning to a legislative entry used in the Constitution. Entry 33 of List II of Schedule VII uses the expression ""cinema"". The expression ""cinema

being a legislative head of power should receive an interpretation of the greatest amplitude and cannot be restricted to a particular apparatus.

Notwithstanding the difference in the mechanism used, in one case magnetic tapes are used which are not nitrocellulose base and the other with the

VCR (magnetic tapes base), the magnetic tapes used in the VCR have the result of producing the same audio visual effect on a common viewer,

and therefore, the television and VCR should be taken to have come within the scope of the expression ""cinemas"" occurring in Entry 33 of List. II.

9. The question whether the exhibition of films through television sets or television screens through VCRs is public or private is relevant only for the

purpose of finding out whether there is necessity to regulate it or not. That question will not, however, affect the question whether the television

screens and VCRs can be taken to fall within the definition of ""cinema.""/> We are inclined to agree with the view expressed by the Madhya Pradesh,

Bombay, and Karnataka High Courts and hold that the impugned legislation passed by the State Legislature falls within Entry 33 of List II of Sch.

VII.

10. The learned counsel for the petitioner relies on the decisions in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., and R.S.

Nayak Vs. A.R. Antulay, in support of this view that the expression ""cinema"" occurring on Entry 33 of List IT should receive a restricted meaning.

in Gannon Dunkerleys case (Supra) the Supreme Court had held that the expression ""sale of goods"" occurring in Entry 54 of List IT should be

understood in the sense in which it" was understood by lawyers at the time when the Constitution was framed. But, we do not see how that

decision will help the petitioner. There, the expression ""sale of goods"" came up for interpretation; and it was held it is only those transactions which

had been understood as sale in the legal world in the year 1950 that will come within the scope of Entry 54 and not any other transaction, In that

case, the court was concerned, with the nature of the transaction that was contemplated by the Entry. However, in this case, we are concerned

with a particular apparatus and the enquiry is whether that apparatus will amount to a cinema. Having regard to the well established doctrine of

liberal construction of legislative entries, all apparatuses which are used for producing the same audio visual effect on the viewers should come

within the expression ""cinema"". Therefore, we are of the view that the decision in Gannon Dunkerley's case does not affect the interpretation of the

expression ""cinema"" occurring in Entry 33 of List IT. The decision in R.S. Nayak Vs. A.R. Antulay, is also not of any help to the petitioners herein.

In that case, the question arose as to whether Mr. Antulay who was a Member of the Legislative Assembly is or is not a public servant and

whether he should be proceeded against under the provisions of the Prevention of Corruption Act, 1947. One of the contentions raised before the

Supreme Court was that he comes within the meaning of public servant under S. 21 of the I. P. C. The Supreme Court held that looking to the

history and evolution of S. 21, it is clear that till 1964, an M. L.A., could not have been conceivably comprehended in the expression ""public

servant"" and the law did not undergo any change since the amendment, and therefore, apart from anything else, on historical evolution of S. 21,

adopted as an external aid to construction, one can confidently say that an M. L. A. was not and is not a "public servant" within the meaning of the

expression" in any of the clauses of S. 21 of the I. P. C. The view taken by the Supreme Court was that since the office of an M. L. A., was not

there in 1860 when the I. P. C. was passed, S. 21 cannot attract an M. L. A., and therefore, an M. L. A., is not a public servant within the

meaning the expression contained in Cl. 12 (a) of S. 21 of the I. P. C. Thus, the reasoning of the Supreme Court is that since the office of an M.

L. A., came into being long after the Indian Penal Code was passed and as there is no mention of that office in any of the Clauses in S. 21, Section

21 cannot be taken to refer to an office, which was created later long subsequently. That reasoning will not apply to the case on hand which -

raises the question, whether a modern apparatus, which produces the same audio visual effect on the viewer, will come within the scope of the

expression ""cinema"" occurring in Entry 33 of List II of Sch. VIII. Such a question as arises now before us is governed by the well established rule

of construction that the legislative heads should receive the widest possible interpretation, and their scope cannot be restricted with respect to those

apparatuses that were available and used at the time when the Constitution was framed. Dealing with this question, Seervai, in his Treatise on the

Constitutional Law of India, Third Edition, Vol. I, says as follows: -

It has been said, at times, that a statute must be construed as on the day it was enacted; but this proposition is subject to qualifications. In *Dyson*

Holdings Ltd. v. Fox 1976 QB 503, the question for decision was the meaning of the word "family in the expression "member of the family". The

facts of the case were briefly these: The defendant lived with the tenant of a house as if she were his wife for 21 years until his death in 1961. They

never married and had no children. After his death the defendant continued to live in the house for which she paid rent as if she was his widow until

the plaintiffs, who owned the house, learned in 1973 that she was not in fact his widow. The plaintiffs refused to accept further rents and brought

proceedings to eject her. The trial Court having decided that the defendant was not a member of the family, reluctantly ordered delivery of

possession of the house to the owners, The defendant appealed, All the three Judges, Lord Denning M. R., James and Bridge L. JJ., held that

whatever may have been the position in 1950 when *Gammans v Ekins* 1950 2 KB 328 was decided by the Court of Appeal) the meaning of the

word "family" which was a popular word, had clearly changed. Lord Denning observed:

The word "family" in the Statute is not used in any technical sense but in a popular sense. It is not in the sense in which it would be used by a

studios and unwordly lawyer, but in the sense in which it would be used by a man who is base, "common to popular" to use Shakespeare's

words in *Henry V.* Act IV, see in I quoted by Sir, Raymond, Evershed M.R., in this context in *Langdon v. Hapton* (1951) 1 KB 666 or in the modern

words by the ordinary man in the street: see *Brock v. Wollams* (1949) 2 K 388 per Cohen L.J." Maxwell, in his treatise on the interpretation of

status 12th Edition at page 102 while dealing with these aspects, says the head "Extension with new things" as follows:

The language of statute is generally extended to new things which were not known and could not have been contemplated when the Act was

passed, when the Act deals with a genus and the thing which afterwards comes into existence was a species of it. Thus, the provision of Magna

Carta which exempted Lords from the liability of having their carts taken for carriage was held to, extend to degrees of nobility not known when it

was made, such theas Dukes, Marquises and Viscounts.

xx xx xx xx

Similarly, bicycles were held to be ""carriages"" within the provision of the Highway Act 1835 against furious driving (Taylor v. Goodwin (1879) 4

QBD 228: but see Williams v. Ellis (1880) 5 QBD 175) and tricycles capable of being propelled by steam to be ""locomotive, within the

Locomotives Acts 1861 and 1865, (Parkyns v. Preist (1881) 7 QBD 313), though not invented when these Acts were passed.

Where an Act of 1790 (which was deemed to be a public Act) exempted ferry proprietors from assessment to any ""taxwhatsoever"" in respect

of the ferry, it was held that the exemption extended to Income Tax even though that tax was first imposed considerably after 1790. (Pole-Carew

v. Craddock ((1920) 3 KB 109; but see. Post, pp. 243-244, 262)

Occasionally, the principle, that the law does not concern itself with trifles will be invoked in applying a statutory provision.

We are not thus inclined to agree with the learned counsel for the petitioners that the impugned Act is bad for lack of legislative competence.

11. The learned counsel for the contesting respondents, however, pointed out that even if the impugned Act does not fall within the expression

cinemas"" occurring in Entry, 33 of List II, it will clearly fall within the expression ""entertainments"" occurring in the same entry. As has been held by

the Supreme Court in Geeta Enterprises and Others Vs. State of U.P. and Others, , wherein the word ""entertainment"" occurring in Section 2 (3) of

the U. P. Entertainment and Betting Tax Act, 1937 came up for consideration, the said expression has been used in a very wide sense so as to

include within its ambit entertainment of any kind including one which may be purely educative, In that case, there was a video show and claimed ;o

be of educative value, and the question arose whether it was entertainment. The Court did not have any hesitation to hold that the video show

which is eligible to tax u/s 2 (3) of the U. P. Entertainment and Betting Tax Act, 1937 is- an entertainment. The learned counsel for the petitioner

would, however, distinguish the above case on the ground that it deals with the question of eligibility to entertainment tax and not the question as to

the legislative competence, and therefore that decision may not be applicable here. However, having regard to the fact that we have already upheld

the legislative competence on the ground that the pith and substance of the enactment is "cinemas" occurring in Entry 33 of List II, we find it

unnecessary to deal with the question as to whether it falls within the expression "entertainment" occurring in Entry 33 of List II of Sch. VII.

12. The next question to be considered is as to whether Ss. 9(2) and 10(2) are invalid as contended for by the petitioners as being colourable

exercise of power by the Legislature, According to the petitioners, in making these provisions, the Legislature is doing indirectly what it cannot do

directly, and therefore, the enactment of these two provisions will clearly amount to colourable exercise of the power. The learned - counsel for the

petitioners submits that copyright falls within the exclusive power of the Parliament and that cannot be encroached by the State Legislature. In

support of the above proposition, the learned counsel for the petitioners refers to the following observations in the decision of the Privy Council in

Attorney General for Alberta v. Attorney General for Canada (1939) AC 117 : -

.....it is well established that if a given subject-matter falls within any class of subjects enumerated in S. 91 of the British North America Act,

it cannot be treated as covered by any of those within Section 92 of the same (British North America) Act.

The said decision also lays down some criteria for ascertaining whether the legislation falls within S. 91 rather than under S. 92. One is to make a

comparison of the lis. Though the result of the comparison will not by itself be conclusive, it will go a long way in supplying an answer to the

problem which has to be solved. The next step is to examine the effect of the legislation and the next is to see the object and the purpose of the Act

in question. According to the learned counsel, if the tests laid down by the Privy Council in the above case are applied to the facts of this case,

then Section 9(2) of the impugned Act which required every video library to have a letter of consent from the person who is the first owner of the

cinematograph film, and in case of assignment of the cinematograph, from the assignee of such copyright, will be clearly outside the legislative

competence of the State, for, it is the Parliament which has got a power to make a law on Copyright, and the State cannot create a new copyright,

which is not contemplated by the Copy right Act. It is contended that the copy right is a right created under the Copy right Act and it is only the

Parliament which can create a copyright and provide punishments for infringements of such a right, It is said that any infringement of S. 9(2) is an

offence cognizable under S. 20 and punishable under S. 15 with imprisonment which may extend to three months or with fine which may extend to

Rs. 1,000/- or with both, and in the ease of a continuing offence, with a further fine which may extend to one thousand rupees for each day during

which the offence continues, and the film also can be confiscated under S. 18.

13. The submission of the learned counsel for the petitioners is that what are the rights which can be brought under the protection of the Copyright

Act and what are the punishments for infringement thereof will clearly fall within the legislative power of the Parliament under Entry 49 of List 1

Patents, inventions and designs; copyright: trademarks and merchandise marks."" and the State Legislature cannot bring in new rights under the

Copyright Act and make the infringement a more serious offence than what the Parliament contemplated and provide for a more serious

punishment under the Copyright Act. So far as the Copyright Act is concerned, it does not create any copyright in a video tape and that the

creation of a copyright in respect of the VCR by the impugned Act and providing for more serious punishment for infringement of such rights, than

what is contemplated under the Copyright Act is clearly outside the legislative competence. The learned counsel for the respondents would counter

the argument of the petitioners" learned counsel by saying that the video tapes are capable of abuse and that in the guise of keeping a video library,

the owners of video libraries may resort to, public distribution and exhibition that, having regard to the nature of the trade or business in he video,

tapes, has to be necessarily regulated in public interest, and that regulation also involves in ensuring that the owner of the video library carries on a

lawful business or trade after obtaining the consent from the owner of the copyright. According to him, the pith and substance of the impugned Act

is not copyright. But it is either cinema or entertainment or trade or commerce or public order, and therefore, the State Legislature has got the

power to regulate the trade or business in the distribution of video tapes from the so-called libraries. Therefore, S. 9(2) should be taken to be only as an incidental provision. The respondents' learned counsel submits that while making a law on video tapes treating them as a cinematograph, the Legislature can incidentally take into account the provisions of the Copyright Act, and see that the owner of a video library does not infringe the provisions of the Copyright Act. S. 9(2) has been enacted, to ensure that a person owning a video library and distributing the video films among the members of the public should have the consent of the owner of the copyright. The learned counsel also relies on the decision of the Supreme Court in *State of Bombay Vs. Narothamdas Jethabai and Another*, to show as to what should be taken to be the pith and substance of an enactment. In that case, the constitutional validity of the provisions of the Bombay City Civil Court Act, 1948 came up for consideration before the Supreme Court. It was contended that the said Act purported to have been enacted by the State Legislature under Item 1 of List II of Sch. VII has encroached on the legislative power of the Parliament under Items 28 and 53 of List I Sch. VII to the Government of India Act, 1935. Rejecting that contention, the Supreme Court held that the Bombay City Civil Court Act is not ultra vires the Provincial Legislature by reason of its being an encroachment by the Provincial Legislature upon the field of legislation reserved for the centre under List I of Sch. VII to the Government of India Act, 1935, that the legislative power conferred on the Provincial Legislature by Item 1 of List II has been conferred by use of language which is of the widest amplitude (administration of justice and constitution and organisation of all Court). Such legislation does not curtail or limit the power of legislation conferred on the Central Legislature under Items 28 and 53 of List I. It was further pointed out that the doctrine of pith and substance postulates that the impugned law is substantially within the legislative- competence of the particular Legislature that made it, but only incidentally encroached upon the legislative field of another Legislature, and therefore the said doctrine allows incidental encroachment if the law is in pith and substance, within the legislative field of the particular Legislature which made it. Thus, according to the learned counsel for the respondents, it is well established that once the pith and substance of the legislation falls within any one of the entries in List II of Sch. VII, the

legislation cannot be said to fall under any of the entries either in List I or List III of Sch. VII merely because there is an encroachment on the fields

covered by the entries either in List I or List III. It is further submitted by the learned counsel that once a legislation as a whole is held to fall with

reference to its pith and substance, under an entry in List 11, it is not open to the petitioners to cut up the same and to interpret its various

provisions in a disintegrated manner to find out whether each provision of the Act falls within the legislative entry. According to the learned counsel,

once the doctrine of pith and substance is satisfied by the legislation, then that legislation cannot be held to be outside the legislative competence,

merely because some of the provisions appear to have encroached on the legislative, entries on the other lists. In support of this, the learned

counsel for the respondents relied on the decision in *A.S. Krishna Vs. State of Madras*, wherein it has been observed as follows: -

When a law is impugned on the ground that it is ultra vires the powers of the Legislature which enacted it, what has to be ascertained is the true

character of the legislation. To do that, one must have regard to the enactment as a whole, to its object and to the scope and effect of its

provisions. If on such examination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be

valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach

to the question to view such a statute not as an organic whole, but as a mere collection of sections then disintegrate it into parts examine under

what heads of legislation those parts would severally fall, and by that process, determine what portions thereof are intra vires and what -are not.

Reference has also been made to the decision of the Supreme Court in *Chaturbhai M. Patel Vs. Union of India (UOI) and Others*, wherein the

Supreme Court has pointed out that it is within the competence of the Central Legislature to provide for matters which may otherwise fall within the

competence of the provincial legislature, if they are necessarily, incidental to effective legislation by the Central Legislature on a subject of

legislation expressly within its power. In that case, a challenge was made to the validity of Ss. 6 and 8 of the Central Excises and Salt Act, 1944

and the Rules made there under as being beyond the legislative competence of the Central Legislature as they trench upon the provincial field of

items 27 or 29 of List II. While rejecting that contention, the Supreme Court had observed-

The various provisions of the Act and the Rules made there under were, in our opinion, essentially connected with the levying and collection of

excise duty and In its true nature and character the Act remains one that falls under "item 45 of List I and the incidental trenching upon the provincial

field of items 27 or 29 would not affect its constitutionality because the extent of invasion of the provincial field may be a circumstance to determine

the true pith and substance but once that question is determined, the Act, in our opinion, would fall on the side of central field and not that of the

Provincial field.

In *Srinivasa Enterprises, Represented by the Managing Partner, Peddi Venkateswarlu and Others Vs. Union of India (UOI), Represented by*

Ministry of Law, Justice and Company Affairs and Others, , dealing with the validity of the Prize Chits and Money Circulation Schemes (Banning)

Act, 1978 enacted by the Parliament under Entry 7 of List III of Sch. VII, the Supreme Court held that the pith and substance of the Legislation is

not one against lotteries, that it deals with a special species of contracts, although one such feature is the award of prize to subscribers and that the

core of the subject matter must govern the competence of the legislation. The Supreme Court has also pointed out as follows: -

In matters of economics, sociology and other specialised subjects, courts should not embark upon views of half-lit infallibility and reject what

economists or social scientists have, after detailed studies, commended as the correct course of action. The final word is with the Court in

constitutional matters but judges hesitate to rush in, where even specialists "fear to trade". If experts fall out, court, perforce, must guide itself and

pronounce upon the matter from the constitutional angle, since the final verdict, where constitutional contraventions are complained of belongs to

the judicial arm

*In *Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others, , the end purpose of the legislation has also been**

taken as the criterion to determine the legislative field under which it will fall.

14. Mr. Venugopal, learned counsel appearing for one of the respondents, namely, the Film Chamber, relying on the decisions above referred to,

contends that S, 9(2) which is intended to see that the owner of a video library carries on his trade lawfully, is an incidental provision which is

found necessary for carrying out the objects of the Act, -and therefore, that provision cannot be treated as falling outside the legislative field,

notwithstanding its alleged encroachment in the field of copyright falling under Entry 49 of List 1. Similarly, according to the learned counsel, S.

10(2) which provides for two requirements, namely, (1) a certificate from the Board M Censors, and (2) that the body of the film, should not have

been altered or tampered with in any manner since the issue of the certificate, is intended to maintain - public morals, and public order and this is

Jay way of regulation of the distribution of videos by the video libraries to the members of the public, and. hence both Ss 9(2). And 10(2) are

clearly within the competence of the State Legislature.

15. The learned Advocate General appearing for the State, in support of the impugned Act and the Rules framed there under submits as follows.

Cinema is not only a major trade but also the major source of income to the State by way of entertainment tax, It is a trade affecting public morals

and public order, and. therefore, it calls for a regulation. Video tapes will also fall within the expression cinema and the requirement as to licence, is

one form of regulation. So far as the video library is concerned, the Act requires the owners thereof to take out 9 licence under S. 4, a letter of

consent from the owner of the copyright under S. 9 and a certification from the 4Cen"sor Board under S, 10. According to him, Ss. 9 and to will

not amount to colourable legislation and even if those sections result in incidental trenching on matters outside its State legislative field they cannot

be taken to go beyond the legislative competence, The consent letter, contemplated by Section 9(2) is insisted upon for two reasons, (1) for

ensuring, the revenue to "he State and (2) for ensuring that the trade carried on by the owners of video libraries is lawful. If the owner of a video

library carries on his trade without the consent of the owner of the copyright, then it will result in the owner of the copyright, taking proceedings for

stoppage of the trade which in turn wilt result in the loss of revenue to the Government: and it is for this reason, the consent is insisted learned

Advocate General. Sections 9(2) and 10(2) are merely ancillary provisions and they do not form the pith and substance of the enactment.

Normally an. effect of entertainment, cannot be considered to be the subject matter of the encroachment for the purpose of determining the field of

legislation. Reference had been made to the decision in *M. Karunanidhi Vs. Union of India and Another*, where the Supreme Court while dealing

with the question of repugnancy between law made by State and the Parliament has observed as follows: -

Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List trenches upon any of the

Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the

provisions of the Act it appears that by and large the law falls within the four corners of the State List and encroachment if any, is purely incidental

or inconsequential.

Thus according to the learned Advocate General, even though Sections 9(2) and 10(2) may encroach on the powers of the Parliament under List

1, it should be held to be valid, for, they are merely incidental provisions " and it is well established that such incidental encroachment is

permissible, if, the pith and substance of the legislation falls within the State's legislative field.

16. On a due consideration of the rival contentions put forward by the parties, we are of the view that Section 9(2) is not a mere incidental

encroachment on the entry "copyright" falling in List - I, but it amounts to an addition to the provisions of the Copyright Act and therefore it falls

outside the permitted limit of encroachment and as such, it should be taken to be ultra vires. Though the learned Advocate General states that

Section 9(2) is intended to ensure increase in revenue to the State, we cannot agree that Section 9(2) is in any way connected with the collection of

entertainment tax. A reading of Section 9(2) will clearly show that it has nothing to "do " with the levy, assessment or collection, of entertainment

tax. The said section merely enables the owner of the copyright to stipulate conditions for parting away with. the so-called copyright in the video

films and it does not provide for any improvement of the State revenues, for insisting, on a consent letter from the owner of the copyright does not,

in any way, improve the State revenues, It cannot be disputed that Section 9(2) proceeds on the basis that the owner of the cinematograph film

which has been recorded in the VCR is also a owner of the copyright in the video film. The assumption of the Legislature that the owner of the copyright in the cinematography is film is also the owner of the copy right in the video film is correct. It cannot be disputed that the copyright is a bundle of rights, and it is personal. The law relating to copyright was originally contained in the Copyright Act of 1914 and later in the Copyright Act of 1957. The Indian Copyright Act, 1914 was modelled on the English Copyright Act, 1911. Under the provisions of the Indian Copyright Act, 1914, there was no copy though its various components such as story, music, etc., were considered to be rights protected by the Copyright Act. It is only in the 1957 Act, the definition of copy right was enlarged to include the exclusive right to communicate works by radio-diffusion, and a separate copyright was recognized in a cinematograph film apart from its various components namely, story, music etc., Section 2(d) of the Copyright Act, 1957 defines an author in relation to a cinematograph film, as the owner of the film at the time of its completion. Section 2(f) of the said Act defines a cinematograph film as including the sound track, if any, and cinematograph, is to be construed as including any work produced by any process analogous to cinematography. Though the Indian Copyright Act, 1957, was modelled on the English Copyright Act, 1956, when the English Copyright Act was amended providing for copyright in respect of television the Indian Act was not amended. But, on the other hand, it introduced Chapter VIII regarding the rights of broadcasting authorities, and Section 37 provided that "where any programme is broadcast by radio-diffusion by the Government or any other broadcasting authority, a special right to be known as "broadcast reproduction right" shall subsist in such programme". Even though the Copyright Act, 1957 did not provide for any copyright in respect of shows shown on television sets as was done by the English Copyright Act, 1956, as a result of the inclusive definition of cinematograph film including any work produced by any process analogous to cinematography, the exhibition of film right was recognized in a television through video tapes in which a cinematograph film is recorded, will also fall within the definition of cinematograph film. As already stated, the 1957 Act has created a separate copyright in respect of a cinematograph film. Therefore, in view I of the extended definition of a cinematograph film in Section 2(f) which includes any process analogous to

cinematography, the video tape should also be taken to come within the definition of "cinematograph film". We have already held that the video tape will fall within the expression "cinematograph" or "cinema" while dealing with the question of legislative competence. Though there is no separate provision creating a copyright in a video film, we have to hold that since video tape comes within the expression "cinematograph film" in view of the extended definition contained in the Act, the copyright should also be taken to have been created in respect of a video film under the Copyright Act, 1957. We cannot, therefore I agree with the learned counsel for the petitioners, Mr. V. P. Raman, that under the Copyright Act, there is no copyright in respect of the video film and that so long as the Act is not amended providing for a copyright in a video film, the provision in Section 9(2) requiring a consent letter from the so-called owner of the copyright cannot be held to be valid.

17. However, Mr. V. P. Raman, is right in his contention that in the guise of an incidental provision, the State Legislature has practically amended the Copyright Act, in that, they have made the infringement of the copyright a cognizable offence, and has provided more serious punishment for such infringement. If the legislature wanted to invoke the provisions of the Copyright Act for infringement of a copyright in a video film, it could refer to the relevant provisions of the copyright Act and deal with the infringement of the copyright on the same basis as an infringement under the Copyright Act. If the intention of the Legislature is to see that the owner of the video library carries on his business lawfully, it is not necessary for making the infringement a cognizable offence, while an infringement of a copyright under the Copyright Act is not a cognizable offence. Providing for a more serious punishment than what is done under the Copyright Act is virtually making an addition to the provisions of the Copyright Act. In this view of the matter, we have to say that the Legislature has done indirectly what it cannot do directly, and that will amount to a colourable exercise of power. We are therefore, of the view that S. 9(2) is not an incidental or ancillary provision as is claimed to be. Therefore, the said S. 9(2) should be held to be ultra vires as it is clearly severable from the other sections of the Act.

18. Coming to S. 10(2), it is the contention advanced on behalf of the petitioners that neither the Cinematograph Act, 1952, nor the

Cinematograph Certification Rules, 1983, provide for the certification of video films or the manner of doing it. The Cinematograph Act, 1952 and

the Cinematograph Certification Rules, 1983 do not also provide for the manner of certification for video films intended for private exhibition. Part

II of the Cinematograph Act, 1952 deals with the certification of films for public exhibition. S. 5(5A) deals with the manner of certification of films

by the Board of Censors for public exhibition. Thus, there is no provision for certification of a film for private exhibition which is restricted to

members of one's own family and friends. The various forms of application for certification of film contained in Schedules 1 and 2 of the said Rules

indicate that certification is required only for public exhibition. The Cinematograph Certification Rules, 1983 have since been amended. By a

notification -from the Ministry of Information and Broadcasting cit. 28th Feb. 1984 which has been gazetted in the Gazette of India on 24th Mar.,

1984, the application forms under I (A), 2 (A), 4 (A) and 5 (A) had been introduced in addition to the existing forms. Form I (A) is the form of

application for certification for public exhibition of a video film produced in India. Form 2 (A) is for certification for public exhibition of a video film

imported into India

Form 4 (A) is the form for certification of a video film for unrestricted public exhibition.

Form 5 (A) deals with the Form of Certificate for video film -for exhibition restricted to adults only. Similarly, Form 6 (A) is the Form of Certificate

for video films for children below the age of 12 and Form 7 (A) is the Form of Certificate for public exhibition restricted to members of any

profession or any class of persons. Thus, the certification contemplated by the Cinematograph Certification Rules, 1983 as amended is only in

respect of public exhibition of video films, and it does not apply to exhibition of films to a restricted audience such as family members or their

friends in their residence. The petitioners herein are persons who are running video libraries and they distribute the pre-recorded video cassettes to

its members and not to outsiders. The Form of Application for membership in some of the video libraries had been produced before us. The terms

and conditions for membership in a video library are that the members should deposit a particular amount till they terminate the membership that

the member will have the advantage of taking a tape on a daily hire of Rs. 10/- that the membership is not transferable, that the members must have

the identification card at the time of collection of the video cassettes, and that the tapes given out from the video library should only be used by the

members and their dependants and they should not be used for public viewing, Thus, the members to whom the Video tapes are given for hire by

the video libraries are prohibited from using the video tapes for public viewing. Having regard to the -fact that the, provisions of the Cinematograph

Certification Rules, 1983 do not contemplate the certification of a video film for private exhibitions in the residence of the members of the video

library, the requirement of the production of a certificate in respect of video films hired out by a "video library to its members under S. 10(2) is

invalid. As pointed out, already certification is contemplated in the certification Rules, only if an applicant for certification intends to use the video

film for public exhibition and not when he does moot intend to do so. Thus, the insistence on certification under the impugned Act and the Rules

framed there under is not valid. A video library which merely hires out to its members a video film for their own use and not for public show or

exhibition cannot approach the Censor Board for a Certificate, for the owner of the library does not intend to use the, video tape for public

exhibition. In this view of the matter, we have to hold that S. 10(2) of the Act is not only invalid but also unworkable. Thus, even though the

constitutional validity (of the TamilNadu Act 7 of 1984 is upheld, Ss. 9(2) & 10(2) are struck down as being invalid and ultra vires.

19. The learned counsel for the petitioners has raised one more contention. According to him, all the petitioners herein have "applied for licence as

contemplated by .S. 4 of the Act for keeping a video library. But the licences have not so far been granted, and that in respect of persons who are

not yet licensed under the Act, Ss. 9(2) and 10(2) cannot in any event be enforced, and for this submission, the learned counsel places emphasis

on the words ""licensed under the Act"" occurring in Ss. 9(2) and 10(2). The learned Advocate General, with reference to this contention, fairly

concedes that Ss. 9(2) and 10(2) will be applicable only to a person licensed under S. 4 of the. Act and it cannot be applied to a person who is

not licensed under the Act. But he says, that a person -not licensed under, the Act, but found contravening the provisions of Ss. 9(2) and "10(2)

will however be proceeded against for not taking a licence under the Act, though they cannot be directly proceeded against for infringement of Ss .

9(2) and 10(2) of the Act. It is, therefore, made clear that Ss. 9(2) and 10(2) can-not be, enforced as against the petitioners so long as they are not licensed under the Act.

20. In this view of the matter, the writ petitions are allowed to the extent indicated above. There will be no order as to costs. Writ Appeals 357, 362 and 363 of 1984 are dismissed, without any order as to costs.

21. The learned counsel for the petitioners as well as the learned-counsel for the respondents make oral applications for, leave to appeal to the

Supreme Court, against the judgment just now pronounced by us. Since the parties have succeeded and lost in part and the questions involve the

interpretation of the provisions of the Constitution, the case should be taken to involve matters of considerable public importance and also involve

substantial questions of law as to the interpretation the provisions of the Constitution.

22. Leave is, therefore, granted to both parties.

23. Order accordingly.