
(1988) 09 BOM CK 0002

In the Bombay High Court

Case No : Writ Petition No"s. 451, 1836 and 2115 of 1984

Ramesh Sippy and etc.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-09-1988

Acts Referred:

Bombay Entertainment Duty (Amendment) Act, 1987 — Section 3(1A), 3(A), 4C
Constitution of India, 1950 — Article 14

Citation : AIR 1989 Bom 250 : (1988) 3 BomCR 642 : (1988) 90 BOMLR 578 :
(1989) MhLj 165

Hon'ble Judges : Kotwal, J; Dharmadhikari, J

Bench : Division Bench

Advocate : Aspi Chinoy, N.H. Seervai and S.M. Kapadia, instructed by Harilal Thakar and Co, for the Appellant; P.O. Anklesaria, Govt. Pleader, for the Respondent

Judgement

Dharmadhikari, J.—As all these writ petitions involve common questions of law and fact they were heard together and are being disposed of by this common judgment.

2. The petitioners are proprietors of video game parlours at Bombay and Sangli. The said parlours have number of mechanical, electro-mechanical and electronic games. It is the case of petitioners that video games were introduced for the first time in the year 1980. At that time the said games were a great novelty and attracted considerable public interest, as a consequence of which the takings from operation of the said machines were quite higher. However thereafter public interest in the said games has declined sharply, with a corresponding marked decline in the profits. It is then contended by them that the actual taking in the case of a particular shop and for a particular machine would very greatly depending upon the number of factors such as, the area or locality in which the games parlour is located, whether the machine in question is a new one or an obsolete one whether the machine is in perfect operational order on all working days or not and also whether the supply of electric power is regularly available

on all working days. A shop in a busy locality would have takings on higher level than a shop located in a small mofussil town. The working of the machine also depends upon the repair facilities and availability of necessary spare parts etc. some machines, such as, foot ball machines which are purely mechanical, can be operated on a coin of only 25 paise. On the other hand flipper pin ball machines which are electro-mechanical can be operated on a coin of 50 paise. Similarly wall machines which are also electro-mechanical machines can be operated on a coin of 50 paise. As against these, electronic flipper pin ball machines and electronic wall machines can be operated on a payment of Re.1/- at a time. There are some expensive and elaborate video games which can be operated on a payment of only Rs. 2/- at a time. Therefore the amount of revenue yielded would be wholly dependant upon the type of machine and the amount of money which is required to play it each time. Thereafter the petitioners have given gross collections from the machines. It is also contended by them that the said games are games of skill.

3. On the basis of the above averments the petitioners have challenged the provisions of the Bombay Entertainment Duty Act , 1923 as amended by Act No.7 of 1987. According to the petitioners an entertainment duty or a tax could be levied on an Act of entertainment only. If a tax is not levied on an Act of entertainment but on carrying on a business or calling of entertainment, it will fall under Entry No. 60 of List II of VII Schedule to the Constitution and therefore, will be hit by art. 276 of the Constitution of India . If it is a tax levied on the equipment of the entertainment then it will be ultravires being beyond the Legislative competence. It is not covered by Entry No.62 of List II of the Seventh Schedule. According to the petitioners by Bombay Entertainment Duty Act , 1923, as amended by Act No. 7 of 1987, a duty or a tax is being imposed on the machine itself which is an equipment of entertainment and not on the Act of entertainment. The tax levied is also hypothetical and notional, since it has no nexus with the Act of entertainment as such. In support of these contentions Shri Chinoy and Shri Kapadia Learned counsel appearing for the petitioners, have placed strong reliance upon the decision of the Supreme Court in *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment, , Western India Theatres Ltd. v. Cantonment Board Poona, Cantonment, Rajab Mahal Co-operative Housing Society Ltd. Vs. State of Maharashtra and Others, , Rajab Mahal Co-op. Housing Society b. State of Maharashtra* and a decision of the Division Bench of this Court in Writ Petn. Nos, 38 and 240 of 1984, *Ramesh Waman Toke v. State of Maharashtra*, decided on 28th Feb. 1984 (reported in *Ramesh Waman Toke and Others Vs. The State of Maharashtra and Others,)* by Chandurkar, C.J. and Jahagirdar, J. it is also contended by the learned counsel that provisions are also discriminatory since unequals are treated equally, meaning thereby that the machines which yield different revenues because of its make or location, are treated equally in the matters of taxation and on that count also the duty levied is violative of Art. 14 of the Constitution.

4. On the other hand it is contended by Miss Anklesaria learned counsel

appearing for the respondents that the video game or video show is exigible to tax under s. 3 of the Act . in support of this contention she has placed strong reliance upon the decision of the Supreme Court in AIR 1983 SC 098 , M/s. Geeta Enterprises. V. State of Uttar Pradesh. According to the learned counsel video game machines provide entertainment. Taking and earnings from these machines are considerable. Duty is levied in lump sum because that was the only mode available and possible. Even the Division Bench of this Court in Ramesh Waman Toke and Others Vs. The State of Maharashtra and Others, has in terms accepted the position that a consolidated sum of money or lump sum could be basis of taxation. In support of her contentions she has placed strong reliance upon the various decisions of the Supreme Court, including Avinder Singh and Others Vs. State of Punjab and Others, . Avindar Singh V. State of Punjab. AIR 1976 SC 670, Income Tax Officer v. N., taken Roy, Start E OF Karnataka v. M/s. Air Corporation and a decision of this Court in Appeal No. 73 of 1982 arising out of writ petition No. 1159 of 1977 Ahmeddabad Mauncaturing and Calico Printing Co., Ltd v. Municipal Corporation. Greater Bombay decided on 17th July, 1987: (reported in AIR 1088 Bom 384). In fact the tax is levided on the Act of entertainment itself. It is then contended by her that classification is made area-wise which is wholly permissible. In law. In this contest it cannot be forgotten that wherever the machine is situated it has to be operated on a coin of similar denomination and, therefore classification is any way illegal of violative of Art. 14 of the Constitution.

5. In view of the decision of the Supreme Court in Geeta Enterprises"s case, Geeta Enterprises and Others Vs. State of U.P. and Others, , it is clear that video game is exigible to tax. It will be enough if a reference is made to the head note of the said decision which reads as under.

"The word entertainment" has been used in S. 2(3) in a very wide sense so as to include within its ambit, entertainment of any kind including one which may be purely educative. Sub-see. (3) itself by using the word "entertainment" amusement game or sport to which person are admitted for payment" has extended the scope of entertainment to expressly include any kind of amusement, game or sport. By operating the video, the operator of the video pays 50 paise per 30 seconds for playing the games sports and other kind of performance which are shown on the machine and which can be watched by interested spectators. The circumstances that no admission fee is charged from viewers of video by itself, however, cannot defuse or alter the kind of entertainment derived by the person who pays for playing the games. The fact that for playing the video games a great amount of skill is required is not material because he would derive pleasure and be entertained regardless of whether he possesses skill or not. If he possesses skill he may derive more pleasure on less payment otherwise he will have to pay but he will derive pleasure all the same. Besides, the game brings a substantial return for the person who makes available these facilities. Hence such an exhibition falls within the purview of the word entertainment as envisaged in sub-sec. (3). The money

charged for use of the video machine is an admission to entertainment and the payment made by the person who uses the machine is the payment for admission. It is a payment connected with entertainment which a person is required to make as a condition of attending the entertainment . hence video show is clearly exigible to tax under S. 3 of the Act .

the expression "video games parlour" is defined in s. 2(k) of the Act , which means a place of entertainment where persons are required to make a payment for the purpose of working a machine installed therein which operates electronically or mechanically or electro-mechanically. Section 3(1A) which provides for levy of duty on video game in lump sum reads as under.

"3(1A). Notwithstanding anything contained in Cls. (a) and (b) of S. 2 or in any other provisions in relation to the admission on payment contained in this Act , there shall be levied and paid to the State Government entertainment duty in the case of video game at the following lump sum rates, namely;

(a) within the limits of the Municipal Corporation of Greater Bombay at the rate of Rs. 500 per machine per month on the total number of machines installed in the video games parlour ;

within the limits of all the areas, other than the area of the Municipal Corporation of Greater Bombay, referred to in sub-cl. (I). (11), (111), and (1V) of cl. (b) of sub-sec (I), at the rate of Rs. 250/- per machine per month on the total number of machines installed in the video games parlour."

Section 3(AA) provides for surcharge on the entertainment duty. Then comes S. 4C which provides for remission or refund in respect of machine in video game parlours remaining inoperative and unproductive and reads as under;

"4C. (I) Where any entertainment duty is payable in respect of video game, per machine per month on the total number of machines installed in the video games parlour and nay machine has remained inoperative and unproductive of any entertainment throughout the month or portion of the month for which such duty is payable, the prescribed officer shall remit or refund the proportionate duty for the period for which the machine has so remained inoperative and unproductive.

Provided that, no such remission or refund shall be granted unless notice in writing of the fact of the machine being so inoperative and unproductive has been given to the prescribed officer, and that no remission or refund shall take effect for nay period previous to the date of the delivery, or the date of posting under certificate of posting of such notice.

(2) The burden of proving the fact entitling any person to claim relief under this Section shall be upon him."

Therefore it will have to be seen as to whether only because a lump sum or consolidated duty is levied, it will be beyond the legislative competence and therefore ultra vires. In writ petition Nos. 38 and 240 of 1984, Ramesh Waman

Toke and Others Vs. The State of Maharashtra and Others, this Court was not concerned with the tax on video games. This has been made clear in para 11 of the judgment. In the said para it is observed by the Division Bench that:

"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".

Thus the Division Bench has not considered the said question. It is contended by the petitioners that by the impugned provisions a tax is levied on the machine itself irrespective of the Act of entertainment. According to the learned counsel for the petitioners that though the machine is a source of entertainment, tax cannot be levied on the machine itself but could only be on the Act of entertainment. In this context reliance is placed by them upon the decision of the Supreme Court in *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment*, and particularly upon the following observations in para 7 thereof : i.e.

"Nor is the impugned tax a tax imposed for the privilege of carrying on any trade or calling. It is a tax imposed on every show that is to say, on every instance of the exercise of the particular trade, calling or employment. If there is no show there is no tax".

Therefore it is contended that the tax or a duty cannot depend upon the capacity of the machine to entertain. In the present case the tax is levied in lump sum and that too on a notional basis. The tax is payable even in the case where the machine, though could be used, in fact is not used. In substance therefore, it is the contention of the petitioners that the tax as levied is on the machine itself and not on the Act of entertainment. We find it difficult to accept this contention.

6. IN the affidavit filed in reply by the respondents, it is contended that the entertainment duty charged on the video game parlours on lump sum basis is based upon the entertainment received by the patrons of the parlour having regard to the takings from such machines. If the factors as alleged by the petitioners are required to be taken into account for the purpose of charging entertainment duty, it would be impossible to arrive at a proper rate, inasmuch as every video games parlour would trot out different factors and different quantum of expenses, including overheads and repairs etc. the expenses and outgoings in respect of each video games parlour would likewise be different in each case. Therefore the quantum of duty cannot be fixed with reference to the factors alleged by the petitioners. It is the case of the respondents that on an average video game parlour nets Rs. 60/- per hour with one video game machine. If such a parlour operates on an average from 8 a.m. to 9 p.m. with one machine only, it earns Rs. 720/- per day. This would be the case with a machine which operates on a coin of 50 paise. Therefore video games parlour which operate on more than one machine for higher denominations of money, for a period of at least 4 hours of the day makes an earning of Rs. 240/- per day. Therefore, a flat

sum of Rs. 550/- per machine payable as entertainment duty (i.e. Rs. 500 for entertainment duty plus Rs. 50 surcharge) is wholly reasonable. It was then contended by the respondents that if the factors as alleged by the petitioners are taken into account it would be impossible to levy entertainment duty, inasmuch as, rates of entertainment duty would be required to be varied in each case on the basis of factors alleged by the petitioners. The factors such as kind of video machine. Denominations in which they are operated, nature of entertainment provided by each such machine, average takings of the video games parlours locality in which video game parlour is located etc. are factors which have been taken into account in determining the rate of duty charged and it is because of innumerable differences alleged by the petitioners that it has been considered necessary to charge an uniform rate of duty. The levy is not made on a notional or a hypothetical basis but has been arrived on an actual basis of average takings of the video game parlours. Therefore according to the respondents the tax levied on lump sum basis was the only alternative, so far as the video game parlours are concerned. On the other hand according to the petitioners the tax could be levied on the basis of sale of tokens or on the basis of coins required to be dropped in the slot for the operation of the machine, which could be equated with the admission fee.

7. It is by now well settled that in the matter of taxing statute the legislature enjoys a larger discretion in the matter of classification so long as it adheres to the fundamental principle underlying the doctrine of classification. The power of the legislature to classify is of wide range and flexibility so that it can against its taxation in all proper and reasonable ways. The legislature which is competent to levy a tax must inevitably be given full freedom to determine which articles should be taxed, in what manner and at what rate. In tax matters, the State is allowed to pick and choose districts objects persons, methods and even rates for taxation if it does so reasonably (see *State of Karnataka and Another Vs. Hansa Corporation*,). It is equally well settled that the micro classification will not vitiate the tax. Only because the tax is levied at a conveniently flat rate having regard to the various circumstances or as an easy means of collection and a variety of other pragmatic variables, to call it invalid, is an absurdity, especially because in fiscal matters large liberality must be extended to the Government having regard to the plurality of criteria which have to go into the fiscal success of the measure. (See *Avinder Singh and Others Vs. State of Punjab and Others*, , *Avinder Singh v. State of Punjab*).

8. It may be stated at the outset that the reasonableness of the tax is not challenged nor it is alleged that the tax imposed is exorbitant, or expropriatory or confiscatory. In the present case mathematical precision is impossible. It would also be impossible for the State to keep watch on all the machines. To say the least for imposition of a tax it is not the mathematical precision which is relevant nor it could be the basis. The micro classification is also not contemplated nor possible. The tax contemplated by the Act is not a tax on ownership of machine or its possession. In the normal circumstances, when a

video game machine is installed in a video parlour, it could safely be inferred that it is used as a source of entertainment. Therefore, in substance it is a tax on Act of entertainment. This is clear from the fact that a lump sum tax is fixed irrespective of capacity of a machine. Tax does not vary with the cost of the machine or its make. Machine is chosen as a mere criteria for the purpose of calculation. Incidence of tax is not on the machine but is on the Act of entertainment. From the definition video game parlours it is clear that it is a place of entertainment where persons are required to make a payment for the purpose of working a machine installed therein which operates electronically, or mechanically or electro mechanically. Therefore the machines installed in the video game parlours are part and parcel of the Act of entertainment. Since any other mode of imposition of tax was either impossible or impracticable, legislature has chosen to impose a tax in lump sum at a flat rate. But from this alone an inference cannot be drawn that the tax is levied on the machine itself and not on the Act of entertainment.

9. The apprehension expressed by the learned counsel for the petitioners that the tax is leviable even if the machine is not in operation or is unproductive, is belied by the provisions of S. 4C of the Act. Section 4C in terms provides for remission or refund in respect of a machine in video game parlour remaining inoperative or unproductive. If the provisions of S. 3(1A) are read with S. 4C of the Act then it could safely be said that these provisions have identifiable object behind it and the levy has a nexus between the subject and object of levy contemplated by the Act.

10. So far as the challenge based on Art. 14 of the Constitution is concerned, as observed by the Supreme Court in *State of Maharashtra v. Madhukar Balkrishna Badiya*, Civil Appeal Nos. 1631-33 of 1987 decided on 17-8-1988: (reported in AIR 1988 SC 2962), that "Art. 14 is offended only if the classification rests on grounds wholly irrelevant to the achievement of the objective and this lenient standard is further weighted in the State's favour by the fact that a statutory discrimination will not be set aside if a state of facts may reasonably be conceived by the Court to justify it. Tax laws have to respond closely to local needs and courts' familiarity with these needs is likely to be limited. Therefore, the Court must be aware of its own remoteness and lack of familiarity with the local problems. Classification is dependent upon peculiar needs and specific difficulties of the community. The needs and the difficulties of a community are constituted out of facts and information beyond the ken of the Court". In the present case classification is area-wise. It has a rational basis. Duty is charged upon the entertainment received. It is the case of the respondents that even after amendment of the Bombay Entertainment Duty Act there is increase in the number of video game parlours in the Municipal Limits of Greater Bombay and elsewhere. In Greater Bombay video game parlours have increased from 119 in January 1984 to 174 in June 1984. Since Bombay is a commercial town its population is larger than elsewhere in Maharashtra, video game parlours in Bombay are making more profits than the video game parlours elsewhere.

Therefore since the takings in Bombay from the video game parlours are larger, a flat rate of duty at the rate of Rs. 500/- per month per machine is charged whereas having regard to the takings in places other than Bombay a flat rate or only Rs. 200/- per month per machine is charged. Thus a reasonable classification is made in that behalf. The micro classification within the metropolitan city of Bombay was neither called for nor possible. Therefore the classification made is wholly reasonable and it is not possible for us to accept the challenge of the petitioners based on Art. 14 of the Constitution also.

11. IN this view of the matter we do not find any substance in these writ petitions. Hence Rule discharged in all these writ petitions with no order as to costs.

12. Rule Discharged.