
(1986) 03 PAT CK 0010

In the Patna High Court

Case No : C.W.J.C. No's. 2559, 4037, 4046 and 4105 of 1985

Sayed Jamilur Rahman and Others

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 21-03-1986

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 202, 203, 204

Citation : (1986) 34 BLJR 502 : (1986) PLJR 562

Hon'ble Judges : S.S. Sandhawalia, C.J.;R.N. Prasad, J

Bench : Division Bench

Judgement

S.S. Sandhawalia, C.J.—Can the levy of tax under the Bihar Entertainment Tax Act, 1948, be validly consolidated on the basis of the gross collection capacity for every theatre show payable by the proprietor of the entertainment? Is the voluntary compounding of such a levy permissible on the application of proprietor. Are Sections 3-A and 3-B of the Act aforesaid (recently inserted by the Bihar Finance Act, 1985) providing for a consolidated payment of or option for compounding the tax, violative of Articles 14 and 19 of the Constitution 1 These are the primal questions in this set of four connected civil writ petitions.

2. The representative matrix of facts may be briefly noticed from C. W.J.C. No. 4046 of 1985 Messrs Amraqali Films Limited and Ors. v. The State of Bihar. (1) The 1st petitioner company--Messrs Amrapali Films Limited under the Companies Act and carries on the business of film exhibition registered under the name and style of Mona 70 M.M. at east of Gandhi Maidan, Patna. Petitioner No. 2 - Messrs Rupam Cinema, a proprietary concern - carries on the business of film exhibition at Shivgunj, Arrah, in the district of Bhojpur. The seating capacity of petitioner No. 1 is 1361 and that of petitioner No. 2 is 775. It is averred on their behalf that Sections 3 and 4 of the Bihar Entertainments Tax Act, 1948 (hereinafter called the "Act") provided the levy of an entertainment tax at such rates not exceeding 150 per cent of the amount of payment chargeable for admission as the State Government may fix by a notification and such taxes shall be payable by the

proprietor of an entertainment. In pursuance thereto, the State Government issued a notification prescribing the rate of entertainment tax as 110 percent of the amount of payment towards entertainment chargeable for admission. Later on, the petitioners were required to fix adhesive stamps issued by State Government on admission of tickets itself representing the amount paid as entertainment tax.

3. The Governor of Bihar, without getting previous approval of the President of India, in exercise of the power under Clause (1) of Article 213 of the Constitution promulgated two ordinances called the Bihar Entertainment Tax (Amendment) Ordinance, 1985 (Bihar Ordinance 9 of 1985) and the Bihar Entertainment Tax (Amendment) Second Ordinance, 1985 (Bihar Ordinance 18 of 1985), and thereby new Sections 3-A, 3-B, 3-C, 3-D, 3-E and 3-F were inserted after Section 3 of the Act. Section 3-A provided for consolidated payment of tax by the proprietor and for this purpose the State Government was to classify places in categories for the fixation of the percentage of the levy which shall be uniform for a particular class of places. In fixing classification the State Government was to take into account only the type of place, its location, population, industrial growth and type of market. It is the stand of the petitioners that the most important factor, namely, the quality of the film exhibited had been completely given a go-by by the said provision. Section 3-B provided for the compounding of tax. Thereafter the Bihar Finance Act, 1985 (Bihar Act 4 of 1985) was enacted inserting Sections 3-A to 3-F in the Act, which had been earlier introduced by the Ordinance in substantially the same form. However, two new provisos were inserted in Sections 3A and 3B. By virtue of these two provisos to Sections 3A and 3B, the consolidated tax payable by the proprietor of the entertainment for each show shall not be less than the highest amount of tax paid during any of the three preceding years for each show under Sub-section (1) or (5) of Section 3 or 3A. Similarly a new proviso to Section 4 was added providing that where a tax is levied u/s 3A or 3B, the proprietor shall not be entitled to collect any amount exceeding the tax calculated at the rate notified u/s 3(1) as tax from persons admitted to the entertainment.

4. On the 14th of August, 1985 the respondent State Government issued notification No. 774 (annexure 1) purporting to classify places in categories fixing consolidated amount of tax for different categories. Thereby the cities of Patna and Jamshedpur were classified in category A, the rate of tax where for was prescribed at 39 per cent of the gross collection capacity. The stand of the petitioners is that though the rate of tax is 39 per cent, in fact, it works out to 74.45 per cent of the average annual occupancy of the cinemas, which is assailed as excessive and unreasonable. It is claimed that by the impugned notification only population has been taken into account for fixing the tax liability whilst ignoring the other statutory considerations of location, industrial growth and type of market. It has been averred that the impugned notification discriminates between different cinema owners of the State of Bihar and there can be no legal justification for placing Digha, Patna City, Ranchi and Patna from

a lower category under the notification issued under the Ordinances to category A and thus enhancing the tax liability enormously beyond the capacity of the cinema owners of that area to pay the same. It is claimed that the provisions of the impugned Sections 3A and 3B are patently discriminatory and the uniform burden based on the cinema owners by the impugned formula is *ex facie* irrational and discriminatory by completely excluding from consideration the material relevant factors.

5. It is then averred that the impugned provisions far from curbing the evil of tax evasion have, on the other hand, as between an honest tax-payer and an evader, rewarded the evader and punished the honest. The adverse effect of television on cinema audience is then highlighted with particular reference to the use of video cassette recorders which, according to the petitioners, are becoming a major parallel for the cinema business. In spite of the Government's efforts, it has not been able to stop the illegal screening of pictures under the Copyrights Act by the video cassette recorders and the evil instead is growing in geometrical proportions.

6. A frontal and pointed attack is then levied against the second proviso to Sections 3A and 3B of the Act. These provide for the minimum amount of tax to be not less than the highest amount of tax for every show payable by the proprietor during any of the three preceding years. It is pointed out that the highest amount of tax must necessarily depend on factors which are uncertain, unstable and co-incidental. A particular house may succeed in obtaining an exceptionally popular--and what they call--a hit picture and for a period the house may run full from show to show. No taxation can be based on the foundation of such an accidental occurrence, and to presume there from that thereafter the cinema house would always have full shows is an absurdity based on no rationale. This may again inter-act differently on old and new cinema houses located in the same town and in the same locality. The arbitrariness of the impact of these provisos *ex facie* manifest and the extent of discrimination is sought to be highlighted by reference to the chart given in annexure 3. It would appear there from that the Ashok Cinema earned the maximum amount in the year 1983-84 which works out at 50.01 per cent of the gross collection capacity which would be even in excess of the statutory mandate of 45 per cent laid out in Section 3A.

7. The varying quality of films and their capacity to attract audience are then highlighted by pointing out that in the year 1982, 135 Hindi films were released out of which only 7 were super hit or hit pictures whilst others were ordinary ones and the remaining 69 were plainly losing propositions, which could only be graded as "B" and "C". The varying factors like the number of cinema houses in a town, the availability of first class quality films, the air-conditioned, air-cooled and ordinary nature of the theatre and the ability of the proprietors to book prestigious films, are highlighted as imponderables which lead to wide variation in the gross collection capacity of a theatre. The compulsory consolidation of the

tax thus operates unevenly, harshly and in the most cases is confiscatory. The subsidiary provisions in form C of the Schedule are then sought to be assailed on ancillary grounds and even the voluntary consolidated compounding is sought to be challenged, It is averred that the levy of tax is now loaded against the petitioners to their detriment and for all practical purposes amounts to the applicability of rationale of "Heads I win and tails you lose" at the expense of the honest tax-payers. The challenge to the provisions is then also laid on the basis of Articles" 202 to 207, 213 and the proviso to Article 304(b) of the Constitution. The variation of the taxation incidence from the highest at 39 per cent for category "A" and the lowest at 19 per cent for category "G" has also been challenged. It is claimed that the arbitrariness of the tax had compelled the petitioners to suspend the exhibition of films from the 1st of June, 1985 and it is apprehended that they will be further compelled to abandon the business unless the offending provision is struck down and interim relief is granted.

8. In the counter affidavit filed on behalf of the respondent State the compulsions which necessitated the impugned legislation are first high-lighted. It has been averred that prior to 1972 the entertainment tax was levied and assessed in the manner then prescribed. However, this was proving unsatisfactory to check evasion and in the year 1972 Section 5 of the Act was amended and a provision was made that adhesive stamp of the value of the amount of entertainment tax be affixed to the admission tickets. However, in spite of the said amendment experience showed unmistakably that large scale evasion of entertainment tax continued. The proprietors of the cinema theatres many times permitted viewers to the halls without issuing a proper ticket and without affixing any adhesive stamps thereto. The respondent State found it physically and practically impossible to check every show in the cinema halls and to prevent the heavy leakage of revenue. This apart, it was the sad experience that the entertainers created various law and order problems at the time when the checking was conducted thus rendering an effective check difficult if not impossible. In particular it is averred that in the towns such as Ranchi, Dhanbad, Jharia, etc., entertainers permit visitors to the show without issuing tickets and instead give slips to them in place of such tickets. This large scale evasion was manifest from the data and the compilation reports prepared by the State Government. As an example, the cinema halls at Muzaffarpur, Bhagalpur, Jharia, Bettiah, Naugachhia, Lakhisarai, Dalsingsarai, etc were paying tax merely at the rate of 1 per cent to 5 per cent of their gross collection capacity. If this figures were ever to be correct then the industry could have long ago collapsed because on that basis the admission fee could not meet even a fraction of the basic actual expenses of running the cinema halls. A chart showing payment by such entertainers has been annexed as annexure A to the counter affidavit. It is pointed out that even cinema halls situated in the prosperous district towns of Muzaffarpur and Bhagalpur were merely paying tax at the rate of 6 to 8 per cent of their seating capacity. The respondent State's attempt to make surprise checks showed a large number of cases where the officers had been insulted,

manhandled and threatened with serious and dire consequences and other methods of effectively evading tax were resorted to apart from the blatant use of force and violence as well. It was in this context that the respondent State and the legislature thought it not only expedient but indeed necessary to check the blatant evasion of tax and cure the evil by enacting the impugned legislation herein.

9. As regards the legislative competence, basic reliance is on item 62 of List II of the 7th Schedule of the Constitution, namely, the tax on entertainment. It is claimed that under the scheme of the Act tax is levied on the entertainers or the proprietors of the cinema halls but they are allowed to shift the burden by charging the said tax from the viewers to the extent permissible u/s 4 of the Act.

10. As regards the challenge on the point of the tax being arbitrary or confiscatory, it is the respondent State's stand that nothing worth the name has been brought on the record to establish that the cinema industry as a whole would be affected adversely and the entertainment business as a whole would stand confiscated under the consolidated rate of tax with an option to compound the same. The data sought to be placed on record on behalf of the petitioners have then been assailed as misleading, incorrect and unworthy of reliance. It is the stand that these self-serving figures in charts are rested on the very evil of evasion and by passing of the entertainment tax which is sought to be cured by the impugned legislation. Indeed, it is the stand that all these figures are manipulated even on the foundational base of evasion and the same are not being accepted by the respondent and are expressly denied. Nevertheless even from the petitioners' figures themselves, it is sought to be shown that with regard to repeat run pictures the average collection in many cinemas was more than 39 per cent of the gross collection capacity. Particular reference is made to the Chanakya Cinema Hall where the repeat run or the second or third run of the pictures (what to say, of the original first exhibition) "John Johni Janardan", Raj Tilak", "Gangwa" and "Sampat" would indicate that the average gross collection of tax was much more than even the maximum of 39 per cent. An extract of the payment of tax by the petitioners is contained in annexures B series to the counter affidavit.

11. It is then highlighted that the provisions of Sections 3 and 4 of the Act now authorise the proprietor to collect entertainment tax from the viewers at the present high rate of 110 per cent of the admission fee. Therefore, whenever the occupancy rate is high or the house is full, the provisions provide a bonanza to the proprietor in so far as the entertainment tax above the break even rate would also get added to his profits and go into the private pockets of the cinema owners. It has been submitted that as a common and settled experience most of the cinemas in class A towns run to a total occupancy and indeed many times viewers have to be turned back from the doors because of the houses being full. Similarly in class B towns the occupancy rate is 80 per cent and even in class C towns 70 per cent, in classes D, E and F between 60 to 70 per cent, in classes

G.H. and J between 50 to 60 per cent and in class K towns above 50 per cent. It is submitted that in this context the consolidated rate of tax varying from 10 per cent to 39 per cent is more than amply well-related to the occupancy rate in the areas and is in no way confiscatory. Even assuming without admitting that on a particular occasion the entertainer may not be in a position to realise the full amount of the consolidated tax from the viewers in the particular show, the extent of burden will be very meagre and at best less than 5 per cent which more than evens out in other shows and is a far cry from the tax being confiscatory in nature.

12. The challenge to the notification issued under the proviso to Section 3A is repelled by alleging that a valid and sound classification has been made on the primary basis of population, but not losing sight, of the industrial growth, geographical position, etc, as well. It is pointed out that these are interacting factors because urban population growth is clearly higher in towns which are having industrial or commercial complexes, and conversely where there is industrial and commercial development people are naturally attracted thereto, thus raising the population. Consequently, the plea of the petitioners that classification based on population is arbitrary is claimed to be untenable.

13. It is then pointed out that the compounding of the tax u/s 3B is indeed beneficial to and in the interest of the proprietor. This compounding is indeed optional on the application of the cinema owners and if they opt for the same, they are entitled to run any number of shows without any restriction. The voluntariness of the provision automatically takes it out of the ambit of compulsive arbitrariness.

14. It has been averred that the impugned provisions do not operate as a restriction on inter-State trade and the levy of the tax on the entertainers of cinema houses, which are located in Bihar only. The provisions of Article 301 or 304B of the Constitution of India are not even remotely applicable.

15. It is then the stand that no meaningful adverse effect of television or video cassette recorders on cinema shows in the State of Bihar and the number of visitors thereto is visible. In the State of Bihar cinema continues to be the most common and attractive source of entertainment because of the absence of any other alternatives, and, normally cinema shows attract full houses in class A towns and an occupancy of not less than 50 to 70 per cent in the remaining categories.

16. Lastly, the challenge to the second proviso to Section 3A and 3B is repelled somewhat sketchily by stating that the fixation of rate on the basis of the highest amount paid in last three years has been rational in fixation of rate, namely, capacity of the house, its location, its interior fixture, seating arrangement, etc.

17. Inevitably, the controversy herein has to centre on the language and the provisions of the impugned Sections 3A and 3B of the Act. The relevant parts

thereof, therefore, may be read at the very outset for facility of reference.

3A. Consolidated Payment of Tax--Notwithstanding anything contained in the Act, the State Government, by notification, may levy consolidated amount of tax not exceeding 45 per. cent and not below 10 per cent of the gross collection capacity for every show and such amount of tax shall be paid by the proprietor of an entertainment to the State Government:

Provided that the State Government shall for the purpose of levy of consolidated amount of tax, classify places in categories for the fixation of such percentage and the rate of consolidated tax shall be uniform for a particular class of places. The State Government shall for the purpose of classification, take into account the type of place, its location, population, industrial growth and type of market.

Provided further that the consolidated tax payable under this section shall not be less than the highest amount of the tax for every show payable by the proprietor of an entertainment during any of the three preceding years under Sub-section (1) or (5) of Section 3 or under this section.

Explanation--"Gross collection capacity" shall mean the total amount calculated for total seating capacity of the theatre which shall include the admission fees, tax calculated on the basis of rate notified under Sub-section (1) of Section 3 from time to time, surcharge or charge for any privilege, right, facility, service or thing combined with the right of admission to any entertainment."

"3B. Compounding of Tax--(1) The State Government may, in lieu of tax payable u/s 3A on application of a proprietor, in the form prescribed under Sub-section (2) of Section 3-F, on such conditions, as may be prescribed, permit him to pay a fixed amount or a fixed percentage of gross collection capacity for a specified number of shows in a specified period irrespective of actual number of shows which may be held in that period:

Provided that the fixed amount or the fixed percentage of gross collection capacity shall not be less than the highest amount payable by the proprietor of an entertainment during any of the three preceding years of the concerned period under Sub-section (1) or (5) of Section 3 or Section 3A or under this section.

... ..

18. For a true construction of the aforesaid provisions, it seems apt to notice their legislative background. Indeed, more than any other case, it becomes necessary to be aware of the legislative purpose in enacting these provisions and the evils they are sought to curb. The Bihar Entertainment Tax Act, 1948, succeeded the predecessor Central statute, the Cinematograph Act, 1918. The present Act and its provisions have broadly held the field ever since. Section 3 of the Act, as amended from time to time, is the charging Section of the statute and its relevant portion now stands in the following terms:

3. Tax on Entertainments--(1) Subject to the provisions of this Act, there shall be levied and paid to the State Government an entertainment tax at such rates not exceeding one hundred fifty per centum of the amount of payment chargeable for admission as the State Government may fix by a notification issued in this behalf and such tax shall be payable by the proprietor of an entertainment.

(2) There shall further be levied and paid to the State Government, a tax at such rate, not exceeding rupees one for every show of an entertainment, as the State Government may from time to time fix and notify and such tax shall be deemed to be part of the entertainment tax and shall be payable by the proprietor of an entertainment:

Provided that nothing in Sub-section (1) or (2) shall preclude the State Government from fixing and notifying different rates of entertainment tax for different entertainments or different classes of an entertainment or entertainments of different places or areas.

... ..

19. It is plain from the above that the incidence of taxation therein is laid on the individual cinema-goer, who seeks entry for the purpose of entertainment. However, in the course of time, the actual and practical working of the provisions clearly indicate that there was a large scale evasion of the entertainment tax. In order to prevent leakage of revenue, in 1972, the relevant statutory provisions were amended for providing the affixing of adhesive stamps equivalent to the value of the entertainment tax on each ticket sold to the cinema goers. It would seem that the ingenuity of the tax evaders was too subtle to be blocked by mere adhesive stamps. There was no serious let up in the evasion of entertainment tax and the failure to plug the leakage of revenue and the loopholes in the statutory provisions became manifest. Many cinema proprietors permitted people to enter the hall on mere entry slips and without tickets and collected both the entry fee and the purported entertainment tax, thus diverting it from the coffers of the State to the pockets of the black marketeers. When the loss of revenue assumed alarming proportion, the State was compelled to look around for other methodology of blocking the leakage of revenue and on the firm base of the data available and the experience of the collecting agency, a new legislative scheme of consolidation of the payment of tax and its voluntary composition was envisaged.

20. The respondent State, following the pattern, inter alia, in the two southern States of Andhra Pradesh and Karnataka, visualised a basic change for the payment of entertainment tax by the proprietors of cinema houses on the surer basis of the gross collection capacity for every show exhibited in their respective cinema houses. With that end in view, the Bihar Entertainment Tax (Amendment Ordinance, 1985 (Bihar Ordinance No. 9 of 1985), was first promulgated on the 1st March, 1985, followed by the Bihar Entertainment Tax (Amendment) Second Ordinance, 1985 (Bihar Ordinance No. 18 of 1985), on the 18th May, 1985. It would appear that the statutory changes in the structure and the levy of the

entertainment tax initially met with stiff opposition from the proprietors of the cinema houses and a long State-wide closure thereof by way of strike in June, 1985. Certain changes were thereafter made by the Bihar Finance Act, 1985, and the objects and reasons thereof, appended to the Bill, deserve notice in extenso:

It is essential to raise funds for different Public Welfare Schemes and to give effect to financial proposals of the State Government as well as to make the provisions relating taxes etc. more appropriate to the present economic conditions.

The entertainment tax is one of the main source of revenue of the State Government. In spite of all precautions and amendments brought earlier in the Bihar Entertainment Tax Act, 1948, the tendency to evade entertainment tax could not be curbed. With a view to override the shortcoming, it is essential to introduce the system of compulsory consolidated compounded tax scheme for collection of entertainment tax by amending the said Act. Such scheme is in vogue in some of the Southern States of the country.

In order to achieve the object mentioned above, it is essential to amend the different Acts, such as Bihar Finance Act, 1981, Bihar Entertainment Tax Act, 1948, Bihar Electricity Duty Act, 1948, and Cess Act, 1980.

Necessary provisions have been made for the aforesaid purpose in the Bihar Finance Bill, 1,985, and the object of the Bill is to enact those provisions.

In Chapter III of the Bihar Finance Act, the basic amendments to the Bihar Entertainment Tax Act, 1948, were made by inserting Sections 3A to 3F therein, whilst introducing consequential changes in the other sections. There by Clause (e) of Section 2 of the Act was substituted to prescribe that entertainment tax includes taxes levied under Sections 3, 3A, 3B and 3C, and amendments were also made in Sections 9, 9B, 13D and 19 of the Act A validation and exemption provision was added thereto vide Section 21A and changes were made in the succeeding Section 22 The provisions of the newly inserted Sections 3A and 3B were made retrospective with effect from the dates on which the earlier Ordinances Nos. 9 and 18 had come into force.

21. Having noticed the legislative background one may now advert to the crucial question of the vires of the impugned provisions of Sections 3A and 3B of the Act. These have been Challenged on a wide variety of grounds. In this judgment, which has to be compulsively exhaustive, it is not only apt but indeed conducive to clarify that this challenge to the constitutionality may be dealt with under its distinctive heads.

(1) Competence of the State Legislature to enact Sections 3A and 3B of the Act:

22. Dr. Y.S. Chitale, who led the attack on behalf of the petitioners, first spearheaded his challenge on the ground of the lack of legislative competence by the Bihar Legislature. Inevitably, this centered around Entry 62 of List II of the Seventh Schedule to the Constitution, which is in the following terms:

62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

Now the core of the argument herein is that the consolidated tax u/s 3A of the Act ceases in essence to be a tax on entertainment *stricto sensu* and thus goes beyond the scope of Entry 62. According to the learned Counsel for the petitioners, the three basic pre-requisites of entertainment, which have been authoritatively spelt out, are (i) the person who gives the entertainment, (ii) the person who receives the entertainment, and (iii) the incidence of tax on the receiver. If any of these three qualifications is absent, the tax would cease to be an entertainment tax. It was sought to be pointed out that u/s 3(1) of the Act, the incidence of taxation is placed on the cinema-goers, but, by virtue of the impugned Section 3A the tax is now levied on the cinema-owners. It was sought to highlight the fact that the taxing event was the admission or entry of the cinema-goers to the show, u/s 3(1), whilst Section 3A made it an impost on the proprietor of the cinema theatre. On these premises, learned Counsel argued that herein this becomes a tax on the profession or trade of running cinema houses, and, may thus be hit by Article 276 of the Constitution. In the alternative, it was argued that this becomes a tax on the income of the cinema proprietors or on property and, therefore, goes beyond the ambit of Entry 62.

23. Yet another limb of the larger argument aforesaid was sought to be highlighted by the learned Counsel by contending that the quantum and the measure of the tax imposed is itself indicative of the character of the tax. Where income or a rational basis ceases to be the incidence of tax and it becomes a mere arbitrary impost on the cinema owners, as such, then the very character of the tax may change and undergo a metamorphosis. It would thus lose its essential character of a tax on entertainment. The overall basic reliance of the learned Counsel was on *Cantonment Board, Poona Vs. Western India Theatres Ltd.*, *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment*, *Ramesh Waman Toke and Others Vs. The State of Maharashtra and Others*, and *Union of India and Ors. v. Bombay Tyre International Limited and Ors.* 1984 (I) Supreme Court Cases 467.

24. Before appraising and analysing the aforesaid contention, one may, perhaps, at the very threshold notice the inimitably fair stand of Dr. Chitale. He conceded that both on principle and binding precedent, if the tax is held to be as one on entertainment, then it could be validly levied either on the cinema-goer or on the cinema-proprietor. However, for this basic proposition, I would not content myself by resting merely on the concession. It is plain that the issue is concluded by precedent, both persuasive and binding. Way back in *Cantonment Board Poona v. Western India Theatres Limited (Supra)*, the identical issue was raised, whether the entertainment tax could be levied on the proprietor of a cinema-theatre or on the person who gives the entertainment in contradistinction to one who receives the same. After an indepth discussion of the matter, the Division Bench concluded as follows:

If in substance the tax was a tax upon the show or in the case of the regular theatre upon the performance given therein, it makes no difference whatsoever as to whether the tax is levied from the person who obtains admission to the entertainment or from the person who gives it....There again the duty is leviable confining ourselves to cinemas from the exhibitor of the films. He may pass it on, as he actually does pass it on, to the person who obtains admission to the show. But the legal liability is not on the person who obtains admission.

25. The aforesaid view was challenged in appeal, and, in affirming the judgment of the Bombay High Court their Lordships in *Western India Theatres Ltd. v. Cantonment Board Poona* (Supra) reiterated the aforesaid particular finding in no uncertain words as under:

If the words are to be so regarded, as we think they must, there can be no reason to differentiate between the giver and the receiver of the luxuries, entertainments, or amusements and both may, with equal propriety, be made amenable to the tax.

26. It was the common stand before us that the aforesaid view has not been deviated from thereafter, There would thus remain no controversy that once the tax is held to be a tax upon entertainment, the same may be validly levied on the proprietors of cinema theatres.

27. Before proceeding further it is equally apt to remind oneself that herein we are called upon to construe Entry 62 of List II and the consequent competence of the State Legislature to enact laws there under. The plain language of this entry is widely couched and includes within its sweep all "taxes on entertainments, amusements, betting and gambling." These are words of wide amplitude and there is nothing whatsoever to constrict their scope. This apart, it is well settled as a canon of construction that all the entries in the Legislative List should not be read in a narrow, restricted or pedantic sense. Each general word therein should be held to extend to all ancillary or subsidiary matters, which can fairly and reasonably be said to be comprehended in it. The widest possible construction according to the ordinary meaning must be put upon the words used therein. If authority is needed for this well-settled proposition, there is no dearth there for and a reference may be made to *Navinchandra Mafatlal v. Commissioner of Income Tax, Bombay City* 1955 AIR S.C. 581, and *Sri Ram Ram Narain Medhi Vs. The State of Bombay*, .

28. In the light of the above, the core question herein is, whether the impugned Section 3A of the Act, providing for a consolidated payment of the tax, alters the very nature and character of the tax. Does it metamorphose it from admittedly a tax on entertainments u/s 3 to a tax either on trade or professions or income or on property? To my mind, the answer to this question must be rendered in the negative for the detailed reasons that follow.

29. Herein what deserves pointed highlighting is the fact that the tax is related to every show of entertainment. The relevant words of Section 3A would bear

repetition to bring this in the forefront and read as under:

...may levy consolidated amount of tax not exceeding 45 per cent and not below 10 per cent of the gross collection capacity for every show....

It was forcefully contended by the learned Advocate General, and, in our view rightly, that the whole emphasis is on "every show". The gross collection capacity is not an abstraction, but comes into play only if there is a show and with regard to every such show. Consequently, the corner stone to what is sought to be taxed was every show of entertainment, and, it was the act of the proprietor of the cinema theatre providing entertainment in each show which is the subject matter of taxation. Plainly enough the occupancy rate, the gross collection capacity of the particular cinema hall and the rate of the entry ticket are all ancillary to the primary factor of entertainment provided in every show by the proprietor. On principle and the language of the provision, the learned Advocate General was right in contending that to label such a provision, like Section 3A having the most direct nexus with every show of entertainment as anything else than a tax on entertainment would only be doing violence to the plain language, purpose and effect to the statute.

30. To my mind, it seems plain from the very language of Section 3A that the levy of tax herein is not in the abstract on the mere sitting capacity of a cinema hall alone, nor is it in any way wholly rested on the factum of the property in the cinema hall vesting in its owner as such. The tax is not on any notional gross collection capacity, but, indeed on the actuality of a cinema show being held therein. The line of distinction between what may be merely notional and what is indeed actual is sharply and distinctly drawn. There was no dispute, and, indeed could not be any, before us that a cinema show provides entertainment. Therefore, a tax, which has for its corner stone every show, is a tax plainly on entertainment provided in those shows. To put it tersely, if there is no show, there is no tax, and, if there is a cinema show, then there is an entertainment tax thereon. Both on principle and the language of Section 3A it has to be held that in essence the tax remains tax on entertainment and merely provides for a different modus of collection through the means of a consolidated payment thereof.

31. Yet again binding precedent is equally in favour of the respondent in *Western India Theatres Ltd.* (supra). Therein their Lordships have in terms held that if the tax is levied on every show then it is a tax on entertainment and thus within the ambit of Entry 50 of Schedule VII of the Government of India Act, 1935, which is in *pari materia* with Entry 62 in List II of the Seventh Schedule to our Constitution. Indeed identical language finds place in the said precedent which has now been employed in the impugned Section 3A. It is as under:

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....The impugned tax is a tax on the act of entertainment resulting in a show. In our opinion, therefore, Section 73 is a law with respect to matters enumerated in Entry 50 and not Entry 46 and the Bombay legislature had ample power to enact this law.

It seems plain that the terminology employed in Section 3A is squarely within the ambit of the earlier precedential mandate of the final Court. Once that is so, every cinema show is entertainment and a tax thereon is squarely covered by Entry 62 of List II.

An identical view has later been taken by a Division Bench of Rajasthan High Court in *Dhannalal and Others Vs. The State of Rajasthan and Others*, , in the following words:

Accordingly in the case of a cinema it means a tax on a show. Merely because the proprietor or exhibitor of a cinema house is called upon to pay the tax, it does not acquire the character of a tax on the calling or the trade.

32. Much emphasis was sought to be placed by Dr. Chitale on *Ramesh Waman Toke and Others Vs. The State of Maharashtra and Others*, . A close analysis of that judgment would, however, disclose that the same is not only distinguishable, but indeed may go to the aid of the respondents. Therein, only Section 3(1)(c) and (d) of the Bombay Entertainments Duty Act, 1923, as amended by Maharashtra Ordinance 22 of 1983, was struck down on the ground of being beyond the scope of Entry 62 of List II. It is significant to notice that the challenge therein was raised only on behalf of touring cinemas and persons exhibiting video shows, which came within the ambit of Sections 3(1)(c) and (d) of the Bombay Act, as amended by the Ordinance. Thereby, on the plain language of the statute, what was sought to be taxed was the number of shows permitted by the licence and not at all the number of shows actually held. The Bench conclusively found that the taxation therein was rooted on a notional number of shows permitted or likely to be held and not on the actuality and the fact of those having been so held. It was only in such a peculiar context that the Bench took the view that a notional impost of this kind was not in essence a tax on entertainment. The firm finding arrived at was in the terms following:

It does not take into account the possibility of the owner of a touring cinema not being able to hold the number of shows which he is permitted to conduct; it does not take into account the possibility that no cinema shows at all may be held on certain occasions; and it does not take "into account actual payments made for admission of the persons visiting touring cinemas....In both these cases the provision totally ignores the possibility of exhibition not being held on certain occasions and also the possibility of the owner of a video exhibition not conducting shows which such owner is permitted to conduct under the permit issued by the prescribed officer....In 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.

It was on the aforesaid findings that the provisions of Clauses (c) and (d) of Section 3(1) of the Bombay Act were held to be beyond the competence of the Bombay Legislature, It seems plain that the ratio of this case has no relevance to the present one. Herein, the incidence of tax is on every show of entertainment. It is not rested on any theoretical capability of the show being held, but on the same being practically so held. It is not rested on any notional entertainment, but on the actuality of the entertainment provided by the particular show.

33. Indeed the learned Advocate General, apart from distinguishing the aforesaid Bombay case, seemed to turn the tables on the petitioners by himself relying on the observations in Paragraph 14 of the report therein. Whilst rejecting the challenge on behalf of the petitioners that the levy of entertainment duty can be only on payments for admission made by the persons claiming admission and on no other basis, the Bench observed as follows:

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 seems manifest that *Ramesh Waman Take and Others*" case (supra) does not in any way advance the case of the petitioners.

34. It is common ground that the legislative inspiration for the consolidation of entertainment tax was drawn from the statutory schemes admittedly in existence in the southern States of the country. Indeed this found express mention in the objects and reasons of the Bill for the Bihar Finance Act, 1985. Dr. Chitale, in all fairness brought to our notice the unreported Division Bench judgment of the Andhra Pradesh High Court in Writ Petitions Nos. 6404 of 1984 decided on 19.7.1984, which had repelled an identical challenge to the vires of the Andhra Pradesh Entertainments Tax Act, 1939, as amended by Andhra Pradesh Entertainments Tax (Amendment) Act, 1984. It would appear that in the State of Andhra Pradesh a consolidated payment of entertainment tax had already existed for long with regard to the cinema shows in towns whose population did not exceed 25 thousand. It was only the extension of the same principle to the larger towns, which was sought to be assailed on behalf of the petitioners in the said cases. In distinguishing the elaborate and exhaustive judgment of the Andhra Pradesh High Court, Dr. Chitale had attempted to argue that therein the maximum rate of levy was only 24 per cent and there was a classification of theatres on the basis of those being either air-conditioned air-cooled or ordinary, and, further, that the said Act had only continued or perpetuated the earlier consolidation of entertainment tax on theatres located in places of populations centre below 25 thousand.

35. A close perusal of the Andhra Pradesh judgment (in Writ Petition No. 6404 of 1984 and others) would indicate that the same is massively in aid of the stand taken on behalf of the respondents. The points of distinction sought to be drawn by the learned Counsel for the petitioners are one, without any difference, and, particularly so with regard to the question of the competence of the State Legislature to enact such a legislation under Entry 62 of List II. The ratio of the said judgment, to my mind, is thus equally attracted in the present case. Therein, it was observed as under:

According to Section 4, the consolidated levy is on a show. Only if a show is held, the tax is to be paid according to Section 4(1). If no show is held, no tax is payable. It is true that u/s 5, the prescribed tax has to be paid irrespective of the number of shows held, and, even in a case where no show is held; but, that method is only optional. There is no compulsion on any proprietor to opt for the Section 5 method of levy.

The Andhra Pradesh Division Bench further held that merely because the method of levy of entertainment tax was changed to that of a consolidated tax did not in any way take it out of the competence of the State Legislature and the legislation was wholly within the parameters of Entry 62, List II, of the Seventh Schedule to the Constitution.

36. In fairness to the learned Advocate General one must notice the firm stand taken by him that the mere shifting of the situs of the tax or a change in the method of its collection would in no way take away from its essential characteristic of being a tax on entertainment. It was contended with plausibility that prior to the impugned Ordinances and the amendments introduced by the Bihar Finance Act the admitted position was that the tax u/s 3 was an entertainment tax. The levy thereof was, however, notionally on the cinema goers, even though it was collected through the agency of the cinema owners by the medium of affixing adhesive stamps of the value of the entertainment tax to the entry tickets. Learned Advocate General contended that it has been conceded on behalf of the petitioners and other wise settled by binding precedents that entertainment tax may be either levied from the cinema goers or from the cinema proprietors. Now, once it is so, the mere shifting of the incidence of tax from cinemagoers on to the shoulders of the cinema owners does not in any way amount to the vanishing or evaporation of the factum of entertainment. It is not in dispute that within the State thousands of cinema shows would be held and millions of visitors thereto would be entertained thereby. On the present statutory provisions of Section 3A, it is nobody's case that any tax can be levied even if there is no cinema show and consequently no entertainment. Indeed the taxing event and the levy and the incidence thereof is on the holding of cinema shows and the consequent entertainment provided to cinema goers by the cinema proprietors. Therefore, it is difficult and indeed impossible to hold that virtually the identical taxation by virtue of the consolidation of its payment would cease to be a tax on entertainment. If such a tax is entertainment based,

namely, on the actual entertainment provided, and taking a fair average of cinema goers is levied on the cinema proprietors, its basal foundation of entertainment cannot evaporate into thin air. Therefore, neither the shifting of the incidence, of tax on the cinema goers to the cinema proprietors, nor any change in the methodology of its levy or collection by way of a consolidated payment, would affect the intrinsic nature or character of the tax.

37. Before closing on this aspect, it may be noticed that no serious challenge in this context was laid to Section 3B of the Act. The same merely provides for compounding in lieu of the tax payable u/s 3A, This is entirely voluntary in nature. The statute itself provides that it is only on an application of the proprietor that the State Government may permit him to pay a fixed amount or a fixed percentage of gross collection capacity for specified number of shows in a specified period. Section 3B, therefore, is purely optional and there is no compulsion on a cinema owner to conform to the same. Indeed, it is a concessional provision for which the cinema owners may opt, if it seems to be for his benefit. From no angle whatsoever can any serious challenge thus be laid to the very vires of Sub-section (1) of Section 3B of the Act. However, the issue with regard to the proviso thereto would be dealt with separately hereinafter.

38. To finally conclude on this aspect, it must be held that the levy u/s 3A of the Act is clearly a tax on entertainment. The mere consolidated payment thereof does not in any way alter the nature or character of such a tax. This in no way converts the entertainment tax into a tax either on trade or professions or property or income. The provisions of Section 3A are thus clearly within the wide sweep of Entry 62 of List II of the Seventh Schedule to the Constitution. Consequently, the legislature of the State of Bihar was fully competent to enact the same. The challenge on the ground of lack of competence of the legislature must, therefore, be unreservedly repelled.

(II) Challenge on the Ground of Article 14 of the Constitution: Main Provisions of Section 3A:

39. Inevitably, what is first pointedly laid under attack is the provision of Section 3A itself. The core of the submission herein is that the "gross collection capacity for every show", which is the corner-stone of the tax base, has no relevance or relation to the financial return or gain to the proprietor of the cinema halls on whom the tax liability now rests. The alleged impost is, therefore, challenged as wholly arbitrary, irrational and devoid of reasonable classification. It was argued that in large cinema halls the gross collection capacity may be substantial but the actual financial return may be marginal if the show is wholly or partially unattended. It was highlighted that u/s 3A the gross collection capacity is related to every show and the amount of tax liability is placed on the proprietor of the cinema hall irrespective of the attendance in that show with particularity or with regard to the general occupancy rate. Frontal attack, therefore, is that the upper limit of 45 per cent fixed by Section 3A and the actual levy at the rate of 39 per cent for class A cinema halls on the isolated basis of their gross collection

capacity is rested on no rationale, principle or reasonable classification or--to put it strongly in the words of the learned Counsel--it indicates no method in its madness.

40. Elaborating his stand, Dr. Chitley had contended that whilst the gross collection capacity in a show is one thing, the actual attendance and collection in terms of rupees, annas and pies is altogether another. The latter, it was submitted, depends entirely on a number of imponderable factors primarily like-- (i) the type, popularity and the star value of the picture being exhibited; (ii) the publicity, etc, made for the said show and (iii) the type of the cinema house, its furnishing and whether air-conditioned, air-cooled or ordinary. These were labelled as the major factors which govern the actual financial collections of the cinema proprietor and not the mere isolated factum of the existence of the gross seating capacity in the cinema hall. Consequently, it was argued that to levy a tax on the proprietor on the basis of the mere existence of the gross seating or collection capacity of a cinema hall whilst the actual financial returns there from may be limited or nil is an irrational impost devoid of reasonableness and thus violative of Article 14. The larger reliance was on AIR India Vs. Nergesh Meerza and Others, , holding that only arbitrary or unreasonable provision made by the State cannot be upheld.

41. Now, in appraising the aforesaid argument one must at the very threshold hearken to the fact that it is a taxation statute which we are called upon to construe. Undoubtedly, even a taxing provision has to pass through the crucible of Article 14. This is now settled beyond cavil. However, there is undoubtedly a shade of difference in testing an ordinary provision on the anvil of Article 14 and one which seeks to levy a tax in the economic field. This has been well-recognised for long in American jurisprudence from which sometimes our precedent has sought to draw inspiration. Way back in 1957 Frankfurter, J., in *Moray v. Doud* 1957 354 U.S. 457, in his inimitable style, has observed as follows:

In the utilities, the tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to "legislative judgment. The legislature after all has the affirmative responsibility. The Courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts, and the number of times the judges have been overruled by events self-limitation can be seen to be the path to judicial wisdom and institutional prestige and stability.

The American law on this aspect has been summed by Willis in his authoritative treatise on "Constitutional Law" (page 587) as under:

A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods, and even rates for taxation if it does so reasonably....The Supreme Court has been practical and has

permitted a very wide latitude in classification for taxation.

The aforesaid statement of the law has been quoted and approved as correctly representing the position with reference to taxing statutes under our Constitution as well. In *East India Tobacco Co. Vs. State of Andhra Pradesh*, , it was further observed as under:

But, in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the State has a wide discretion in selecting the persons or objects it will tax, "and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, that it would be violative of Article 14.

42. Now, apart from the above, one must equally keep in mind the basic principle that the burden to prove discrimination is always heavy and heavier still when a taxing statute is under attack. The Supreme Court of the United States in *Madden v. Kentucky* 1940 (309) US 83 : 84 (Lawyers Edition 590), tersely observed as follows:

In taxation even more than in other fields, Legislatures possess the greatest freedom in classification. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Reiterating the aforesaid principle, Chief Justice Hidayatullah, speaking for the majority, in *The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another*, , has held as under:

The burden is on a person complaining of discrimination. The burden is proving not possible "inequality" but hostile "unequal" treatment. This is more so when uniform taxes are levied. It is not proved to us how the different plantations can be said to be "hostilely or unequally" treated. A uniform wheel tax on cars does not take into account the value of the car, the mileage it runs, or in the case of taxis, the profit it makes and the miles per gallon it delivers. An Ambassador taxi and a Fiat taxi give different outturns in terms of money and mileage. Cinemas pay the same show fee. We do not take a doctrinaire view of equality....

"To be able to succeed in the charge of discrimination, a person must establish conclusively that persons equally circumstanced have been treated unequally and vice versa.

43. It is in the light of the aforesaid two principles that the rival stands on the constitutionality of Section 3A of the Act on the basis of Article 14 have to be appraised. Herein what first prominently meets the eye is the fact that the legislature has itself provided both the mnema and the maxima of the leviable rate of tax. In terms it is mandated that the consolidated amount of tax is not to exceed 45 per cent and not to be below 10 per cent of the gross collection capacity. It is then common ground that the notification (annexure 1) issued under the Act is well within the parameters so provided. Indeed whilst the

statute provides for the maximum of 45 per cent, the notification as yet leaves the highest rate of tax by far below the same, namely, at the rate of 39 per Cent. It is well settled that in a taxing statute it the minimum and the maximum rates are advisedly settled by the legislature then the same itself provides a rational guideline which militates against any arbitrary levies or oppressive and confiscatory results. The learned Advocate-General was, therefore, right in contending that at the very threshold the legislature itself has guarded against any arbitrary or irrational levies by fixing the parameters. Firm reliance was rightly placed by him on *Sitaram Bishambhar Dayal etc. v. State of U.P.* AIR 1972 SC 1168, (paras 5 and 6 of the report) and *Hiralal Rattanlal Vs. State of U.P. and Another etc. etc.*, .

43A. Inevitably one must look somewhat closely at the concept of the gross collection capacity, which is now made the foundational base for the consolidated amount of tax to be levied. This has to be viewed in the light of the explanation to Section 3A and for the facility of reference, the same may be quoted afresh:

Gross Collection Capacity" shall mean the total amount calculated for total seating capacity of the theatre which shall include the admission fees, tax calculated on the basis of rate notified under Sub-section (1) of Section 3 from time to time, surcharge or charge for any privilege, right, facility, service or thing combined with the right of admission to any entertainment.

It seems manifest from the aforesaid explanation that gross collection capacity u/s 3A is not an ambivalent or etherial concept, but is firmly rooted in the actual total seating capacity of the theatre. Necessarily, the total seating capacity of a theatre has a direct connection with the financial returns accruing to the owner from a cinema show held therein, The tax base, therefore, has a rational link with the actual or the possible financial gain which can accrue to the owner from his theatre.

44. Proceeding further from the above premise the firm stand of the respondent State herein is that the tax base on. the gross collection capacity has not been arrived at on any fanciful or theoretical considerations but upon the terra-firma of virtually undisputed facts, the long and settled experience of the department, and on an in-depth inquiry and examination of the matter by the authorities to curb the evil of persistent tax evasion and leakage of State revenue. Basing himself squarely on the pleadings, the learned Advocate-General pointed out that certain cinema halls, e.g., the Ashok Cinema in Patna, were continuously checked over a prolonged period by the Enforcement Staff, It is clearly dedicated that despite some invitable leakage of revenue and tax evasion, the rate of entertainment tax over a constant period of one year worked out at 40 per cent of the gross collection capacity of the said cinema hall. It was rightly highlighted that it was not possible, nor within the means of the limited. Enforcement Staff to check each show of every cinema hall, or the visitors thereto, where ingenious devices to evade the entertainment tax were blatantly adopted continuously for one year. Nevertheless gross and sample checking of the Chanakya Cinema in

Patna had again indicated a tax rate at par with that of the Ashok Cinema, Patna, and directly related to its gross collection capacity. The present taxation scheme of the consolidation of tax on the basis of the gross collection capacity of every shows was thus not arbitrary but rested on the firm, data, and experience collected by the State Government, and on the basis of the actual, continuous and surprise checks and surveys duly conducted. It was on such impeccable date of this experience that the Government proposed and the legislature adopted the consolidation of entertainment tax rested on the surer foundation of the gross collection capacity of each cinema hall with regard to the shows held by it. This perhaps was the last arrow in the bow of the State Government directed at the monster of persistent and all pervasive evasion of entertainment tax which, despite previous attempts, had, according to the learned Advocate-General, come to be the rule rather than the exception.

45. It is in the light of the above submission that the categoric averment of the respondent State in paragraph 19 of its counter affidavit calls for notice in extenso:

...But, as submitted above, the common experience shows that most of the cinema shows in class A town run to the full capacity of the house, and the cinema halls located in class "B" town 80 % of its capacities, in class C" 70% in class D, E, F, town between 60 to 70%, in C.H.J. between 50 to 60 % and in class K town above 50 % so on and so forth. Class "K" town normally gets the viewer more than 50 % of their capacity. It is submitted that the rate of tax which has been levied under the consolidated rate of tax which has been levied under the consolidated rate is between 39 per cent to 10 per cent of sitting capacity and does not operate as confiscatory nor fixation of the rate of tax is arbitrary.

The aforesaid pleading could not, in any meaningful way, be effectively controverted on behalf of the petitioners. Once that is so, it is disclosed that on a firm factual base there exists a broad average of occupancy rate of cinema halls in the different metropolis, cities, towns and other minor urban areas within the State of Bihar. These have been classified as classes A, B, C, D, E, F, G, H, I, J, and K. in the notification (annexure 1). Consequently, it follows that the gross collection capacity of a cinema hall resting on the number of seats therein, when viewed against the average occupancy thereof over a period, is directly and irrevocably related to the actual financial collections there from. Therefore, the gross collection capacity is inextricably linked with the monetary gain derived from an entertainment show by its proprietor. A tax base on such gross financial return has therefore, a clear rationale underlying the same. It cannot possibly be said that an entertainment tax levied on financial gain related to the gross collection capacity of a show and further resting on its location and ancillary criteria and within the parameters of the statutory maximum and minimum rates is in any way either devoid of rationale or of any reasonable classification.

46. Now, the object of the impugned statute is neither in dispute nor in doubt.

The plain purpose of the taxation herein is to raise revenue. As the objects and reasons expressly mention, it was essentially to provide for funds for different public welfare schemes and the entertainment tax was one of the main sources of revenue of the State Government. In spite of precautions and amendments earlier, the tendency to evade entertainment tax could not be curbed and this was a last ditch attempt to avoid leakage of revenue by a compulsory consolidated entertainment tax.

47. Viewed in the light of the above, the impugned Section 3A (as has already been held) has a clear rationale resting on a reasonable classification. Equally this has a direct nexus to the purpose and object of the statute to both raise and to avoid evasion of entertainment tax. Once it is so held, it is unnecessary--if not irrelevant--to probe that such a classification must be the most perfect one possible or must measure up to the meticulous standard advocated on behalf of the petitioners. Taxation statutes cannot be struck down on the ground that a better classification could have been arrived at or with care a superior rationale should have been devised. So long as the classification satisfies the test of reasonableness, its perfection or the fact that there could have been a truer rationale becomes alien to the issue for the purpose of determining its constitutionality. The sole touch-stone herein is that the classification devised by the legislature stands up to the test of some reasonableness. It is not for the Courts to sit in judgment on the wisdom and the policy of the legislature and in particular in the context of economic taxation measures. If authority was needed for such basic proposition, reference may well be made to *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, . Inevitably, the challenge to the constitutionality of the main provision of Section 3A of the Act must be rejected.

First Proviso to Section 3A:

48. Learned Counsel for the petitioners had then focussed their attack on the first proviso to Section 3A as well. In challenging the same, the basic stand was that the type of place, its location, population, industrial growth and type of market were wholly irrelevant to the occupancy rate in a cinema hall. On this premise, it was contended that any classification based on all or any one of these considerations would again not stand the test of reasonableness. In particular, it was highlighted that the notification (annexure 1) issued under this proviso has taken into consideration only the population test. It was thus argued that the population test of a city or town is again utterly irrelevant. According to counsel for the petitioners, the occupancy rate would be determined by such factors as the quality of the theatre (whether air-conditioned, air-cooled or ordinary) or situation in a fashionable or richer area of the same town and the number of cinema halls in the whole of the town or in its immediate vicinity. Dr. Chitale gave an example of the city of Bangalore where there are more than 150 cinema halls and even on a single long road as many as 22 such theatres were located. The submission, therefore, was that the issue of the mere population of the town not only becomes irrelevant but, in fact, may be counter-productive because of

the large number of cinema halls therein or their concentration in one street even though it be in the heart of the city.

49. On this premise, even one uniform rate for all cinema halls in Patna was challenged as invidious. Counsel submitted that occupancy rate would depend upon whether the cinema hall is located on the out-skirts of Patna city or in the heart thereof, whether the hall was well furnished and air-conditioned or otherwise, whether the means of communication up to the hall were good or not and lastly whether it was located in an area which was either prosperous or more entertainment-minded. Reliance was placed on *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, , and *State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others*, , wherein a flat rate of tax on property or a flat rate for irrigation irrespective of the quality of the land had been struck down.

50. In appraising the aforesaid contention, one has to keep in mind the broader role of the first proviso to Section 3A. It is plain that this is purely ancillary in nature and intended to classify places in order to render an equitable levy of the consolidated entertainment tax. Plainly enough, the main provision is Section 3A and if the same can stand by itself then the mere minor imperfection in the criteria spelt out for such classification or trifling errors in its execution are not issues which can go to the root of constitutionality. The first proviso is indeed in a way an attempt to rationalise and soften the rigour of the compulsory consolidation of tax by classifying places according to the five categories mentioned, therein. Mainly it mandates that the rate of the consolidated tax shall be uniform for all classes of place, which shall be determined, inter alia by taking into account the type of place, its location, population, the industrial growth and type of market.

51. In compliance with the first proviso the State Government has issued the impugned notification No. S.O. 774 on the 14th of August, 1985 (annexure 1). Thereby the urban areas in the State of Bihar have been serially categorised under 11 heads labelled as classes A, B, C, D, E, F, G, H, I, J and K. In class A fall the areas within the limits of Patna and Ranchi Municipal Corporations and the Jamshedpur Notified Area Committee. The highest rate of consolidated amount of tax at 39% of the gross collection capacity for every show is leviable in this class. In descending order the tax rate decreases till in class K governing numerous small townships the rate of consolidated amount of tax is a mere 12 per cent of the gross collection capacity for every show. Challenge has been laid to this notification (annexure 1) as well.

52. The learned Advocate-General in repelling the challenge against the first proviso rightly highlighted that in the classification of places inevitably propitiation has the greater role and, indeed, a primal role to play because it provides the feedstock from which the entertainment tax is derived. Other factors might well come in but they are inevitably variable and present such imponderables that the foundation-base herein must remain on the firm footing of the population of a place. Wherever it is larger, it must provide more potential

for custom to cinema houses and consequently a higher rate of occupancy directly related to the consequential gross collection capacity. It was therefore, that in the notification (annexure 1) issued under the proviso the basic criterion has been the classification of towns on the basis of their population generally. Nevertheless, it was pointed out that other factors have not been lost sight of. For instance, the city of Patna has been clubbed with the town of Jamshedpur which has a relatively lower population of 5 lacs after taking into consideration the fact of the industrial growth in the said steel city and the consequent prosperity generated thereby which may provide a richer pasture for the entertainment tax. Wherever such clear indicia were available, they have been taken note of and otherwise the basic yard-stick of population has been used in categorizing cities and urban areas in classes A, B, C, D, E, F, G, H, I, J and K in the notification.

53. Highlighting the population base, the learned Advocate-General rightly pinpointed that this had a direct nexus with profitability so far as the entertainment tax was concerned. Every person provided potential of a customer going to a place of entertainment. Population was thus indicative not merely of numbers but equally of other categories like industrial growth or the peculiarity of markets or commercial conditions. For instance, Jamshedpur has a larger population because of the industrial growth therein provided by the base of the Tisco and Telco groups of industry. Similarly, he pointed out that trade and commerce and the type of market are so closely inter-linked with population that it would be difficult and, indeed, impossible to delink them from each other on the present data available to the Government. It seems elementary that wherever there was larger population, there would inevitably be a greater trade or commerce and varying types of markets. Wherever there was potentially greater trade and commerce, human population would be attracted thereto as if by magic. It is thus in this context that the five categories mentioned in the first proviso are so inter-linked that any finical or sharp dividing line therein would be merely a futile or doctrinaire exercise. These are primarily guidelines for classification, The first proviso in terms states that these are factors which should be taken into account. They are not mutually exclusive and they are so inter-linked, intertwined and over-lapping that they cannot possibly be meticulously separated. The learned Advocate-General, therefore, pointed out that on this broad base the various towns in the impugned notification (annexure 1) have been classified on the criterion of accretion of one lac of population therein, e.g., those above 5 lacs, 4 lacs, 3 lacs, 2 lacs, one lac and lastly those with less than a population of 50,000.

54. In fairness to Mr. Shreenath Singh, learned Counsel for the petitioners in C.W.J.C. 4105 of 1985 (who had broadly adopted the submissions made by D. Chitley), one must notice his extreme stand that the consolidation of tax at a uniform rate on cinema houses within the towns is inherently discriminatory. According to him, the first proviso as well as Section 3A are necessarily vitiated because they discriminate betwixt different kinds of cinema halls located

differently and with varying capacity, by levying a uniform rate of tax. The argument was that the incidence of tax falls uniformly on persons patently unequal and treating unequals as equals as a classic case of discrimination. He pinpointed that the best cinema hall in the town of Patna located in the heart of the city would be paying the same rate of tax as a dilapidated and old cinema hall poorly located on its out-skirts. The vice of discrimination was thus alleged to be inherent in the situation. According to counsel, this could be taken away only by the virtually impossible exercise of classifying different cinema halls according to the innumerable, variable and imponderable factors which may affect the rate of occupancy. A uniform rate of entertainment tax within the same town, according to him, was hit by the rule in *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, . Counsel distinguished the case of *The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another*, , by saying that the earlier case has neither been differed from nor overruled in the same.

55. I regret my inability to agree to what appears to me as the extreme and doctrinaire submission aforesaid. However, as I find myself so completely in agreement with the view of the Division Bench of the Andhra Pradesh High Court in Writ Petition No. 6404 of 1984 and its analogous cases decided on 19th of July, 1984 that it would be wasteful to extend the compliment of a separate rational refutation thereto. An argument identical to the aforesaid one was raised before the said Bench which stands repelled in the terms following:

We are unable to appreciate this argument. The whole argument is premised on the assumption that it is the location that matters. In other words, the assumption is that a theatre situated in the heart of the city will always get more audience than situated elsewhere. This is not true. The rate of occupancy in a theatre depends upon several variable factors. The quality of the pictures, the facilities/comforts provided, the age of the theatre, and even the traffic restrictions, if any, in front of the theatre--whether it is a two-way or one-way street--determine the rate of occupancy. It is conceded by the learned Counsel for the petitioners that there may be a difference in the rate of occupancy between two air-conditioned theatres situated in the heart of the City of Hyderabad, say, Abid"s It is also conceded that a far-flung air-conditioned theatre may have a better rate of occupancy than an air-conditioned theatre in the heart of the city. It is thus evident that location alone cannot constitute the basis for classification It may be that the proprietor or lessee of a cinema-theatre situated in the outskirts of the city is better and well connected with the Distributors or the producers of films, and gets better pictures, while the proprietor/lessee of a cinema-theatre in the heart of the city may not be so well connected with the result that he does not get good or fetching pictures. Indeed, instances are not lacking where the Distributors who are powerful people in the film industry, themselves own theatres. They would prefer their own theatres, even though they are situated/in the heart of the city. Then again, the question arises "What do you mean by heart of the city?. There may be several equally important or busy centres in a given city, or...town, Then again, there is another

factor....What we wish to emphasize is that, it is difficult to pin-point any single factor as responsible for the success or failure, or for the high rate or low rate or occupancy. There are any number of factors which go to determine the rate of occupancy in a theatre. Indeed it may not be possible or "practicable for the Legislature to conceive of, or devise such classification as to meet every conceivable situation, or to ensure that not a single proprietor of a cinema-theatre is prejudiced. That is not the requirement of the law as well.

In the light of the above, it has to be held that the first proviso to Section 3A and the notification (annexure 1) issued there under are well rested on a reasonable classification spelt out on the basis of the categories mandated by the legislature itself. Once it is held that the classification of towns is based on the rational criteria of population-cum-industrial growth and the type of market, type of place, location, etc., it seems pointless to lay a constitutional challenge merely because a better criterion could be devised with mathematical perfection. It cannot be said that any such imaginative possibility would render a reasonable classification by the legislature either unreasonable or unconstitutional. So long as the same has a rational base and stands up to the test of reasonableness with an added nexus to the object to be achieved, the same is beyond the pale of constitutional infirmity. Reliance on behalf of the respondent has been rightly placed on *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment*, -- *The Western India Theatres Ltd. Vs. The Cantonment Board, Poona, Cantonment*, ,--and (para 14)-- *Sri Ram Ram Narain Medhi Vs. The State of Bombay*, . The challenge to the first proviso to Section 3A must, therefore, be also repelled.

Second Proviso to Section 3A:

56. Though the main provision of Section 3A and the first proviso thereto has well withstood the challenge of Article 14, it appears to me that the Achilles' heel of this provision is the super-added second proviso thereto. To permit a closer analysis thereof in this particular context, it would bear repetition.

Provided further that the consolidated tax payable under this section shall not be less than the highest amount of the tax for every show payable by the proprietor of an entertainment during any of the three preceding years under Sub-section (1) or (5) of Section 3 or under this section.

Both the language and the import thereof seem to be somewhat plain. It lays down in no uncertain terms that the consolidated tax payable shall at least be equivalent if not more than the highest amount of tax paid for a show by the proprietor during any of the three preceding years. Obviously enough, the provision does not even remotely hint at any average to be drawn, but expressly talks in absolute terms of the highest amount of tax for the show which might come to have been paid in the earlier prescribed period. In essence it means that if at any stage during the earlier period of three years, there was a full-house in the cinema theatre, the proprietor must thereafter pay the consolidated tax at

the same highest rate, irrespective of the leanest occupancy that might follow.

57. The unreasonableness of the second proviso is writ large on its face. Frontally assailing the same, Dr. Chittale argued rightly that it rests on unwarranted and irrational assumption that past prosperity will imperatively and necessarily be projected and repeated in future. It was pointed out that if at any stage in the preceding three years an outstandingly good and hit picture was received in the cinema house and it was fortunate enough to have a run of full-houses there for he must pay the tax at the same rate later for a picture which may be a total commercial flop. It was submitted, and, in our view rightly, that there is no guarantee or even a possibility that a run of full-houses in a cinema theatre, or an isolated instance of a full-house, would necessarily be repeated thereafter. Indeed, it was pointed out that sometime the full-house in a theatre may empirically come to be so for a wide variety of reasons. However, under the second proviso, even if a cinema theatre had only one full-house in a three year period preceding, he was bound thereafter to be taxed at the highest level and not below. This, according to the Counsel, was the essence of unreasonableness and a mandate to pay consolidated tax on the assumption that the cinema hall would always run at the full-house level.

58. Presenting the perversity of the provision from another angle, Dr. Chittale highlighted that the State's own case was that there appeared to be a massive tax evasion in the payment of entertainment tax. Consequently, the honest tax payer, who had earlier bona fide shown a full-house occupancy, is penalised ever afterwards for his honesty by being compelled to pay the entertainment tax on the basis of the said full-house. On the other hand, an evasive and dishonest cinema owner, who had evaded tax and not shown even the actual full-house as such, would thereby be benefitted ever afterwards for being entitled to pay tax at a much lower rate. In a way this would only be a perpetuation of the evasion earlier committed and a inter se discrimination between the honest and the tax evading cinema owners with the benefit going to the latter.

59. Learned Counsel for the petitioners highlighted the deleterious effect of the second proviso on the preceding provisions of Section 3A and the first proviso. It was rightly contended that those provisions are equally coloured and affected by the onerous minima provided herein. Therefore, the highest rate of tax, namely a virtually full-house occupancy, has been ordered by the second proviso, which was utterly irrational and untenable on any principle of reasonableness. Referring to the practice of the Department of arriving at some kind of average of the preceding years, the Counsel rightly contended that the clear provisions of the second proviso cannot be whittled down by what the Commissioner for the time being may choose to interpret it. It was rightly submitted that the sound canon of construction demands that the statute has to be interpreted according to what its language says by the courts and not what the administering officers say about it.

60. In meeting the piercing challenge against the second proviso, the learned

Advocate General found himself on a very weak wicket. He was fair enough to concede that the language of the second proviso was not happily worded. It was undoubtedly capable of the construction that the minimum rate of the consolidated tax payable there under would be the highest amount of tax paid for any show in the last three years. However, he advocated that the proviso may be read down to bring it within the bound of constitutionality. It was brought to our notice that the administering officers had construed it moderately and reference was made to Annexure "A" (to C.W.J.C. No. 4105 of 1985), a circular of the Commissioner of Commercial Taxes, Bihar. Thereby a somewhat curious mode for calculating the mechanism for the highest tax paid in three years is devised by dividing the total number of show for each cinema and the same is worked out somewhat confusingly on that assumption. The learned Advocate General stated that if so calculated and construed, the provisions of the second proviso are not unreasonable. It was his case that the repetition of the words "every show" in the second proviso is confusing and is a mere surplusage, which may be ignored. If that were to be excluded, then it would be possible, by a strained process of construction, to apply it as the Department is seeking to do.

61. The learned Advocate General was, however, himself fair enough to concede that if a plain grammatical construction is given to the second proviso and it is not read down, then the same would work out both irrationally and oppressively. He fairly did not support the assumption that if once there has been a house-full in the preceding three years, the same would necessarily be inflexibly repeated in all subsequent shows. However, as a background to the legislation, he pointed out that neither in the earlier Ordinances, nor in the Bill submitted to the Legislature this proviso found any place. It was only during the debate in the House that the insertion of the second proviso was made, and it was stated at the Bar that the legislative proceedings did not indicate any meaningful debate or reasons there for. According to the learned Advocate General, this was done in order to meet the criticism that without some minima being provided, the entertainment tax, far from raising the State's revenue, might well go into the coffers of the cinema owners and provide a bonanza to them. It was argued that in the outlying areas, where the tax liability is as low as the rate of twelve percent, a high occupancy or a full-house would have the effect of the levied entertainment tax also going in to the pockets of the cinema owners and not into the coffers of public exchequer.

62. Now, on a plain reading of the second proviso, and, equally from the somewhat weak-kneed stand of the Respondent State with regard thereto it is manifest that this provision lays down categorically that the consolidated tax payable shall be at the rate of the highest amount of the tax paid for a show by the proprietor during any of the three preceding years. In practical terms, the cinema owners must pay the tax on the assumption of a virtually 100 percent occupancy rate of the seats continuously hereafter. In assence it either visualises or man dates that if there was once a house full in the last 3 years in a cinema (sic) admission rate of Rs. 1/--per seat and the entertainment tax rate of 110 per

cent thereon, the total collection at 100 per cent occupancy would be Rs. 210/-. However, if the occupancy rate was at 40 per cent, the cinema-proprietor would collect only Rs. 48/-, including the admission and entertainment tax. In such a situation, under the second proviso, he would be obliged to pay tax at the highest rate of occupancy, which would border around Rs. 110/-. Consequently, the tax would itself outstrip the total collection of Rs. 48/- by as much as Rs. 26/-, and the cinema owner must run into a clear loss aforesaid, apart from the expenses and other maintenance charges. Therefore, under the second proviso, the cinema owner must run into irrevocable loss even on an average occupancy rate of 40 per cent to 50 per cent. Even the learned Advocate General had fairly conceded that no reasonable person could visualise of the full-houses in a cinema theatre continuously or a 100 per cent occupancy rate of the seates therein. The tax rate provided by the second proviso would thus be utterly irrational and plainly confiscatory.

63. Because of the inability to sustain such a provision, it had been suggested that the second proviso should be read down and its rigours be softened. As I have said earlier, the language and the import thereof seems clear and unambiguous to me. The rule of reading down cannot be employed for twisting or distorting the plain meaning of a statutory provision. It can possibly come into play only if two constructions can equally be placed on a statute. That does not even remotely appear to be the case here. It appears to me that the second proviso cannot be saved by any exercise of reading it down to mean something which it does not say.

64. We were invited on behalf of the respondent State to place a construction on the second proviso to Section 3A, which allegedly has been placed by the Department in the circular dated 17th August, 1985 (Annexure 4 to C.W.J.C. No. 4105 of 1985), issued by the Commissioner of Commercial Taxes, Bihar. We cannot possibly slip into an error on this account. It is the primal function of the Courts to interpret law as they find it and not to derive its meaning from others. It is the intendment of the State legislature expressed by the language employed by it which is the governing factor and not the procedure or practice adopted by the Department administering the same. Even otherwise, it is plain that Annexure "4" does not even pertain to be an interpretation *stricto sensu* of the second proviso to Section 3A. It merely states that the cinema owners, who do not want to make payment of compounded tax u/s 3B, should make payment of entertainment tax for each show at notified rate in the said notification. It then proceeds to evolve a formula of its own for arriving at an estimate as to which of the two amounts is higher and direct that the cinema owners shall have to pay a consolidated tax for each show u/s 3A at the rate of the amount whichever is higher of the two amounts. The suggested calculation is somewhat remarkable because of its confusing nature. Indeed, Counsel on either side could hardly spell out its true import with any degree of precision. It seems to be plain that this Annexure "4" has little or no relevance to the true construction and import of the second proviso to Section 3A.

65. As has been pointed out by the learned Advocate General himself this second proviso did not form part of the earlier Bihar Ordinance No. 9 of 1985, nor was it incorporated in the second Bihar Ordinance No. 18 of 1985. Even when the Bill for the Bihar Finance Act, 1985, was introduced, any such provision was not even remotely in sight. The respondent State, even when pointedly asked, has been wholly unable to state either the circumstances or the rationale in which this provision came to be inserted into the statute. From what has been stated at the Bar, it seems to appear that the provision is somewhat of a half-baked measure which has been hurriedly cooked in the heat of the debate in the legislature. The larger ramification of the provision and its infringement of Articles 14 and 19(1)(g) of the Constitution do not seem to have been realised. If at all, it was necessary to have a minima for the consolidated rate of tax, it must be rested on a more reasonable and rational base.

66. To conclude on this aspect, there seems to be no option, but to hold that the second proviso to Section 3A, which does not withstand the test of rationality, is clearly violative of Article 14 of the Constitution and the guarantee of equality before the law. The same is consequently struck down hereby.

67. In this part of the judgment the challenge has been focussed primarily on the basis of Article 14. However, it has been manifestly demonstrated that the second proviso would not only operate irrationally but is indeed demonstrably oppressive and expropriatory. Therefore, it equally violates Article 19(1)(g) by imposing unreasonable and irrational restriction on the fundamental right to carry on the occupation, trade or business of cinema exhibition, because of its oppressive nature. It must, therefore, be struck down on this additional ground as well.

68. Once it is held as above, the issue of the severability of this provision from the rest of the provisions of Section 3A comes to the fore. Inevitably, learned Counsel for the petitioners gathered in for the kill by contending that this proviso was unseverable and the whole of Section 3A and the first proviso also must fall along with it. It was argued that the second proviso was the part and parcel of the whole scheme of tax, which could not be worked without it and it had been expressly inducted by the legislature during the debate therein. Dr. Chittale even went to the extreme length of contending that the minimum rate provided by the proviso was the core of the charging section and, if that fails, the whole provision must fall.

69. The aforesaid contention of the learned Counsel for the petitioners, however, must fail. It seems somewhat plain to me that the second proviso is in no way an integral or inseverable part of Section 3A. Indeed, it is somewhat of a superimposition or addition to the main provision of the section and the categorization provided by the first proviso. It seems somewhat obvious that taxing statutes do not always and necessarily contain any minima for their imposition. The normal, and, indeed, the usual pattern of tax statute is the charging provision and the rate on which it is to be worked out. Both of them find complete place in the

remaining provisions of Section 3A and the first proviso. The tax base, the minimum and the maximum of its imposition and the individual fixing of the rate in different classified localities are all fully and adequately provided in the main provision of the Section and its first proviso, when read with the notifications issued there under.

70. Indeed the background of the legislation which has been noticed gives to my mind the lie direct to the contention of unseverability on behalf of the petitioners. It is common ground that when Bihar Ordinance No. 9 of 1985, and Bihar Ordinance No. 18 of 1985 were originally enacted and enforced they did not contain any provision like the second proviso. The law thus stood complete and adequately applicable without the aid of any such requirement. Equally, when considering the legislation to be introduced, the Government in the proposed Bill did not provide any provision for minimum tax, nor was there a hint of any similar or parallel provision in the said Bill. The proposed amendments were thus well thought to be complete without such a surplusage. Learned Counsel for the petitioners have been wholly unable to pin-point how the taxing provision would become unworkable or be vitiated if the second proviso is excluded there from. It must, therefore, be held that the second proviso, spelling out the minima for the consolidated tax rate is in no way an integral part of Section 3A. It is plainly and easily severable. It is not the head or heart of the provision, but merely a minor limb and, perhaps, as was said at the outset picturesquely, is only the heel of this provision, which can, without great damage, be surgically severed. Therefore, Section 3A and the first proviso thereto can easily stand by themselves and are hereby upheld.

Proviso to Sub-section (1) of Section 31?:

71. To avoid wasteful repetition, one may now turn to the first proviso of Section 3B as well. It has been earlier noticed that no meaningful challenge to Sub-section (1) of Section 3B could be raised, because of its voluntary nature. It is common ground that this comes into play only if the cinema proprietor opts for it and applies for the compounding of the tax. Sub-section (1) of Section 3B, therefore; is more of a beneficial and concessioner nature, which is attracted only at the option of the cinema proprietor himself. No meaningful challenge to this provision was either raised or can thus possibly be raised.

72. However, the same cannot be said of the proviso attached thereto, which is, for all practical purposes, in pari materia with the second proviso to Section 3A. To highlight the identity or in any case the similarity, the two provisions may be juxtaposed against each other:

Second Proviso to Section 3A: Proviso to Section 3B (1): "Provided further that the "Provided that the fixed amount consolidated tax payable under or the fixed percentage of gross this section shall not be less collection capacity shall not be than the highest amount of the less than the highest amount pay- tax for every show payable by able by the proprietor of an enter the proprietor of an entertain-

tainment during any of the three ment during any of the three preceding years of the concerned preceding years under Sub- period under Sub-section (1) or (5) of section (1) or (5) of Section Section 3 or Section 3A or under 3 or under this section." this section."

A plain look at the language thereof makes it manifest that barring minor marginal changes, the language, intent and thrust of the two provisions is identical. Consequently the same vices which have been earlier noticed in detail with regard to the second proviso to Section 3A would automatically attach to the proviso to Section 3B as well. For identical reasons given above, it must be held that the proviso to Sub-section (1) of Section 3B is violative both of Articles 14 and 19(1)(g) of the Constitution and is hereby struck down.

73. No serious argument of this provision being not severable was raised before us. However, without resting ourselves on any concession, for the identical reasons given above in the context of the second proviso to Section 3A, it must be held that this proviso is severable and Sub-section (1) of Section 3B can stand by itself independently. The said provision is consequently upheld.

(III) Challenge based on the Provisions of Article 19(1)(g) of the Constitution:

74. The main thrust of the attack under Article 19 was that u/s 3A of Act the entertainment tax would be oppressive, confiscatory and indeed expropriatory. Basic reliance herein was placed on the isolated and unauthenticated figures added to the record on behalf of the petitioners. Elaborating the matter, Dr. Chittale sought to highlight from facts and figures that even at the highest rate of entertainment tax at 39 per cent of the gross collection capacity as levied by the notification at Annexure "1" (in C.W.J.C. No. 4046 of 1985) in the cities of Patna, Ranchi and Jamshedpur would require an average occupancy rate of 74 per cent to break even with the tax levied. Apprehending further enhancement, it was contended that if the statutory limit of 45 per cent in Section 3A were to be reached (which might well be in future) then the average occupancy rate would have to be as large as 50 per cent or more. It was the case that in the event of such high rate of average occupancy not being achieved the taxation rate would become oppressive and even confiscatory. Barely any money would be left in the hand of the cinema proprietors to meet the numerous expenses and contingencies of running a cinema house. Counsel contended that if the taxation structure was at such a level that even after all the care and input no profits is possible from the trade or business, then such a tax would plainly become confiscatory and oppressive. It was not necessary that there must be an actual loss or an income into the petitioners, capital. It is sufficient that if after all the investments, inputs and industry, little, or no profit accrues, then it is plain that such taxation is an unreasonable restriction on trade and business and can only be labelled as oppressive and unconstitutional.

75. Another limb of the argument to augment the above stand was a reference to Section 10(2) of the Act, which empowered the State Government to exempt

any entertainment or class of entertainments or any person or class of persons from the liability to pay entertainment tax. Relying on Notification No. 997 dated the 30th October, 1969, and Notification No. 509 dated the April, 1974, it was pointed out that military personnel in uniform and officers attached to the N.C.C. and also such persons in civil dress having authorisation certificates from the Station Officer concerned, have been exempted from the liability to pay entertainment tax. Equally, personnel of the Border Security Force and the Bihar Military Police in uniform and in civil dresses with authorisation certificates have also been exempted. Counsel contended that the result would be that whilst the seats would be occupied, no tax can be collected from such occupants by the proprietor, without any corresponding concession for the payment of the consolidated tax on such occupancy. It was further pointed out that the admission fees to the cinema houses were again not within the free will of the cinema proprietors, but were strictly regulated by the State under the Act. These have further remained wholly unchanged for the last 5 years, despite a rising graph of inflation. In such a situation, it was contended that the incidence of the consolidated tax becomes wholly oppressive.

76. Mr. Shrinath Singh, learned Counsel appearing for the petitioners in C.W.J.C. No. 4105 of 1985, was somewhat more picturesque in pressing his challenge. It was contended that the object of taxation is to raise revenue and not to dry up the very source thereof. Like a palm tree, it has to be tapped and not chopped off and a cow that has to be milked and not killed. It was his case that it would be both oppressive and counter-productive to kill the hen that lays the golden eggs of entertainment tax in this field. Relying on the somewhat self-serving pleadings in his writ petition, it was sought to be contended that no cinema business whatsoever can now be carried on with such stringent, oppressive and confiscatory taxation. By reference to Annexure "7" to the writ petition (pages 74-75 of the brief) it was attempted to be shown that the cinema house would inevitably run into heavy loss with the alleged heavy incidence of tax. Forestalling the charge of rampant tax evasion and manipulation in figures learned Counsel relied on those provided by the Veena Cinema, with regard to the popular motion picture "Coolie" (vide Annexure 11 to the supplementary affidavit). It was sought to be pointed out that irrespective of inspections, the said cinema in its accounts had consistently shown full houses for a long period for this picture.

77. On the evidentiary aspect, learned Counsel for the petitioners have attempted to contend that in this context under Article 19, the burden for showing that the tax, both in its character and quantum, is reasonable would lie upon the State. Basic reliance was placed on *Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another*, for submitting that it was not for the petitioners to establish, but the State to show the reasonableness of the levy. Reference was made to Article 265 of the Constitution that no tax can be levied except by the authority of law. Reference was also made to the recent judgment of the Supreme Court in *D.S. Nakara and Others Vs. Union of India (UOI)*, . On

these premises also it was contended that the respondent State had failed to discharge the burden laid upon it by the law.

78. In the context of the challenge under Article 19, the matter has now to be viewed against the background that the second proviso to Section 3A, as also the proviso to Sub-section (1) of Section 3B, have already been earlier struck down. They have been held to be violative of both articles 14 and 19. The poisonous fang of oppressiveness has already been extracted and removed from Sections 3A & 3B. The matter has thus to be viewed after excluding the aforesaid unconstitutional provisions from our ken. It has already been held that Sections 3A and 3B can stand independently and on their own and are severable from the of or mentioned provisos. Express and pointed notice, therefore, must be taken that what now falls for appraisal is only the main provisions of Section 3A and its first proviso read with the explanation thereto.

79. It is somewhat plain from the above that herein the primal stand of the petitioners is rested on some jugglery from the unverified figures and data provided piecemeal primarily during the course of arguments. It is somewhat axiomatic that the vital issue of constitutionality cannot turn merely on the self-serving figures provided by an interested litigant, the authenticity of which is frontally questioned. Indeed, these have been categorically controverted on behalf of the respondent State both in their counter-affidavits and at the Bar. Learned Advocate General, making a frontal assault on the purported figures and data supplied by the petitioners, took the stand that the same are entirely questionable and self-serving and he rested his whole case on the ground that there has been a large scale tax evasion and a cooking up and manipulation of figures and accounts. It was his firm stand that the correct occupancy of cinema houses and the real financial returns were not correctly reflected therein, because tax evasion was rampant and indeed was a continuing process. The whole thrust of the new legislation was indeed directed against the same. Particular reference was made to the figures provided on behalf of the petitioners with regard to Roopam Cinema at Arrah, which were plainly contradictory regarding the tax rate paid and the average occupancy rate indicated. The repeated and vehement stance herein was that from these self-serving manipulated figures, resting on the blatant base of tax evasion, nothing meaningful has been brought out to conclusively show that the carrying on of the cinema trade in the State has been rendered impossible or totally unprofitable and that the entertainment tax is either oppressive or expropriatory. The tongue-in-cheek argument was that the proof of the pudding is in the eating, and, despite the levy of the consolidated tax, all the cinema houses in the State are nevertheless being continued to run, and, according to the learned Advocate General, perhaps, more profitably.

80. From the rival stand it would emerge that the foundational base of the challenge on behalf of the petitioners herein is rested somewhat shakily on figures and data which do not stem from any impeccable or independent source.

It is sought to be buttressed from figures provided by the interested source of the petitioning litigants and there is no absolute guarantee of the authenticity thereof. The respondent State in its counter-affidavits has both expressly and impliedly categorically challenged the correctness of these figures. This has to be viewed in the context of the fact that undoubtedly these is (as, perhaps, in other fields as well), a gross tax evasion in this field, which has earlier been sought to be countered by the State by other methodology.

81. That this is a phenomenon not confined to the State of Bihar would appear when reference is made to the judgment of the Division Bench of the Andhra Pradesh High Court in Writ Petition No. 6404 of 1984 and others dated the 19th July, 1984. Therein also a similar contention of oppressive taxation was sought to be raised on somewhat similar data. Rejecting the same, it was observed:

In the case of "Apsara", "Menaka" and "Sree Ramana" theatres, all situated within the city of Hyderabad, the average occupancy rate during the same period is shown as 138%, 14% and 15%, respectively. It is stated that even during the last few years the occupancy rates were the same. We find it difficult to believe that, with such low occupancy rate, the theatres were still able to survive in the business. These figures furnished to us must be examined in the light of the allegation made in the counter-affidavit that, this new method of consolidated levy was brought in with a view not only to simplify the tax structure, but also to plug the large scale evasion prevalent in the State...."In the above circumstances, we view with scepticism the actual occupancy figures furnished by the "petitioners. There is also the allegation of large scale evasion of tax pleaded by the Government. If the average rate of occupancy is 10% then the situation must be that the occupancy rate never goes beyond 20% and in some cases it falls to as low as 1% or 2%. These appear to be wholly unrealistic figures. It is difficult to believe that when the theatre in villages are having not less than 50% average occupancy, the theatres in bigger towns and cities would be having only 10% or 15% average occupancy. In fact, they should have more occupancy not less....

82. For all the aforementioned reasons, there seems no other choice, but to conclude that there is no impeccable or unimpeachable figure and data brought on the record which can possibly sustain to the hilt the rather tall stand of the confiscatory or expropriatory nature of the consolidated entertainment tax herein.

83. Learned Advocate General indeed turned the tables on the petitioners by pointing out in the alternative that even the questionable and unverified figures provided by the petitioners themselves, far from establishing the confiscatory nature of the tax, themselves clearly indicate that even earlier the tax rate paid on gross collection capacity of individual cinema theatres worked out betwixt 27% to 37%. It was pointed out that by the impugned notification, the lowest rate of tax is as low as 12 per cent and at the highest is 39 per cent. Therefore, in the mofussil areas the cinema owners may well stand to gain from such consolidation. Even assuming that the rigour of the tax rate may in some cases

have been raised by a marginal percentage, it cannot be said that the long existing entertainment tax would thereby become necessarily confiscatory or oppressive.

84. It was rightly highlighted that herein the factors are so variable and so many imponderables intervene that it would be indeed a miracle to tabulate that with absolute perfection and to categorise and classify each one accordingly. Counsel was indeed right that perfection must however remain an ideal and is not to be easily achieved with mathematical precision in the hybrid and complex region of taxation structures at varying economic strata. It is undisputable that even the maximum rate of 30 per cent of the gross collection capacity can be evened out by an occupancy rate of 74 per cent only. Similarly, as regards the lowest category of the tax rate at 12 per cent, the same could be well met with even 18 to 20 per cent of the average occupancy rate of the cinema theatres. Now, to say that the minimum of 18 or 20 per cent occupancy cannot be achieved, is patently untenable. The learned Advocate General forcefully took the stand that on the other hand it was the settled experience of the Department that in the metropolitan areas like that of Patna, Ranchi and Jamshedpur, the occupancy rate may be as high as 93 to 100 per cent. It is not uncommon herein to find full house notices while customers are turned away from cinema gates because of such house-fulls and the pressure on the cinema seats. The cickets are sold in black-market, which poses a problem of its own, The true effect of a high average occupancy will be noticed in detail hereinafter. It suffices that in this context, the variability of the tax rate from 12 per cent to 39 per cent matched to the average occupancy rate of 18 per cent to 74 per cent, which the impugned notification envisages is a sound synthesis against the background of the fact that not unoften there may be a long run of 100 per cent occupancy with hit pictures in the cinema halls. Therefore, it has been rightly contended on behalf of the respondent State that the rate of tax is in the discretion of the taxing authority and cannot be labelled as oppressive merely on the basis of a marginal enhancement or on the mere opinion or allegation of the taxpayers Mr. Justice Holmes was perhaps a solitary and distinct exception when he said that he liked to taxes because with them he bought civilization. That approach is now conspicuous by its absence, and, a grievance against any tax is the rule. However, in order to succeed under Article 19, the petitioners have not merely to show that the tax rate may in some areas have shown a marginal upward trend, but they have to firmly establish that the very trade or business of cinema exhibition can no longer be carried on within the whole of the State. That, in my view, they have singularly failed to do.

85. Yet again, the learned Advocate General has sought to show and with plausibility that even the figures provided by the petitioners themselves clearly boomerang on their stand. Pinning upon the admitted figures of the Veena Cinema for the long full-house runs for a picture like the "Coolie", would indicate that the occupancy rate may well remain at 100 per cent for consistent periods. It was highlighted that even for repeat runs of good pictures such 100 per cent

occupancy has been achieved on the figures given by the petitioners, what to say of the first run showing. Now it cannot be denied that on a 100 per cent occupancy rate the result is that even with the highest tax rate of 39 per cent the cinema proprietors would be appropriating as much as 26 per cent of the entertainment tax collected as an added part of their profits apart from the admission fees. Where the incidence of tax is as low as 12 per cent in the Category K in a full-house, the cinema proprietor profits as much as 70 per cent or more of the entertainment tax collected. Thus, the moment the occupancy rate rises, the consolidated tax far from being burdensome becomes a bonanza for the proprietor, in the sense that apart from the basic admission rate, he also appropriates 110 percent thereof which is levied as entertainment tax into his own private pockets. Therefore; this would more than amply compensate for some lean occupancy period on certain days. On the law of averages, it appears that the petitioners, if they paid their tax honestly earlier, they may well be benefited rather than burdened by the scheme of consolidation. The learned Advocate General's contention was that the primary grievance here was being raised because this scheme makes a deeper inroad into the otherwise rampant tax evasion, which shifted the 100 per cent public revenue to private pockets.

86. Now the virtually admitted position that high occupancy rate would indeed bring a benefit to the cinema proprietors deserves to be pointedly highlighted. This results in tax big bonanza for them and even some part of what is levied in the shape of entertainment tax may be added to their private profits. This may amply compensate some lean periods of occupancy, which are but inevitable in a somewhat temperamental trade like film exhibition. By the law of averages, the higher and the lower occupancy rates over a period are bound to settle up evenly like pebbles shaken in a box. That consolidation of tax necessarily leads to this result has equally been noticed in the Andhra Pradesh judgment (*supra*) in the following terms:

The Legislature has fixed this lower rate of tax because of the realisation that the proprietor may not have full occupancy for each show of the day, or each day of the week, or each week of the month, as the case may be. But, the above illustration proves that less than 50 % average occupancy rate would be sufficient to enable a proprietor to meet the tax liability. What he would be collecting on account of entertainment tax would be enough for paying the tax levied u/s 4(1) of the Amendment Act. Indeed, if his occupancy rate is 50% or more, he stands to gain, because whatever he collects on account of entertainment tax over and above the amount he has to pay, would constitute his income....

Indeed, many better theatres would be better-off, because all the entertainment tax they would be collecting over and above the expected average occupancy rate (underlying the rates of tax prescribed) would constitute their own profit....

A broad view has to be taken in such matters, and, more so, in the matter of levy of rates by a taxing enactment. The Act is designed to simplify the tax

structure and its collection, with a view to eliminate the scope for evasion and corruption. Previously, every fact stated by the proprietor was the subject-matter of verification....

In the case of Section 4, the only verification that now needs to be done is the number of shows held by a proprietor. No other investigation or verification is necessary. If a show is held, a particular amount of tax is payable, which is arrived at on the basis of the formula prescribed in the section. It is in the interest of the State and the public at large that such laws are made as eliminate, as far as possible, room for evasion and corruption.

87. I am entirely inclined to agree with the aforesaid view. It has, therefore, to be necessarily held that in the event of higher occupancy rate, the consolidation of tax, far from being oppressive or burdensome, might well indeed be financially beneficial to the cinema proprietors.

88. In fairness to Mr. Shrinath Singh, one must also notice his somewhat extreme stand that the impugned provisions were a colourable exercise of legislative power and a fraud upon the statute. Counsel sought to rely on *Raja Jagannath Baksh Singh Vs. The State of Uttar Pradesh and Another*, and, in particular on Paragraphs 21 and 22 of the said report. This argument deserves only a passing reference. Nothing has been brought on the record or could be remotely pointed out to us which may establish the extreme charge of a colourable exercise of power by the legislature or an intent to commit a fraud upon the statute. I find nothing whatsoever to come to the bizarre conclusion that the classic wisdom of the legislature is being directed to either dubiousness or creating merely a cloak for a colourable exercise of legislative power, amounting to a fraud on the Constitution. We, therefore, merely notice the argument and unhesitatingly reject the same.

89. With equal fairness, we must also notice the firm stand of the learned Advocate General on the legal aspect under Article 19(1) (f) and (g). It was forcefully contended that the burden is squarely on the petitioners to establish beyond doubt in the taxation field that the incidence of taxation was so oppressive or confiscatory that the very trade or profession cannot at all be carried on or continued. This, according to him, has not even remotely been established.

90. I am inclined to accept the aforesaid contention on behalf of the respondent State. Our attention was drawn to the established authority on the Constitutional Law of India by H.M. Shervai, which has now been judicially quoted too often, despite an archaic legal superstition that a living author should not be so done. At page 485 of the First Volume (Third Edition), the learned author has correctly summed up the law in the following terms:

10.23: Certain special questions about the reasonableness of (sic)-retentions have arisen in connection with Article 19(1) (f) and (g) and they have had to be considered in the context of a planned economy. The decisions of the Supreme

Court in connection with the import and export of goods show that the judgment of Government that particular restrictions are necessary is for practical purposes conclusive as to their reasonableness. Again, though the Supreme Court has said more than once that tax laws are subject to Article 19(1) (f) and (g) it is submitted that Article 19(1) (f) and (g) has a very limited application to tax laws. The cases in which tax laws were held to be subject to Article 19 were really cases where it could be said that under the guise of imposing a tax, the law confiscated property. It is submitted that the reasonableness of a taxing statute would be wholly beyond the competence of a Court for it involves an evaluation of factors which the Court is neither entitled, nor competent, to evaluate. The objects to be taxed, the persons to be taxed, the amount of the tax to be levied, the political, social and economic policies which a tax is designed to subserve, are all matters of political and legislative judgment, and they have been entrusted to the legislature and not to the Courts. As long as a tax retains its "avowed character and does not confiscate property to the State under the guise of a tax, the reasonableness of a tax cannot be questioned.

Yet again, a reference must be made to paragraph 19.160 of the same work with regard to Moopil Nair's case, which continued throughout to be the corner stone of many of the petitioner's submissions. The Learned author after quoting from the Twyford Tea Company's case, and, pinpointing the conflict of its ratio with that of the earlier case, has concluded as under.

It is submitted that this is a circuitous way of saying that Moopil Nair's case was wrongly decided. If absurd consequences would have flowed from holding the tax invalid, as Hidayatullah C.J. pointed out, it is because Moopil Nair's case converted the legislative entry, "tax on land" to read "tax on productivity or income from land" contrary to the settled rule that a Court cannot re-write a legislative entry which is plain and unambiguous. It is submitted that the grounds given by Hidayatullah C.J. for holding the Act valid show that the dissenting judgment of Sarkar, J. in Moopil Nair's case was correct, and that the majority judgment required to be overruled.

I am inclined to agree with the aforesaid view, and, in the event of a direct conflict of the co-equal Constitution Benches, would prefer to follow the ratio in Twyford Tea Company v. Kerala. AIR 1970 SCR 333.

90. To finally conclude on this aspect, I would hold that the impugned provisions of Sections 3A do not even remotely constitute any unreasonable restriction upon the petitioners' fundamental right guaranteed to them by Article 19(1)(g) of the Constitution? and, are consequently valid.

(IV) Challenge on the basis of Articles 301 and 304 of the Constitution of India:

91. Mr. Shrinath Singh, learned Counsel for the petitioner, had made a last ditch attempt to challenge Section 3A on the basis of Articles 301 and 304 in Part XIII of the Constitution as well. It was sought to be argued that the impugned tax now infringes the freedom of trade and commerce, and, therefore, the previous

sanction of the President under Article 304 was a pre-requisite. It was the stand that a heavy incidence of taxation was in essence a clog on freedom of trade, which was protected. It was contended that it is an erroneous assumption that Part XIII of the Constitution deals only with the movements of goods. Reliance was made on averments made in Paragraph No. 43 of the writ petition and Paragraph No. 11 of the supplementary affidavit, and precedential support was sought from the isolated observations in *The District Collector of Hyderabad and Others Vs. Ibrahim and Co., etc.,* , and *The Automobile Transport (Rajasthan) Ltd. Vs. The State of Rajasthan and Others,* .

92. In this context it may, perhaps, be noticed at the outset that Dr. Chitale, who led the attack on behalf of the petitioners herein did not even remotely suggest any challenge on the basis of violation of the right of freedom of trade and intercourse. Even though some fragmentary pleadings had been made in the writ petitions, he very fairly did not press the same, and, in our view rightly. On principle it seems difficult, how the levy of entertainment tax within the same State on cinema theatres or its enhancement or methodology of its collection would in any way infract the freedom of trade and commerce within the country, which is guaranteed by Part XIII of the Constitution. It is true that even taxation statutes have to conform to the requirements of Part XIII, but, herein, in the peculiar context of the present entertainment tax one fails to see how any violation of trade, commerce and intercourse within the territory of India is adversely affected. It is common ground that the earlier Bihar Entertainment Tax Act did not require and had in fact not been enacted with the previous sanction of the President. Any amendment in the same statute, and, in particular, directing basically the consolidation of such a tax or its composition, to my mind, does not in any way attract the provisions of Article 304. This contention raised somewhat half-heartedly on behalf of the petitioners, therefore, appears to me as plainly untenable. The reliance of the learned Counsel on the decisions in *District Collector of Hyderabad v. Ibrahim and Co. (supra)*, and, *Automobile Transport Limited v. State of Rajasthan (Supra)* again appears to me as somewhat misplaced. The present case appears to be entirely distinguishable and one fails to see any meaningful analogy even. Mr. Shrinath Singh was fair enough to concede that he could cite no authority that a quantum jump of taxation would necessarily be a restriction on the freedom of trade within the meaning of Part XIII of the Constitution. Tongue-in-cheek we were invited to render and provide such an authority. Respectfully, we are unable to oblige.

93. To sum up on this aspect, the challenge on the basis of Articles 301 , and 304 appears to me as hardly tenable at all and must be categorically rejected.

94. To finally conclude in answer to the questions posed at the outset, it has to be held that the levy of tax under the Bihar Entertainment Tax Act, 1948, can be validly consolidated on the basis of the gross collection capacity for every theatre show payable by the proprietor of the entertainment. Further, the voluntary compounding of such a levy is permissible on the application of the proprietor,

and, lastly, Sections 3A and 3B of the Act except the second proviso to Section 3A and the proviso to Sub-section (1) of Section 3B, which are struck down providing for a consolidated payment of or option for compounding the tax are not violative of Articles 14 and 19 or of Articles 301 and 304 of the Constitution.

95. Before parting with the judgment, it seems apt and indeed necessary to collate the primal findings out of what has become a somewhat exhaustive judgment.

(i) That the levy u/s 3A of the Act is clearly a tax on entertainment. The mere consolidated payment thereof does not in any way alter the nature or character of such a tax. This in no way converts the entertainment tax into a tax either on profession, trade or property or income. The provisions of Section 3A are thus clearly within the wide sweep of Entry 62 of List II of the Seventh Schedule to the Constitution. Consequently, the Legislature of the State of Bihar was fully competent to enact the same. The challenge on the ground of lack of competence of the legislature is unreservedly repelled.

(ii) That the main provision of Section 3A has clear rationale, resting on a reasonable classification. It has a direct nexus to the purpose and object of the statute to both raise revenue and to avoid evasion of entertainment tax. The challenge to the constitutionality of this provision on the basis of Article 14 must be rejected.

(iii) That the first proviso to Section 3A and the Notification Annexure "1", issued there under are well rested on reasonable classification spelled out on the basis of the categories mandated by the legislature itself. Therefore, the challenge to the first proviso to Section 3A on the basis of Article 14 is repelled.

(iv) That the second proviso to Section 3A does not withstand the test of rationality and is clearly violative of Article 14 of the Constitution and the guarantee of equality before the law. The same is consequently struck down.

(v) That the second proviso, spelling out the minima for the consolidated tax rate is in no way an integral part of Section 3A. It is plainly and easily severable. Therefore, Section 3A and first proviso thereto can easily stand by themselves and are upheld.

(vi) That the identical vices which attach to the second proviso to Section 3A shall automatically be attracted to the proviso to Sub-section (1) of Section 3B as well. For identical reasons it, therefore, must be held that the proviso to Sub-section (1) of Section 3B is violative of Article 14 of the Constitution and is hereby struck down.

(vii) That the proviso to Sub-section (1) of Section 3B is severable and the former provision can stand by itself independently. Section 3B (1) is consequently upheld.

(viii) That the main provisions of Section 3A and the first proviso thereto do not

constitute any unreasonable restriction upon the petitioners' fundamental right guaranteed to them under Article 19(1)(g) of the Constitution and are consequently valid.

(ix) That the second proviso to Section 3A would not only operate irrationally, but is demonstrably oppressive and expropriatory. It violates Article 19(1)(g) by imposing any unreasonable and irrational restrictions on the fundamental right to carry on occupation, trade or business of cinema exhibition, because of its oppressive nature. It must, therefore, be struck down on this additional ground as well.

(x) For identical reasons given in the context of the second proviso to Section 3A, it has also to be held that the proviso to Sub-section (1) of Section 3B is equally violative of Article 19(1)(g) and is consequently struck down on this additional ground.

(xi) Sections 3A and 3B do not in any way violate or infract the provisions of Part XIII of the Constitution and specifically Articles 301 or 304 thereof. The challenge to the impugned provisions on the basis of Articles 301 and 304 has to be consequently repelled.

96. In the light of the above, all these writ petitions succeed in part. The second proviso to Section 3A and the proviso to Sub-section (1) of Section 3B of the Act are both struck down on the ground of violation of Articles 14 and 19(1)(g) of the Constitution. Consequently, it is directed that the excess entertainment tax recovered from the petitioners by virtue of the aforesaid provisos shall be adjusted against the future payment of entertainment tax due from them. The petitioners will equally be entitled to claim interest on the said excess entertainment tax.

97. It is the admitted position that one of the writ petitioners had prayed for special leave to appeal against the order of this Court in declining to stay the recovery of tax in the present set of cases. Their Lordships of the Supreme Court in *Asoka Chitra Private Limited v. The State of Bihar*--Petition for Special Leave to Appeal (Civil) No. 11811 of 1985, had recorded the following order:

Special Leave Petition is dismissed since it is directed against an interlocutory order refusing stay. But we will direct that if the petitioners pay up the disputed amount of the entertainment tax under protest and if they also succeed in the case, the respondent will then refund the same to the petitioners together with interest at the rate of 12 % per annum. We hope and trust that the writ petition will be heard by the High Court on 27th November, 1985, which is the date fixed by the High Court while refusing stay.

In accordance therewith we direct that interest at the rate of twelve per cent per annum shall be payable on the excess entertainment tax recovered and adjustable accordingly.

98. In view of the partial success of the Writ petitions, the parties are left to bear

their own costs.