

(1976) 02 DEL CK 0002

In the Delhi High Court

Case No : Criminal Appeal No. 141 of 1971

State

APPELLANT

Vs

V.N. Sood and Others

RESPONDENT

Date of Decision : 17-02-1976

Acts Referred:

Citation : (1976) ILR Delhi 842

Hon'ble Judges : S.I. Rangarajan, J; R.N. Aggarwal, J

Bench : Division Bench

Advocate : M.M. Bajaj, S.N. Chopra and G.N. Aggarwal, for the Appellant;

Judgement

S. Rangarajan, J.

(1) This appeal, preferred against the acquittal of the respondents by the learned Judicial Magistrate 1st Class, New Delhi (Shri A. S. Dhugga), raises an interesting question of construction of the U. P. Entertainment and Betting Taxes Act, 1937 (hereinafter called the Act), extended to the Union Territory of Delhi vide Government of India, Ministry of Home Affairs Notification No. 20/2/50-Judl., dated 2nd April, 1950. The facts, namely undisputed as they transpire from the evidence of the prosecution itself, may be briefly noticed.

(2) Shri Bodh Raj (P.W. 3), Entertainment Tax Inspector, Delhi visited, on 15-11-1968 at about 10 P.M., the Lido Restaurant run by the respondents, along with Shri M. M. Bajaj (P-W. 5); this was done as per the instructions of the Entertainment Tax Officer. They stayed in the restaurant till 11.15 P.M. There were two cabaret programmes by lady artistes and the band was played by four or five persons. The minimum charges for dinner and tea, when there were cabaret programmes, were Rs. 10.00 and Rs. 5.00 respectively, per head. Public Witness 3 contacted the then Manager V. N. Sood (who was now said to be away in America) and recorded his statement (mark B). He also took one cash memo (mark C) which showed that the total amount charged was Rs. 70.00 for seven persons plus sales tax; he also took one menu card. At the time of P. W. 3's visit

72 persons were taking dinner and Rs. 10.00 per head were charged from each person as the minimum charge which each of them had to pay. P. W. 3 stated that there was no (other) charge for entry into the restaurant except for the total minimum adjustable towards food. In other words, if it was tea a minimum of Rs. 5.00 was charged; if it was dinner it was Rs. 10.00 per head. If, however, any person consumed food of the value of more than Rs. 5.00 or Rs. 10.00, as the case may be, he would have to pay the excess. Advertisements were made in newspapers announcing the cabaret show etc. during tea time and dinner time. Mark A is the advertisement dated 15-11-1968 which announced the cabaret show commencing from 7 P.M. and at 10 P.M. daily; patrons were requested to take their seats at 6.30 P.M. and 9.30 P.M., respectively. Shri M. M. Bajaj (P. W. 5) had also stated that he was told by the customers that it was within their knowledge that the management had affixed a board near the gate of the entrance regarding the minimum charge being Rs. 10.00 for a dinner- cum- cabaret programme". He also explained the procedure which was that the persons desirous of seeing the cabaret programme at the Lido restaurant occupied a table and placed an order for food and in addition to the food which they consumed they also witnessed the cabaret performance and listened to the band; at the end a bill was presented to the customer and he had to pay according to the bill. M. S- Aggarwal (a partner) of the Lido restaurant was examined u/s 342 Criminal Procedure Code .; he stated in answer to question No. 3 as follows :

"Q.3. That a sum of Rs. 5.00 per head were charged as minimum charges for the evening snack-cum-Cabaret programme and Rs. 10.00 per head for the nightly dinner-cum-cabaret programme. Ans.. The amount of Rs. 5.00 and Rs. 10.00 per head was exclusively for food."

(3) Section 2(3) of the Act defines "entertainment" as including "any exhibition, performance, amusement, game or sport to which persons are admitted for payment". The charging section 3 reads as follows :

"3(1)There shall be levied and paid to the Central Government on all payments for admission to any entertainment, a tax (hereinafter referred to as entertainment tax) at the following rates, namely- * * * * * (2) * * * * * (3) Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any society, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, or for any privilege, right, facility or thing combined with the right of admission to any entertainment, or involving such right of admission without further payment or at a reduced charge, the entertainments tax shall be paid on the amount of the lump sum, but where the Chief Commissioner is of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the admission to an entertainment, or covers admission to an entertainment during any period for which the tax has not been in operation, the

tax shall be charged on such amount as appears to the Chief Commissioner to represent the right of admission to entertainments in respect of which the entertainments tax is payable."

Section 5 provides as follows :

"5.(1) No person liable to pay entertainment tax shall enter or obtain admission to an entertainment without payment of the tax livable u/s 3. (2) Any person who enters or obtains admission to an entertainment in contravention of the provision of sub-section (1) shall on conviction before a Magistrate, be liable to pay a fine not exceeding two hundred rupees and shall in addition be liable to pay the tax which would have been paid by him. (3) If any person liable to pay entertainment tax is admitted to a place of entertainment without payment of the tax livable u/s 3, the proprietor of the entertainment to which such person is admitted shall, on conviction before a Magistrate, be liable in respect of every such contravention to a fine not exceeding Rs. 500.00 ".

(4) It is unfortunate that there has been no representation on behalf of the appellant because neither the applicant nor its counsel was present during the hearing. We have heard Shri S. N. Chopra, learned counsel for the respondent No. 3 at length. The argument for the respondent is that on the facts which have been admitted no one was admitted for payment to witness the entertainment; the persons who came were at liberty to consume food catered at the restaurant up to the value of Rs. 5.00 or Rs. 10.00 as the case may be; charging a minimum of Rs. 5.00 or Rs. 10.00 did not, Therefore, amount to charging anything for admission for the purpose of witnessing the cabaret. Reliance was placed on the opinion of the majority of the Court of Appeal in *J. Lyons & Co. Ltd. v. Fox* 1919 I K.B. 2. In that case concerts of high class character and consisting of vocal and orchestral music were given during and after the service of teas and dinners. The dinner concert continued for one hour after the service of dinner had ceased. No charge was made in any form except for the meals, which were! served both at a fixed price and a la cane, and for which a bill was rendered to the customer before he left the restaurant. It was held by the majority that the payments made by the customers to the restaurant were not payments for admission to entertainment within the meaning of section 1(1) of the Finance (New Duties) Act, 1916 and that the entertainments duty was, Therefore, not chargeable in respect thereof. There were advertisements in the Sunday newspapers as to the musical arrangements for the forthcoming week, including the names of the vocalists engaged for the tea concerts and for the Sunday evening concert in the restaurant. Similar announcements were inserted for the music performance at the Sunday evening concert. For tea served in whawas known as the empire room each paid 2s. 6d. One of the Customs Officer who attended the restaurant was informed that to hear the concert he must have "a concert tea for 2s. 6d."; on Sunday, in order to hear the concert it was necessary to have the dinner at 7s. or 11s. 6d. It is needless to notice the other rates. Darling J. said that the practice of giving musical entertainments at restaurants

was not a new one ; there was support for it from Dryden's "Alexander's Feast". On a construction of the Act he was unable to find any clear imposition of tax. A. T. Lawrence J. thought that even though the customers were admitted to the restaurant where an entertainment was held and he made a payment, it would be straining language to hold that he had paid for admission to an entertainment. Bailhache J. thought that when one paid for the dinner at a restaurant he did not say that he paid for admission to the restaurant any more than that when one pays for a pair of boots bought in a shop, one would say one was paying for admission to the shop. There were powerful dissents by Salter J. and Shearman J. Salter J. thought that the tea or dinner, as the case may be, was purely incidental to the language to hold that he had paid for admission to an entertainment concert, especially in view of the finding of the Magistrate that the persons were paying not merely for the dinner but also for the entertainment which followed the dinner. Shearman J. put it on the ground that people could hear the concert only after getting admission to the concert room and in the case of tea could not gain admission to that room unless 2s. 6d. were paid. The finding of the Magistrate was that those persons had paid for admission and that there was ample evidence on which it could be so found.

(5) Not only the above case but also some other cases were discussed by Finlay J. in *Attorney General v. London Cashino Ltd.* 1937 (3) A.E.R. 858. That was a case which arose not out of a prosecution but under the Finance (New Duties) Act, 1916. The information laid by the Attorney General prayed that it might be declared (1) that certain revues were entertainments and that the minimum charges made by and/or paid to the defendant company were payments made for admission to such entertainments; and (2) that the defendant company was indebted in respect of tax at the rate specified in the concerned Finance Acts. The premises concerned had been previously used as a theatre. They were adopted and used by the respondents but the general aspect of a theatre was retained; the stage was enlarged; the seats in the stalls and dress circle were replaced by tables and chairs, and staircases were built from the dress circle to the stage. Food and drink were supplied, as in an ordinary restaurant, and patrons were able to dance on the stage. There was, in addition, an elaborate revue performed on the stage, which was fitted and adapted for the production of such a revue. Patrons were allotted tables as in an ordinary restaurant there was a fixed menu each night, but dishes could be ordered a la carte. A minimum charge of 15s. 6d. was made, payment being made before leaving. It was held, distinguishing *Lyons*, that the entertainment was dutiable. In coming to this conclusion Finlay J. expressed himself as follows :

"Now, on those facts, I cannot entertain any doubt that the people who pay 15s. 6d.-they often pay more, but I will take 15s. 6d. for convenience-do pay it, partly, at all events, as Mr. Birkett has said, because they can have a good dinner in pleasant surroundings. But that is not all. They pay it, and to a substantial extent pay it, because they will, in addition to their dinner, be able to see an extremely good and interesting and lively entertainment. People who go out:

constantly dine at a restaurant and then go on to a show, and the happiness of Mr. Stone's conception resided in this, that he had really run the two things into one. Whatever the result may be, I cannot bring myself to doubt that the normal person paying 15s. 6d. pays not only for the dinner, not only for the right to dance to a band, but to a substantial extent also pays it because he desires to see what is a good and elaborate and expensively produced show".

(6) Though Lyons was distinguished on the facts nonetheless some observations made by Bailhache, J. and Lawrence J. were set out. The former had said that it was impossible to hold that the sum paid for the dinner was a payment for admission to entertainment within the meaning of that Act; Lawrence J. observed that the Act was aimed in the case where people paid for admission in an ordinary way. It would not come under the Act, according to those Judges, if "the dinner was the thing, and that music and songs were merely incidental". After referring to some other cases Finlay J. said that payment made in the case before him was payment for admission to an entertainment though it would be entirely wrong to say that the whole of the payment was payment for admission to entertainment, which it manifestly was not. Judgment was, Therefore, entered for the Crown.

(7) In the instant case the complaint made in the Grounds of Appeal is that the above-mentioned judgment of the English Court [reported in 1937 (3) A.E.R. 8581 was not considered by the learned Magistrate while acquitting the respondents.

(8) We have for that reason discussed Attorney General v. London Casino Ltd. in some detail.

(9) We shall now turn to another English case, namely Attorney General v. McLeod 1918 I K. B. 13 where the question for consideration was whether the cost of the music at the concert should be regarded as a part separate and distinct from the dinner or not. There was a lump payment of a guinea which was held to have been paid in the expectation that it would secure admission to the concert; the holding was that if he did pay to secure such an admission entertainment duty was payable. In rendering the judgment for the Crown Roche J. was satisfied that the dinner was the main part of the proceedings and the concert was an essential though separate part. It was the function of the Commissioners (who in fact were the concerned authority under the enactment) and not of the court to determine what part of the lump sum represented payment for other privileges, rights or purposes and what part represented the right of admission to the concert. Roche J. observed "I think that right of admission to the concert has to be regarded and is paid for, and that whether any individual steward avails himself of his right is not this purpose material".

(10) In Attorney General v. Swan 1922 1 K.B. 682 the question whether entertainment duty was livable arose in different circumstances. A cricket club had a playing ground, vested in trustees for the club, on which matches were

played. The public was admitted on payment. Members paid an annual subscription which gave them, among other privileges, that of admission as spectators. The matches were admitted to be "entertainments" and the Commissioners had found that since a portion of the subscriptions was paid for admission to the matches, that portion was held liable to the entertainments duty imposed by the concerned provisions of the Finance (New Duties) Act, 1916. It was held that both the members might be joint owners "of the club property and it was still a question of fact whether payment of subscriptions or any part thereof was made for the purpose of securing "admissions to any entertainments". The decision was rendered by Roche J. who accepted the contention of the Attorney General that if in fact people paid a sum of money for entertainment then entertainment duty was payable. The payments were made in the form of subscriptions to the club. A similar question arose in *Attorney General v. Arts Theatre of London Ltd.* 1913 1 K.B. 439 where Finlay J. had held that a portion of the annual subscriptions was paid in a lump both by the full members and associate members in order to entitle them to join the privileged class of persons who alone had the right, upon making a further payment, to be admitted to the entertainments in the theatre, and that that portion of the annual subscriptions was chargeable with entertainments duty. An appeal against the said decision was dismissed by the Court of Appeal. Lord Hanworth M. R. referred to the club having been founded for the purpose of having a private theatre outside and the privilege of obtaining a ticket exclusively belonging to the associate and full members. Lawrence L. J. referred to the duty being chargeable on the price paid by each member for the right to attend any specific performance given at the club. Romer L. J. explained that the price paid for admission to entertainment may consist of several sums of money paid at different times and at different places and that each one was payment for admission or for "the right of admission; when those payments were added together they constituted the payment for admission or right of admission.

(11) In *Attorney General v. Southport Corporation* (1933) A.E.R. Rep 971 the Court of Appeal considered the question whether a bathing pool was a place of entertainment while holding that it was not since there was no organized entertainment (no question of any band or anything of that sort). Lord Hanworth M. R. pointed out that the questions of special or gala occasions are different for which the entertainment tax could be attracted and was being readily paid. Finlay J., from whose decision the above appeal had been filed, had referred to McLeod and Lyons among other cases. Reference was also made by Finlay J. to *Attorney General v. Valentia* 1942 41 T.L.R. 78 that entertainment tax would be attracted where there was organized entertainment or more highly organized games.

(12) There was still further reference to *Cordiner v. Stockham* 1920 1 K. B. 104 where the facts were somewhat peculiar. An inspector of the Brighton police force who was also appointed to look after entertainments duly visited the palace Pier Band Hall, a structure on the pier. He went into the building and took a seat for which he paid 2 d. and received a ticket. The bandstand was in the centre and

the seats were in series fixed together and screwed to the floor; they were so arranged that all the persons occupying them faced the band. The sides were glass fold panels which were all connected and folded up concertine-like. The central eastern side was open when he entered and shortly afterwards the folding glass panels of the side were drawn and curtains were drawn all round the building so that it would be in utter darkness from the outside. When the building was closed in this way it became a closed building and was for all practical purposes a closed building with a sitting audience. There was no convenience whatever for persons to stand within the band hall, and if they did so they would cause obstruction to the gangways; if the public stood in the gangways they were required to leave. A programme of music was gone through by the band. The structure had a zinc proof and the chairs under it were fixed tip-up chairs. There were hundreds of un-fixed chairs on other parts of the pier, the majority being in the vicinity of the bandstand. The unfixed chairs were marked "This chair must not moved to any other part of the pier". A person occupying a chair on any part of the pier could move to another part of the pier and sat in a chair where he could hear the band and no further payment was required. There were no free seats under the structure nor outside in the immediate vicinity of the band- stand. At all times the seats under the structure could be used by the public on payment of 2 d. It not being disputed in that case that if there had been "payment for admission" to the place of entertainment it was subject to entertainments duty, an offence under the Finance (New Duties) Act, 1916 was committed and there was a conviction by the Justices of the appellant in the above circumstances. The Earl of Reading C. J., with whom Darling J. and Bray J. concurred while dismissing the appeal, pointed out that he could well understand the difficulty in distinguishing between the case of the person who was occupying the chair outside the stand and who nevertheless was entitled to admission within the stand but was concerned only with 2 d. and taking a chair in the roofed structure where the band was playing. The judgment was rested on the ground that the payment included-and this was considered quite sufficient for the purpose- a payment for admission.

(13) Shri S. N. Chopra has drawn our attention to Calico Mills Ltd. Vs. State of Madhya Pradesh and Others, where the facts, briefly, were that Rs. 2 were charged for admission inside a dome, which was visible to those even outside where there was "a display by mannequins who used to wear and show off series, costumes etc. manufactured by Calico Mills. A token on payment of Rs. 2 per head was issued to those wishing to go inside the dome where space was limited which was later on adjusted towards the purchases of cloth made by persons visiting the dome. It was held by Dixit C.J" speaking for himself and on behalf of K. L. Pandey J., that the display by mannequins was not organized entertainment and Therefore not an "entertainment" within the meaning of C.P. and Berar Entertainments Duty Act (30 of 1936). We wonder what assistance can be derived by the respondents from the said decision. It is obvious that those who did not wish to purchase cloth might not pay Rs. 2 for the token. It was

pointed out by Dikshit C.J. that the position of such a visit inside the dome was not different from a person purchasing cloth from inside a shop dome and that one did not speak of such a person as one paying for admission to the shop. It might be pointed out, that some persons were interested more in the feature of display of fabrics by mannequins than in the purchase of any cloth did not make any purchase and did not cash, in the form of cloth, the value of the token, or it might be that those making purchases of high value were indifferent to the credit allowable to them on the strength of a token. But because of such vagaries of some visitors, one could not run away from the facts and hold that the amount paid for the token was a payment for admission to an entertainment within the meaning of the Act. This case is hardly of any assistance to the respondents where they charged a minimum amount for admission to tea or dinner, as the case may be, at the two sessions held each day when the cabaret performance was scheduled to go on.

(14) It is not disputed before us, nor could it be disputed, that the cabaret show was entertainment. The only further question is whether any payment for admission to such entertainment had been demanded and taken. This is not the kind of case where, as in *Lyons*, no charge was made in any form except for the meals which was served both at various prices and a la carte and in respect of which a bill was rendered to the customer before he left; there was no question there of a minimum charge having been fixed as in the present case. What else was the idea behind the requirement of any patron having to pay a minimum of Rs. 5 or Rs. 10 for tea or dinner as the case may be ? If no such minimum had been insisted upon them it would be difficult to say that entertainment duty was leviable. The Lido Restaurant was doubtless making a profit on every item of food sold. By insisting on the minimum the gross sales would go up and the profit also would go up correspondingly. The patrons were asked in the advertisement in newspapers to be in their seats at least half an hour before the concerned cabaret show commenced, there being two shows of short duration during the earlier and later part of the tea and dinner. If a person was there even for a very short duration for either tea or dinner during the prescribed hours he would have to pay the minimum charges. It was one way, Therefore, of compelling people to stay on thus giving them the maximum inducement and opportunity to consume food of even greater value than covered by the minimum charged. If a patron witnessing the earlier portion of the cabaret felt like staying for the later cabaret programme during the concerned session he might be consuming more food than of the minimum and the greater would be the profit to the restaurant. In these circumstances it seems to us, that the Lido Restaurant was insisting on the payment, though indirectly, for the entertainment; this was not merely for the dinner. The fact that the patron was at liberty to consume food of the value of the minimum, whether it was tea or dinner, could not nullify the impact of imposition of minimum charges on those who may not consume food of that value but for such insistence. What is then of relevance to the question we are discussing is not the patrons being able to

consume food or beverage of the value of the minimum but their being required to do so on pain of their losing the balance value if they do not. In this view even if every one of the patrons at every one of these shows consumed food up to the minimum value that would not lead to the inference that the charges were only for the dinner and not for the entertainment.

(15) The above aspect has been missed by the learned Magistrate. It was not disputed before us that if any entertainment duty was payable in law it would attract the penal consequences of the Act and a prosecution could successfully lie even in a case where it would be for the authorities empowered under the Act to separate what would be the cost of the dinner and the cost of entertainment and impose only such duty as would be properly livable for the entertainment part of it. This would be, as was pointed out in the English cases referred to above,. a matter for the authority concerned to separate and fix and not for the Court.

(16) In the result we allow this appeal, set aside the order of acquittal passed by the learned Magistrate and impose a fine on the five partners of the Lido Restaurant (respondents 2 to 6) in the sum of Rs. 40 (Rupees Forty only) each which would be paid in addition to the tax livable u/s 3 of the Act, V. N. Sood the first respondent having been deleted from the array of parties. The appeal is allowed accordingly.