S.S.Kilaje

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2664 OF 2002
WITH
INTERIM APPLICATION NO. 579 OF 2021
IN
WRIT PETITION NO. 2664 OF 2002

1. The Royal Western India Turf Club Ltd.
a Company limited by guarantee and deemed
to be incorporated under the Companies Act,
1956 having its Registered Office at Race
Course, Mahalaxmi, Mumbai 400 034.

2. N.H.S. Mani of Mumbai Indian
Inhabitant, the Administrative Officer of
The Royal Western India Turf Club Ltd. having
his office at Race Course, Mahalaxmi,
Mumbai 400 034. .. Petitioners

Versus

1. The State of Maharashtra

2. The Secretary, Revenue and Forest
Department, State of Maharashtra having
his office at Mantralaya, Mumbai 400 032.

3. Mr. Madhav Kale, Desk Officer, Revenue and
Forests Department, Government of Maharashtra
having his office at Mantralaya, Mumbai 400 032.

4. The Collector of Mumbai having his office at
Old Custom House, Shahid Bhagat Singh Road,
Fort, Mumbai 400 001.

5. The Collector of Pune having his office at
Camp 6, Arjun Marg, Pune.

6. The Administrator and Commissioner, Konkan
Division Mumbai, having his office at Old
Secretariat Building (Annexe) First Floor,
Mumbai 400 032. .. Respondents

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- Mr. Shyam Mehta, Senior Advocate a/w. Mr. Vivek Shiralkar and Ms. Yashoda Desai i/by Shiralkar & Co. for Petitioners / Applicants
- Mr. Himanshu B. Takke, AGP for Respondents

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CORAM : K. R. SHRIRAM &
MILIND N. JADHAV, JJ.

DATE : 1st JULY, 2022

JUDGMENT (PER : K.R. SHRIRAM, J.)

1. Petitioner No.1 (hereinafter referred to as "**Petitioner**") conducts horse races in Mumbai and Pune under the license granted to it by respondent No.1, State of Maharashtra, under the Bombay Race Course Licensing Act, 1912.

2. Petitioner is a members club only. Petitioner, however, permits members as well as non-members, i.e., members of general public, to attend races held at its race courses on payment of entrance / admission fees. On such entrance / admission fees petitioner would collect entertainment duty and pay the same to respondents under the provisions of the Bombay Entertainments Duty Act, 1923 (hereinafter referred to as "**the said Act**"). By year 2002, when the petition came to be filed, and we would say much earlier, mobile phone became a common means of communication and many people started carrying and using mobile phones. For professionals and businessmen, it became indespensable and one may say an extension of their office.

For several years, petitioner did not allow the use of mobile phones at race course during race days and "Off course racing". But due to repeated requests from members and those non-members who were attending the races, petitioner decided to permit use of mobile phones at the race course. It was represented to petitioner that if use of mobile phones was permitted at the race courses, more people would be able to attend the races. This resulted in an increase in the collection of entertainment duty and the State stood to benefit. To restrict the nuisance being caused due to usage of mobile phone during the races, petitioner decided to levy a charge of Rs.1,000/-, later increased to Rs.1,200/-, for those who wanted to take their mobile phones inside the course during the races or for off-course racing. Those who wanted to take their mobile phone had to pay this charge, in addition to payment of entrance / admission fees. Those who did not have a mobile phone or who did not want to carry mobile phone did not have to pay any such charge. They could enter by paying only the entrance / admission fee. Therefore, as submitted by Mr. Mehta, it was not mandatory or a condition precedent for anyone to enter the race course or off course racing on race days.

3. Sometime in February 2001, there were enquiries made to petitioner by various quarters of the State on use of mobile phones during the races, primarily to investigate illegal betting which would

result in loss of revenue to the State. Petitioner replied to the notices received. That was a separate issue.

4. On or about 02.01.2002, petitioner received a copy of a Government Resolution being G.R.No. BET-2001/P.K.23/T-1 dated 27.12.2001 informing them that the State has decided to levy entertainment duty on the use of the mobile phones at the race courses and off-course betting centers @ 50% under section 3(1)(a) and surcharge under Section 3 AA on all sums charged for the use of mobile phones, with effect from 21.01.2001. Petitioner was directed to pay the amounts to Collector of Mumbai (respondent No. 4 / 5 herein). Despite petitioner's reply showing cause as to why such entertainment duty on mobile phone charges should not be levied, petitioner received a communication dated 22.02.2002 from respondent No.4 - Collector of Mumbai demanding an aggregate sum of Rs.1,31,98,902/- as entertainment tax and surcharge on use of mobile phones for the period 21.01.2001 to 31.01.2002. Petitioner filed a reply to the show cause / demand notice as well as attended a personal hearing before respondent No.4. Respondent No. 4 passed orders dated 02.03.2002 and 22.03.2002 rejecting petitioner's submissions and calling upon petitioner to pay a total sum of Rs.1,31,98,902/- towards entertainment tax and surcharge under Section 3(1)(a) of the said act.

5. Aggrieved by this order, petitioner filed an appeal under Section 10(A) of the said Act before the Commissioner of Konkan Division who is respondent No.6. The appeal came to be dismissed by an order dated 19.09.2002 which order is primarily impugned in this petition. In this order, the basis on which government has decided to levy and collect entertainment tax on mobile phone charges collected by petitioner from patrons of races who wanted to carry mobile phone inside the racecourse during the races, is that the Government of Maharashtra has issued a G.R. dated 27.12.2001 wherein it was decided that the charges collected for carrying a mobile phone into the race course during a race are to be treated as payment for admission as defined in Section 2 (b)(iv) of the said Act and it was decided to levy entertainment duty in accordance with the provisions of section 3(i)(a) of the Act. The relevant portion of the impugned order reads as under :

> *"The Government of Maharashtra in Revenue and Forests Departments have issued a Resolution dated 27.12.2001 wherein it was decided that the Mobile Phone charges in race days are to be treated a payment for admission as defined in Section 2(b)(iv) of the said Act and further it is decided to levy Entertainment Duty in accordance with the provisions of section 3(1)(a) of the said Act. Government of Maharashtra has directed the Collector, Mumbai City, to recover Entertainment Duty & Surcharge as the amount collected by the appellants with effect from 21st January, 2001. Considering the position narrated above, the respondent have passed the impugned order."*

6. When subsequent demands were made, petitioner came to this court and this court was pleased to issue rule on 05.12.2002 and as an

interim measure granted time to petitioner to deposit the arrears of entertainment duty subject to which no coercive steps were to be taken. Pursuant thereto, petitioner has deposited entertainment duty demanded by respondents.

Mr. Mehta submitted that if petitioner succeeds in this petition, the amount deposited should be refunded with interest. Mr. Mehta says for the period after 31st January 2002, petitioner will not seek refund as the entertainment duty had been collected from the patrons and petitioner won't be able to return the amount to them. In fairness, Mr. Mehta says that would be unjust enrichment. But for the period 21st January 2001 to 31st January 2002 as the amount had not been collected from the patrons and petitioner had paid from its pocket refund will be claimed.

7. Mr. Mehta for petitioner primarily raises the following as main grounds of challenge:

(i) Carrying of mobile phones during races does not amount to "*entertainment*" (Section 2(a) of the said Act) nor is "*connected with an entertainment*" (Section 2(b) (iv) of the said Act), for the purposes of the said Act. The charges levied do not fulfill the definitional parameters of "payment for admission"(Section 2(b) of the said Act). Hence, the charging section, Section 3 of the said Act, which levies a duty on

payments for admission is not attracted in the present case;

(ii) Besides the aforesaid proposition, carrying of mobile phones during the races has no connection *per se* with horse racing, which is the "entertainment" in question;

(iii) Carrying of mobile phones to the horse race upon payment of the charges is not mandatory and members are permitted to attend the horse race, i.e., the entertainment, without their mobile phones. Even for this reason, the levy is illegal and *ultra vires* the Act;

(iv) Levy of duty by way of a Government Resolution violates Article 265 of the Constitution of India since a Government Resolution does not fulfill the test of "authority of law" under the constitutional provision. Thus, the levy falls foul of Articles 265 read with Article 14 of the Constitution of India;

(v) In so far as the demand for period between 2001-2002, the Respondents have sought to levy entertainment duty under the impugned Government Resolution dated 27th December 2001 for the period commencing prior to the date of the said Government Resolution, i.e., the period commencing 21st

January 2001. This tantamounts to retrospective levy, which is impermissible under the Constitution absent express authority of law.

The direct effect of such retrospective action is that petitioner was not in a position to charge and recover entertainment duty on mobile phone charges from its members, i.e., the actual persons sought to be taxed, and this goes against the grain of indirect taxation and is manifestly arbitrary, unfair and unreasonable, thereby contrary to Article 14 of the Constitution of India.

8. Mr. Takke basically reiterated the stand taken by the State in the impugned orders. He also submitted that betting at the race course certainly is an entertainment because clause (a) of sub-section (1) in Section 3 of the said Act itself provides for rate of entertainment duty for admission to a race course licensed under the Bombay Race Courses Licensing Act, 1912. Therefore, Mr. Takke submitted that there cannot be any doubt on the race course being a place of entertainment or connected with entertainment.

Mr. Takke also submitted that since it was a case where anyone carrying a mobile phone has to pay a separate charge, such payment should be treated as one which a person is required to make as a condition of attending the entertainment. According to Mr. Takke,

this condition is satisfied in the case of persons who wish to carry their mobile phone inside the race course. If they want to attend the races carrying mobile phone with them, they are obliged to make payment for the entry of mobile phone which payment is in addition to the payment made by them for their entry. Thus, all conditions of sub-clause (iv) of clause (b) of Section 2 of the said Act are satisfied. Hence there is no merit in the petition.

9. The questions that arise for determination in this writ petition are as under :

> *(a) Whether the payment made by a person carrying a mobile phone inside the race course can be called as a payment connected with an entertainment?*
>
> *(b) Whether such a payment was a condition of attending or continuing to attend the entertainment?*
>
> *(c) Whether levy of entertainment duty under G.R. dated 27.12.2001 would be violative of Article 265 of Constitution of India?*
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> *(d) If answer to (c) is negative, whether respondents could levy entertainment duty at all under the said G.R. dated 27.12.2001 for the period commencing prior to the date of the G.R., i.e., from 21.01.2001?*
>
> *(e) Whether entertainment tax is payable on such amount by petitioner?*

10. Section 3(1) (before Mah. 13 of 2011 amendment) reads as under :

> *"3. Duty on payments for admission to entertainment*

[(1) There shall be levied and paid to the State Government [on all payments for admission] to any entertainment ["except in the case of video games, exhibition by means of any type of antenna or cable television, [or Internet Protocol Television] or exhibition by means of Direct-to-Home (DTH) Broadcasting service, bowling alley, Go-carting, dance bar, [permitroom or beer bar with live orchestra, pub] discotheque, amusement park, water sports activity, pool game]; [or tourist bus with video facility] a duty (hereinafter referred to as "entertainments duty" at the following rates, namely:- (emphasis supplied)

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Section (2)(a) and (b)(iv) reads as under :

"2(a). "entertainment" includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment, [or, in the case of television exhibition with the aid of any type of antenna with a cable network attached to it or cable television, [or Direct to Home (DTH) Broadcasting Service] for which persons are required to make payment by way of contribution or subscription or installation and connection charges or any other charges collected in any manner whatsoever] [but does not include magic show) [and temporary amusement including games and rides].

2 (b). "Payment for admission" [in relation to the levy of entertainment duty] includes,

(iv) any payment, by whatever name called for any purpose whatsoever, connected with an entertainment, which a person is required to make, in any form as a condition of attending, or continuing to attend the entertainment, either in addition to the payment, if any, for admission to the entertainment or without any such payment for admissions. (emphasis supplied)

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11. Therefore, Section 3 provides that there shall be levied and paid to the state government on all payments for admission to any entertainment, duty at the rate prescribed therein. Therefore what is required to be paid is for admission to any entertainment. Mr. Mehta

did not dispute that attending race courses would be an entertainment. But what he disputed was taking mobile phone inside the race course was not connected with the entertainment and making such a payment was not a condition to attend or continue to attend the entertainment because those who did not want to take the phone could have left it at the gate or left it in the car and therefore it cannot be a payment for admission. Mr. Mehta said it is not a payment made by everyone whether they carry a mobile phone or not. Unless such a payment is uniformly and mandatorily chargeable from all who want to have entry into the races (with or without a mobile phone), it cannot be a payment for admission to any entertainment.

Sub-clause (iv) of clause (b) of Section 2 defines payment for admission in relation to the levy of entertainment duty would include any payment, by whatever name called for any purpose whatsoever, connected with an entertainment, which a person is required to make, as a condition of attending or continuing to attend the entertainment. All the ingredients required in the condition have to be met. Therefore, the payment should be a necessary condition to be complied with for gaining entry into the place of entertainment. The payment made for any other purpose connected with such entertainment will be taxable under the said Act only if the person concerned makes such payment as a condition for entry. In the case at hand, such a charge for mobile phones is not uniformly charged from

all who wanted to visit the race course, such extra-charge is taken only from those who wanted to carry mobile phone into the races. The patrons attending the entertainment or continuing to attend the entertainment for which a person is required to make the payment can decide to go inside without paying the mobile phone charges. Therefore, the patrons, if they do not make the payment, can still go to see the races but if they wanted to take a mobile phone with them they have to pay a certain amount.

12. Moreover, if we examine whether it is connected with an entertainment, once again our answer is negative. We say this because, at the first instance, it is difficult to comprehend as to what entertainment a person would get by taking his mobile phone into the race course. Entertainment is defined by section 2(a) and includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment. Payment for admission is defined in section 2(b) to include various payments such as payment for seats or other accommodation in a place of entertainment. Sub-clause (iv) of section 2(b) provides any payment for any purpose whatsoever connected with an entertainment, which a person is required to make as a condition of attending, or continuing to attend the entertainment. On the facts of the present case, it is difficult to comprehend how a person who pays a charge to take his mobile phone into the race

course is paying for being admitted to place where entertainment is being held. The term 'entertainment' as seen above includes any exhibition, performance, amusement, game or sport to which persons are admitted on payment. None of these elements exist when a person takes his mobile phone into the race course. There is no exhibition or amusement or game or sport enjoyed by a person taking his mobile phone into the race course. The amount charged by petitioner from every person is not for admission to the race course itself but for carrying the mobile phone during the races. Such a payment cannot be termed as payment for any purposes whatsoever "connected with an entertainment" which a person is required to make as a condition of attending or continuing to attend the entertainment. If petitioner had levied a charge from every person who entered a race course, irrespective of whether they were carrying a mobile phone or not, then perhaps respondents could have submitted that sub-clause (iv) of clause (b) of Section 2 would apply.

On the facts of the case, it is obvious that it is not compulsory for anyone wanting to enter in the race course to carry the mobile phone inside. If he does not carry the mobile phone, he does not have to pay. If he wants to carry the mobile phone, he will have to pay. It has nothing to do with entertainment for which he is said to be paying.

13. Mr. Mehta submitted, in fairness, that on identical facts in case of

Delhi Race Club Ltd. V/s. Government of NCT of Delhi and Ors.[1], Delhi High Court has taken a view that entertainment duty was payable. We respectfully disagree with the view expressed by the Delhi High Court.

14. In our view payment for admission has to be read as a whole composite definition and each part of it has to be satisfied to levy the charge of entertainment tax, and therefore, any payment for any purpose whatsoever connected with an entertainment which a person is required to make, though are terms of wider connotation, are bound by the words following in the same clause, i.e., "as a condition of attending or continuing to attend the entertainment in addition to the payment, if any, for admission to the entertainment." The charge paid for taking the mobile phone into the races, additionally paid by the race patron is in addition to the entry fee or admission charges to enter the races. It cannot be said to be a condition of attending or continuing to attend the entertainment because such a condition is not uniformly applicable to all the persons entering the race course. In our view, unless such a condition is uniformly applicable to all persons entering the race course and is payable mandatorily and paid by all, irrespective of whether he carried a mobile phone or not, the same cannot be said to be "payment for admission" as defined in the said

1 2012 SCC Online De 768

Act. Therefore, to the extent of the amounts paid for carrying the mobile phone into the races, it cannot be made subject to the payment of entertainment tax at the rates prescribed under the said Act.

15. We find support for this view in the judgment of the Hon'ble ***Gujarat High Court in Ramanlal B. Jariwala v/s District Magistrate, Surat and another***[2] and of the Madras High Court in ***PVR Ltd. v/s Commercial Tax Officer***[3], both relied upon by Mr. Mehta.

Paragraph 4 of *Ramanlal B. Jariwala* (*Supra*) reads as under:-

> "*We have heard the learned Advocates of the parties on this question. In our view, the submission made by the petitioner is well justified and has got to be accepted. The facts stated in the petition are not controverted by the respondents by filing any affidavit-in-reply. We must, therefore, proceed on the uncontroversial factual position, that the petitioner's cinema theatre which would be having auditorium and where cinema pictures-are exhibited is situated at a height of 35' from the ground floor and that auditorium can be approached after crossing the foyer on the first floor and thereafter crossing glass partition as mentioned in the petition. So far as lift is concerned, the petitioner on the ground floor provides the facility and any party who wants to go on the first floor can approach the foyer and utilise the lift on payment of ten paise per upward trip. The short question is, whether such payment, which the petitioner collects from the cinegoer, can be brought within the network of the Act. The answer to this question depends upon true construction of the relevant provisions of the Act. Section 3(1)of the Act is relevant charging section for our present purpose. It provides that "there shall be levied and paid to the State Government on every payment for admission to an entertainment, other than the payment for admission referred to in clause (b), a tax, at the following rates....."We are not concerned with the rates of tax. Clause (b) also is not relevant for our present purpose as it refers to drive-in-cinema. The petitioner's cinema is not drive-in-cinema. From Section 3(1), it becomes obvious that for attracting charge to tax, payment should be levied by the entertainer viz. cinema owner for admission to entertainment. It is also obvious that tax cannot be levied for payment for admission to any other facility which*

2 (1990) SCC Online Guj. 135

3 (2020) SCC Online Mad.27257

does not amount to entertainment, as such type of levy which is not levied for the purpose of entertainment would become ultra vires the powers of the State legislature, as seen from Entry 62 of Part 11 of Seventh Schedule to the Constitution. The said Entry provides that State legislature is competent to levy taxes on luxuries, including taxes on entertainments, amusements, betting and gambling. Consequent tax must be on payment received for permitting benefit of entertainment. It must, therefore, be found out as to whether payment of ten paise per passenger for use of lift charged by the petitioner for going to the first floor foyer is payment for admission to entertainment. On first principle, it is difficult to comprehend as to what entertainment a person would get by traveling in the lift for approaching given destination. But even that apart, when we turn to the relevant definitions in the Act, we find that admission to entertainment is defined by Section 2(a) to include admission to any place in which the entertainment is held. 'Entertainment' is defined by Section 2(e) to include any exhibition, performance, amusement, game or sport to which persons are admitted for payment. 'Payment for admission' is defined by Section 2(g) to include various payments such as payment for seats or other accommodation in a place of entertainment. Especially, clause (v) of Section 2(g) is worth noting in this connection. It provides that any payment for any purpose whatsoever connected with an entertainment which a person is required to make as a condition of attending or continuing to attend the entertainment in addition to the payment, if any, for admission to the entertainment. On the facts of the present case, it is difficult to comprehend as to how a person who pays ten paise per upward trip in lift for approaching the cine auditorium on the first floor is paying for being admitted to a place where entertainment is held. The term 'entertainment' as seen above includes any exhibition, performance, amusement, game or sport to which persons are admitted for payment. None of these elements exists when a person travels in a lift. There is no exhibition, amusement or game or sport, enjoyed by a person traveling in lift. What is relevant is payment for being admitted to place of entertainment. Ten paise charged by the petitioner from cinegoers are not for admission to auditorium but they are charged for admission to lift. Section 2(g)(v) cannot be of any avail to the Revenue for the simple reason that the payment is not for any purpose whatsoever connected with an entertainment which a person is required to make as a condition of attending or continuing to attend the entertainment. If the petitioner had provided that whether a person travels by lift or not, he will have to pay ten paise more for being admitted to the picture show in the auditorium then the respondent could have submitted with emphasis that Section 2(g)(v) would apply. But on the facts of the present case, it is obvious that it is not compulsory for any one to utilise the lift facility given by the petitioner at the cinema theatre. If a cinegoer climbs up to the first floor then he need not pay ten

paise. But if he wants to avail of the extra facility of lift, he will have to pay ten paise more. It has nothing to do with entertainment for which he is said to be paying. Thus, on the scheme of the relevant provisions of the Act, conclusion is inescapable that charging of ten paise per passenger who is given facility of using lift situated in the cinema theatre is not any payment received for admission to any entertainment. It is easy to visualise that in a cinema theatre especially double decker cinema, lift facility may be offered for convenience of cinegoers to go to upper floor where cinema auditoriums are situated, on upper floors, there may be book stalls, restaurants, ice-cream parlours and without entering the auditorium, person may like to utilise any of these other services or facilities. He may go to purchase books on the first floor or second floor. If he chooses to use the lift, he has to pay for it. But that may have nothing to do with the picture show which may be exhibited in the auditorium. He may' go only for snacks on the first floor or second floor or to have only a bowl of ice-cream there. Similarly, in many theatres, parking facilities are provided wherein cinegoers can conveniently park their scooters and/or cars on payment. Such payment cannot be said to be payment made for admission to entertainment unless such payments are made compulsory for every cinegoer before he can enter the auditorium. In the absence of such situation therefore, it cannot be said that mere collecting of ten paise for getting extra facility of lift if required by any cinegoer would by itself bring this levy within the fold of the Act. The respondents were, therefore, patently in error in insisting that the petitioner should pay entertainment tax on the lift charges. collected by him, from the cinegoers who go to his cinema theatre. The learned Assistant Government Pleader could not show us how such type of levy can be sustained under the provisions of the Act. Consequently, it must be held that insistence of the respondents in calling upon the petitioner to pay entertainment tax on the lift charges on the facts of this case is totally illegal and without jurisdiction. The reasoning given in Annexure F for demanding entertainment tax on the basis of Section 2(g)(v) and 3(1)(k) is also patently illegal and ultra vires as these provisions do not cover such type of levy as seen earlier." (emphasis supplied)

Paragraph 23 and 24 of the *PVR Ltd* (*Supra*) reads as under:-

"*23.* In the case before us, the test for levy of Entertainment Tax *is the entry into the entertainment and payment for that purpose. Entertainment Tax was a State subject and before the said levy of Entertainment Tax being subsumed under the GST Laws enforced in the country with effect from 1 July 2017, was the payment for admission, which as per the definition given in the Tamil Nadu Entertainment Tax Act, 1939, as amended from time to time in Section 3(7)(c) of the Act is that the payment should be necessary condition to be complied with for gaining*

entry into the place for entertainment. The payment made for any other purpose connected with such entertainment will be taxable under the said Act, only if the person concerned is required to make such payment as a condition for entry. Obviously, the online booking charges or internet handling charges, as the name given by some other cinema theater owners is not a mandatory payment for gaining entry into the cinema hall. It is an additional payment for extra or other facility provided by the Cinema hall owner. With the advent of internet, much after the said enactment of 1939, even though amended from time to time, the said Act could not have provided for levy of tax on the service of internet provided by the cinema owner. The same could be a subject matter of levy of Service Tax by the Parliament in the erstwhile law regime, prior to GST, with the Local Administration or Municipal Administration, is leviable only on cost of ticket which entities a person to gain entry into the cinema hall or theater.

*24. Therefore, there is considerable force in the submission made by Mr.Easwar, learned Senior counsel appearing on behalf of the Assessee. Unless such internet charges or online booking charges are uniformly charged from all the customers for having entry into the cinema hall, such extra service charges taken by the cinema owner to the extent of Rs.30/- per ticket could not be made subject matter of Entertainment Tax. Even though such payment along with the cost of ticket at the rate of Rs.190.78 in particular illustration, was part of the overall cost to the customer. The test is attending the entertainment or continuing to attend the entertainment. The mandatory requirement to fall within Section 3(7)(c) of the Act is that a person is required to make, as a condition to attend or continue to attend the entertainment. There is no doubt that booking of a cinema ticket on online basis is not a mandatory condition for all cinema goers, and this is not only optional but altogether a separate facility provided to all on the Web portal of the cinema hall owners. Therefore, the words in the clause 3(7)(c) of the Act, "**any payment for any purpose whatsoever connected with an entertainment**" , in addition to the payment for any for admission to entertainment in clause "(c)", will have to be read in conjunction and not without the context of the words, "**which a person is required (mandatorily) to make as a condition of attending or continuing to attend the entertainment"** . These words are not superfluous or without meaning and in fact, they provide the bedrock condition for applying Section 3(7)(c) of the Act. Unless such a conditional payment for any purpose is integrally connected with the "entertainment" is uniformly and mandatorily chargeable from all, who want to have entry in the place of cinema hall, in our opinion, Section 3(7)(c) cannot cover such payment made by the customer, for availing the facility of online booking of tickets."* (emphasis supplied)

16. Thus on the scheme of the relevant provisions of the Act, conclusion can be arrived that charging of the amount per person who carried the mobile phone into the race course is not payment received for admission to any entertainment. We find support for this view also in ***Markand Saroop Aggarwal & Ors. Vs. M.M. Bajaj & Anr.***[4]

17. On the submissions of petitioner that levy of duty by a G.R. is violative of Article 265 of the Constitution of India, it is settled law as held by the Apex Court in ***Co-operative Sugars (Chittur) Ltd. V/s. State of Tamilnadu***[5] that tax can be levied only by a statutory provision and not a Government order. On this ground also the demand of levy has to go.

18. In view of the above, the questions that arose for determination are answered accordingly, i.e. (a) and (b) negative; (c) affirmative; (d) does not arise; (e) negative. Therefore, we direct respondents to refund the amount deposited by petitioner during the pendency of the petition towards this entertainment duty levied on mobile phones for the period 21st January 2001 to 31st January 2002 together with interest thereon at 6% p.a. (as per Rule 5 of Bombay Entertainment Duty Rules 1958) within eight weeks of receiving an application for refund from petitioner. The refund will be of all amounts paid by

4 (1979) 1 SCC 116

5 1993 Supp(4) SCC 42

petitioner under every head and interest will be payable on all amounts including interest that petitioner has paid since we have concluded that no entertainment duty was payable at all by petitioner.

The refund application shall be made to the Secretary, Revenue Department, Government of Maharashtra, who shall ensure strict compliance with the directions given above.

19. All to act on authenticated copy of this order and the Revenue Secretary shall not insist on a certified copy.

[MILIND N. JADHAV, J.] **[K. R. SHRIRAM, J.]**