



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

***WRIT PETITION NO.2158 OF 2005***

1.     Drishti Adventures Sports Private Ltd.                     )  
       A Company incorporated under the                         )  
       Companies Act, 1956 having registered                 )  
       office at Top Floor, Mehta Mahal,                         )  
       15, Mathew Road, Opera House,                         )  
       Mumbai- 400 004.   )
  
2.     Mr.Natwarlal Somani   )  
       Director of Drishti Adventure Sports                     )  
       Private Limited, having his office at                     )  
       Top Floor, Mehta Mahal,                                     )  
       15, Mathew Road, Opera House,                         )  
       Mumbai- 400 004.   )     .. Petitioners

Versus

1.     State of Maharashtra   )  
       through Government Pleader, Bombay                     )
  
2.     The Collector of Mumbai City                                 )  
       Old Customs House, Mumbai – 400 001.                 )
  
3.     The Deputy Collector   )  
       (Entertainment Duty), Mumbai City                     )

Old Customs House, Mumbai – 400 001. ) .. Respondents

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Mr.Nitin Thakker, Senior Advocate with Mr. Vivek Khemka Ms.Ravina Rajpal, Mr.Sandeep Rebari and Ms.Archi Galal i/by Singh & Singh Malhotra & Hegde for petitioners.

Ms.Jyoti Chavan, AGP for Respondent No.1-State.

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**CORAM : G.S. KULKARNI &  
JITENDRA JAIN, JJ.**

**DATED : 4<sup>th</sup> DECEMBER 2023**

***Judgment (per Jitendra Jain, J.) :-***

. This petition under Article 226 of the Constitution of India has prayed for various reliefs, however, at the time of hearing, the petitioners have pressed the following reliefs :-

“(A) That this Hounourable Court be pleased to declare that proviso to Section 3(1) and sub-section (5A) of Section 3 of the Bombay Entertainment Duty Act, 1923, inserted by the Bombay Entertainment Duty (Amending) Act, 1998, are ultra vires the Constitution of India and bad in law and liable to be struck down.

AA That the Hon’ble Court be pleased to issue a writ of mandamus, or a writ in the nature of mandamus, or any other appropriate writ, direction, or order under Article 226 of the Constitution of India directing the Respondent No.1 to refund Duty Amount i.e. Rs.1,52,45,923/- and any applicable interest as per the discretion of the Hon’ble Court.

D-1 In the alternative if it being held that the entertainment duty is payable for the water sports activity as undertaken by the petitioners than this Honourable Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus, or such any other appropriate writ, direction or order under Article 226 of the

*Constitution of India directing the respondents to submit list of water sports activity operators who have been granted permission by Maharashtra Maritime Board to undertake water sports activity and liable to pay entertainment duty from 1<sup>st</sup> May 1998 to undertake water sports activity and not taxed under the provisions of the Bombay Entertainment Duty Act, 1923 under the provisions of the Bombay Entertainment Duty (Amending) Act, 1998 when it came into force along with the amount recoverable from them as Entertainment Duty and upon completion of recovery submit to this Honourable Court the compliance report.”*

2. Insofar as prayer clause A is concerned, which is the petitioners challenge to the vires of proviso to Section 3(1) and 3(5A) of the Bombay Entertainment Duty Act, 1923 as inserted by the Bombay Entertainment Duty (Amending) Act, 1998 is concerned, it is stated that in the light of the decision of the Delhi High Court in case of ***DLF Golf Resorts Ltd. Vs. State of Haryana & Ors.*** in Civil Writ Petition No.9476 of 2009 dated 3<sup>rd</sup> January 2011, the petitioners do not wish to press for the said prayer. The issues as raised in prayer clause A are kept open. Thus, the adjudication of the present petition is confined to prayer clause AA and D-1.

3. **FACTS** : On 27<sup>th</sup> March 2000, respondent No.1 passed a Resolution granting lease of 500 sq.mtrs. of land at Chowpatty, Mumbai to Maharashtra Tourism and Development Corporation (MTDC) for development of water sports activities. On 29<sup>th</sup> March 2001, MTDC

granted license to the petitioners for a period of 10 years to develop, manage and operate water sports activities on monthly license fees and on terms and conditions set out therein. The petitioners pursuant thereto developed and operated water sports complex and started activities like water skiing, wind surfing, sailing, kayaking, rowing, jet boating etc. In the year 2001, Entertainment Duty Inspector visited the office of the petitioners and sought various documents, license etc. which the petitioners complied with. On 14<sup>th</sup> March 2002, the petitioners addressed a letter to the MTDC requesting for exemption from payment of entertainment duty. On 26<sup>th</sup> March 2002, the petitioners addressed a letter to the respondents recording that the water sports activity does not fall under the Bombay Entertainment Duty Act, 1923. On 27<sup>th</sup> March 2002, respondent No.2 issued a demand notice asking the petitioners to pay the entertainment duty of Rs.8,53,943/-. The said demand was disputed and denied by the petitioners and same was challenged by the petitioners in Writ Petition No.1104 of 2002 on 21<sup>st</sup> November 2002. This Court allowed the petitioners to withdraw the aforesaid writ in order to enable the petitioners to file a statutory appeal under Section 10-A of the Entertainment Duty Act. Pursuant thereto, the petitioners filed an Appeal on 31<sup>st</sup> July 2003. The Appellate Authority rejected the said appeal and

confirmed the demand raised. The said appeal order was challenged in revision and on 10<sup>th</sup> June 2005, the Revisional Authority passed an order upholding the contention of the petitioners that they were entitled to exemption under Section 3 (5A) of the Entertainment Duty Act for a period of 3 years and further 50% remission for a period of 2 years thereafter. The consequence being, after the period of 3 years of exemption, the petitioners have deposited the entertainment duty, of which the petitioners seeks refund in the present petition. Being aggrieved by the said order passed by the Revisional Authority, the petitioners have filed the present petition seeking refund of entertainment duty deposited with the respondents for the period post expiry of exemption period of 3 years. We are informed by the petitioners that at present they have closed all water activities at Chowpatty, Mumbai.

4. **Submissions on behalf of the Petitioners** :- The learned senior counsel for the petitioners has admitted that the Petitioner is covered by Section 3 of the Bombay Entertainment Duty Act which imposes entertainment duty on the activities specified therein, which inter alia includes water activities. The Petitioner also admitted before Appellate/ Revisional Authority and before this Court that they are

engaged in water sports activities. The said admission can also be found in para 2 of the affidavit in rejoinder filed by the Petitioner in February 2017 and in orders of the Appellate/Revisional authorities.

5. The only contention raised by the petitioners is that the respondents have not recovered entertainment duty from the persons purportedly carrying on/engaged in similar activities in the State of Maharashtra and therefore, under Article 14 of the Constitution of India, the petitioners are discriminated and the petitioners too should not be made liable for payment of entertainment duty on its water sports activities.

6. To buttress the plea of Article 14, learned senior counsel for the petitioners has brought to our attention the pleadings made at pages 34-A to 34-H of the petition, wherein the petitioners have pleaded that on various enquiries made, the persons engaged in similar activities at Gateway of India and at other places are not called upon to pay entertainment duty. The petitioners have also brought to our attention a letter dated 6<sup>th</sup> September 2010 addressed by the Office of the Collector and District Magistrate, Mumbai City to the Deputy Secretary, Revenue & Forest Department, Mantralaya on this issue. The said letter records

that the issue of non-recovery of duty from persons carrying on activities at Gateway of India was examined on a complaint made by the petitioners and the explanation was sought from the Secretary, "Gateway- Elephanta Jalvahatuk Sangh Maryadit," wherein the submission of the said Sangh were recorded as to why the said activity is not covered by the Entertainment Duty Act. The said letter further requests the Government for guidance in this connection. The petitioners also relied upon the reply of the respondents dated 21<sup>st</sup> June 2013 and attention was drawn to paragraphs 15 and 16 of the said reply wherein the respondents have furnished the names of the persons running water sports activities similar to the petitioners and who are being regularly charged to the entertainment duty. The petitioners relied on paragraphs 7 to 9 of its rejoinder dated 3<sup>rd</sup> February 2016 to contend that the respondents are not taking any decision to enforce the Entertainment Duty Act against the boat operators at Gateway of India. The petitioners also stated in its rejoinder that none of the persons to whom licenses have been issued by the Maharashtra Maritime Board are registered under the provisions of the Entertainment Duty Act. The petitioners also relied upon the reply of the respondents. The sum and substance of the submission of the petitioners is that since the persons engaged in similar activities are not

being subjected to the entertainment duty, the petitioners are being discriminated by making to pay entertainment duty and therefore, the duty deposited by the petitioners should be refunded.

7. The petitioners further relied upon the Legislative Assembly debates on a bill as presented before the Legislative Assembly to amend the Bombay Entertainment Act, 1923. In this context, our attention was drawn to the speech of an opposition member and reply of the Minister. The contention of the petitioners is that based on such debate, on the floor of the assembly, the intention of the legislature was to levy entertainment duty only in amusement/water parks in which water activities are carried on and not to the activities of the petitioners, because their water sports activities are not in amusement/water park. In support of such submissions, the petitioners relied upon the following decisions:-

- (1) *Bengal Immunity Co. Ltd. Vs. State of Bihar & Ors.*<sup>1</sup> (para 22)
- (2) *Bhagwan Dass Sud & Sons Vs. Income Tax Officer, Special Circle, Ambala.*<sup>2</sup>(page 70)
- (3) *EP Royappa Vs. State of Tamil Nadu.*<sup>3</sup>(para 85)

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1 AIR 1955 SC 661

2 AIR 1956 P & H 148

3 (1974) 4 SCC 3

8. **Submissions on behalf of the Respondents**: At the outset, the counsel for the respondents disputing the case of the petitioners would submit that even assuming the case of the petitioners is to be accepted, Article 14 of the Constitution of India cannot be invoked to obtain relief which has been erroneously or wrongly granted to other persons. The counsel for the respondents further submitted that the activities of the boat operators who undertake ferry services for tourist at Gateway of India are different than the activities of the petitioners. The petitioners themselves have stated that they are engaged in activities of Motor Boat, Speed Boat, Regal Boat Round, Jet Ski Round, Winch Parasail Single, Bay cruise, Couple cruise, etc. Therefore, the contention of the petitioners that the activities of the petitioners are similar to the activities carried out at Gateway of India is not correct. The respondents also contended that the petitioners in the agreement with MTDC have agreed to develop water sports complexes and have also agreed to pay all the taxes and duties which clearly demonstrates that the petitioners were aware that they were liable to pay entertainment duty. In support thereof, the respondents have relied upon the following Supreme Court decisions :-

(i) *Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain*

*& Ors.*<sup>4</sup>

(ii) *Gursharan Singh & Ors. Vs. New Delhi Municipal Committee & Ors.*<sup>5</sup>

(iii) *State of Bihar Vs. Kameshwar Prasad Singh.*<sup>6</sup>

(iv) *Kulwinder Pal Singh Vs. State of Punjab.*<sup>7</sup>

9. The respondents also relied upon the following decisions to contend that the activities of the petitioners are exigible to Entertainment Duty Act.

(i) *Geeta Enterprises Vs. State of U.P.*<sup>8</sup>

(ii) *Commissioner of Excise Entertainment Vs. M/s.Polo Amusement Park Ltd.*<sup>9</sup>

10. **Rejoinder submissions on behalf of the Petitioners** : The petitioners contended that payment of Rs.1.52 crores is made after the petition was admitted and under protest. It is the contention of the petitioners that since the said deposit is made without prejudice and subject to the outcome of the present petition, the contention of the respondents that the petitioners cannot claim negative equality is not correct. It was further contended that since the intent as per the

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4 1997 (1) SCC 35

5 (1996) 2 SCC 459

6 (2000) 9 SCC 94

7 (2016) 6 SCC 532

8 (1983) 4 SCC 202

9 2016 SCC OnLine Del 2360

legislative debate is to tax amusement park in which water activities are provided, the principle of negative equality contended by the respondents State would not be applicable. The petitioners also furnished a statement which is in Form B to contend that the petitioners have not collected the Entertainment Duty from the user of its facilities and therefore, the principle of unjust enrichment would not be applicable.

**ANALYSIS AND CONCLUSION:-**

11. The question which arises in the present petition is as to whether the Petitioner on the issues as urged, can justify in invoking Article 14 of the Constitution of India, to claim refund of duty deposited on the ground that the respondents have not collected duty from similarly placed persons ?

12. **Scheme Of The Act** - Before we dwell upon the reasoning, it would be necessary to note the scheme of the Bombay Entertainments Duty Act.

(a) Section 2 (a) of the Bombay Entertainment Duty Act defines “entertainment” to include 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.

(b) Section 2 (f) defines “entertainment duty”, or “duty” in respect of any entertainment to mean the entertainment duty levied under section 3 of the Act.

(c) Section 2 (g) defines “place of entertainment”, includes —

(i) any addition to the place of entertainment;

(ii) a house, building, tent or any other place where the books of account, ticket books and other relevant records pertaining to the entertainment or pertaining to the management of providing cable connections from any type of antenna or cable television or pertaining to the management of providing Direct-to-Home (DTH) Broadcasting service are kept or are believed to have been kept.

(d) Section 3(1) of the Act provides that there shall be levied and paid to the State Government on payment for admission fixed by the proprietor 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, permit room 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 :

(a) .....

(b) .....

Provided further that, the entertainment duty in respect of an amusement park shall be 15 per cent. of the payment made for admission to the amusement park, including payment made for admission for games and rides, whether charges separately or not.

Provided also that, the entertainment duty in respect of water sports activity, by whatever name called, whether situated within or outside the amusement park, shall be 15 per cent. of the payment made for admission to the water sports activity including payment made for admission for water games and sports, whether charged separately or not.

(emphasis supplied)

(e) Section 3 (5A) (a) provides that notwithstanding anything contained in sub-section (2) or in any other provisions of this Act but, subject to the provisions of clause (b), on and with effect from the date of coming into force of the Bombay Entertainments Duty (Amendment) Act, 1998, there shall be levied and paid by the proprietor to the State Government, the

entertainment duty in respect of any water sports activity as follows, namely :—

- (i) for the first three years from the date of commencement of the water sports activity, no duty ;
- (ii) for the subsequent, two years, at the rate of fifty per cent. of the rate of duty leviable under clause (b) of sub-section (1) or, as the case may be, sub-section (2) of section 3 ;
- (iii) from the sixth year, full amount of entertainments duty leviable at the rate specified in clause (b) of sub-section (1) or, as the case may be, sub-section (2) of section 3.

(f) Section 4B provides for assessment of entertainment duty by the State Government. Section 6 exempts entertainment duty to be levied on entertainments for charitable or educational purposes. Section 8 provides for power to enter place of entertainment by authorised officer of the State Government with a view to carry out inspection for compliance of various provisions of the Act and Rules.

(g) Section 10-A of the Act provides for Appeal and Revision against the order of the Collector.

13. The first assertion on behalf of the petitioner is that the petitioner needs to be similarly treated to that of operators involved in tourism/ferry services at the Gateway of India. In this regard, we may observe that the petitioners could not demonstrate, much less establish

that the activities carried out by such operators at the Gateway of India and at other places are identical to the activities of the petitioners. The activities of the petitioners are namely of water skiing, wind surfing, sailing, kayaking etc. The petitioners have not approached the Court with a definite case of an admitted discrimination between two similarly placed persons in invoking Article 14 of the Constitution of India. In the revision petition as filed by the petitioners, it was neither pleaded nor canvassed by the petitioners before the Revisional authority that since persons engaged in similar activities are not paying duty they too should not be called upon to make the payment towards the duty. The petitioners have purported to make out this case before this Court only by way of amendments to the present petition. On this account itself, the petitioners' case of any discrimination is untenable.

14. Even otherwise if such was to be the petitioners' case, the petitioners were required to file this petition by impleading such persons with whom the petitioners are claiming parity. Considering the relief in the absence of such assertion would be in the teeth of the decisions of the Supreme Court in the case of ***Gurshan Singh & Ors. Vs. New Delhi Municipal Committee & Ors.***<sup>10</sup>, ***J.S. Yadav V/s. State of U.P. & Others***<sup>11</sup>,

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<sup>10</sup> (1996) 2 SCC 459

<sup>11</sup> (2011) 6 SCC 570.

***Public Service Commission, Uttaranchal V/s. Mamta Bisht & Ors.***<sup>12</sup>,  
***Tridip Kumar Dangal & Ors. V/s. State of W.B. & Ors.***<sup>13</sup> The counsel for the Petitioner agreed to this position in law. Further no materials were brought on record to show that such operators were having sports licences, similar to that of the petitioners, much less to implead them as parties.

15. The Petitioner's contention is to the effect that on one hand, the operators at the Gateway of India were not being levied with the entertainment duty, whereas the petitioners were subjected to levy of entertainment duty under the Act and for such reason, the petitioner needs to be put at par with the operators at the Gateway of India.

16. Such contention of the petitioners in legal terms can be considered as a plea of the petitioners to assert a negative equality, for the reason that the petitioner is questioning the action of the State Government in the levy of the entertainment duty only qua the petitioners, and the same being not levied on the operators at the Gateway of India. Conversely, the plea is that the action of the State Government not to levy such duty on the operators at the Gateway of India is illegal

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<sup>12</sup> (2010) 12 SCC 204.

<sup>13</sup> (2009) 1 SCC 768.

and the petitioners needs to be placed in a similar position as that of the Gateway of India operators.

17. It is difficult to accept such case of the petitioners for more than one reason; firstly, as noted above such contention is untenable on the ground of the petitioners failing to demonstrate any parity between the Gateway of India operators and the petitioners, so as to attract any argument of Article 14 of the Constitution. Secondly, even assuming that a plea of such negative equality is called upon to be adjudicated by us, the primary requirement to urge such issue would pre-suppose that to claim such negative equality, the illegality of the State Government in exempting the Gateway of India operators was required to be questioned and assailed by the petitioners. This has also not been either argued before the forums below by the petitioners, as also, such was not the case of the petitioner as the law would mandate. In this context, we may refer to the decision of the Supreme Court in the case of **Gursharan Singh & Ors. Vs. New Delhi Municipal Committee**<sup>14</sup> wherein the Supreme Court has held that under Article 14 of the Constitution guaranteeing equality before law is a positive concept, which cannot be enforced by a citizen or a Court in a negative manner. The Court held that if an illegality or

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14 (1996) 2 SCC 459

irregularity has been committed in favour of any individual or a group of individuals, others cannot invoke the jurisdiction of the High Court or of the Supreme Court that the same illegality or irregularity be committed by the State or an authority which can be held to be a State within the meaning of Article 12 of the Constitution. It was held that such petitioners can question the validity of the actions of the State which are set to have been passed in favour of those persons who were not entitled to the same, but they cannot claim orders, which are not sanctioned by law in their favour on the principle of equality before law. It was held that neither Article 14 conceives within the equality clause, such concept nor Article 226 empowers the High Court to enforce such claim of equality before law. The Supreme Court further observed that if such claims are enforced, it would amount to directing to continue and perpetuate an illegal procedure and an illegal order extending similar benefits to others. It was hence observed that before a claim based on equality clause is upheld it must be established by the petitioner that its claim being just and legal, has been denied to him, while it was extended to others and in such process, there has been discrimination. The facts of the present case clearly demonstrate that the petitioners' case utterly fails when tested on such well established parameters. Thus, the acceptance of

the petitioner's contention that the petitioner should be given a relief because the State has not recovered tax from similar activities carried on by others would amount to calling upon this Court to give relief on the basis of negative equality. It is hence trite law that equality cannot be claimed on any illegality. It cannot be enforced by a Court in a negative manner.

18. We can also test the submissions of the petitioners by way of an illustration. Assuming that Mr.A is regularly paying income tax on its business activity. Mr.B is carrying out the same business activity and earning income but is not paying any tax nor does the Revenue Authority takes any action against Mr.B for recovery of tax. In such scenario, Mr.A cannot file a writ petition against the State to claim the refund of the amount which he has already paid on the ground that since the State has not recovered the tax from Mr.B, hence there is a violation of Article 14 of the Constitution of India qua him and therefore, Mr.A should also not pay any tax or get refund of the tax already paid. The submission made by the petitioners would result in a legal absurdity. The Court cannot be called upon upon to recognise and validate any illegality. Such contention can never be accepted.

19. We may also take note of the other decisions of the Supreme Court on this aspect. In ***Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain & Ors.*** (supra), the Court in such context observed thus:-

“24. The question then is : whether the action of not delivering possession of the land to the respondents is on par with other persons who had possession is ultra vires act and Violates [Article 14](#) of the Constitution? We had directed the appellants to file an affidavit explaining the actions taken regarding the allotment which came to be made to others. An affidavit has been filed in that behalf by Shri Pawan Arora, Deputy Commissioner, that allotments in respect of 47 persons were cancelled and possession was not given. He listed various cases pending in this Court and the High Court and executing court in respect of other cases. It is clear from the record that as and when any person had gone to the court to get the orders of the LAO enforced, the appellant-authority resisted such actions taking consistent stand and usually adverse orders have been subjected to decision in various proceedings. Therefore, no blame of inaction or favouritism to others can be laid at the door of the present set up of the appellant-authority. When the Minister was the Chairman and had made illegal allotments following which possession was delivered, no action to unsettle any such illegal allotment could have been taken then. That apart, they were awaiting the outcome of pending cases. It would thus be clear that the present set up of the bureaucrats has set new standards to suspend the claims and is trying to legalise the ultra vires actions of Minister and predecessor bureaucrats through the process of law so such so that illegal and ultra vires acts are not allowed to be legitimised nor are to be per-petuated by aid of [Article 14](#). The apart, [Article 14](#) has no application or justification to legitimise an illegal and illegitimate action. [Article 14](#) proceeds on the premise that a citizen has legal and valid right enforceable at law and persons having similar fight and persons similarly cir-cumstanced, cannot be denied of the benefit thereof. Such person cannot be discriminated to. deny the same benefit. The rational relationship and legal back up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some person derived benefit by illegality and had escaped from the clutches of law, similar persons cannot plead nor court can countenance that benefit had from infraction of law and must be allowed to be retained. Can one illegality be compounded by permitting similar illegal or illegitimate or ultra vires acts? Answer is obviously no.

28. A host of other decisions in that context have laid the same

*principle. It is not necessary to burden the judgment any further. Suffice to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, nor could it be legalised. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents.”*

20. Similar view on negative equality is reiterated by the Supreme Court in following decisions:-

- (a) In ***State of Bihar Vs. Kameshwar Prasad Singh*** (supra).
- (b) In ***Kulwinder Pal Singh Vs. State of Punjab*** (supra).

21. Having examined the above decisions, we may now examine as to whether the case of the petitioner can be accepted on the decisions as cited on behalf of the petitioners.

22. The petitioners reliance upon paragraph 9 of the decision in case of ***Budhan Choudhry Vs. State of Bihar***<sup>15</sup> would not assist the petitioners. In this case, the issue before the Supreme Court was whether trial by a Magistrate under section 30 or by a Court of Session offends equal protection clause of our Constitution. The Supreme Court after examining the scheme of trial as provided by the Code of Criminal Procedure held that there is no discrimination and whether trial should be

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<sup>15</sup> AIR 1955 SC 191

done by a Magistrate under section 30 or by a Session Judge is a discretion judicially exercised by an appropriate judicial officer. The said decision in paragraph 9 further observes by quoting the language of Justice Frankfurter in ***Snowden v. Hughes*** that “the Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State. The judicial decision must of necessity depend on the facts and circumstances of each particular case and what may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination.” Therefore, the reliance of the petitioners on the decision of ***Budhan Choudhary (supra)*** would not assist the petitioners.

23. The next reliance on behalf of the petitioners is on the decision of the Supreme Court in the case of ***EP Royappa (supra)***. Our attention was drawn by the petitioners to paragraph 85 of the decision in the case of ***EP Royappa (supra)*** which also considers decision in the case of ***Bhagwan Dass Sud & Sons (supra)***. There is no quarrel that if two persons are equally placed then provisions of Article 14 can be invoked.

Thus this decision as relied upon by the petitioners does not support the case of the petitioners. On the contrary, the decision in case of ***Snowden v. Hughes*** which is referred to in the decision in case of ***Bhagwan Dass Sud & Sons (supra)*** goes contrary to the petitioners' case wherein the Court had observed that "the Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State."

24. Now, we consider the case of the petitioner on the "under protest payment." It is contended by the petitioners that since the payment was made under protest, the principle of negative equality would not be applicable. We may observe that the present petition is filed on 22<sup>nd</sup> August 2005. This Court in its order dated 28<sup>th</sup> July 2022 recorded the statement of the petitioner that pursuant to an interim order passed on 10<sup>th</sup> June 2005 the petitioners has deposited a sum of Rs.1,52,45,923/-. We fail to understand as to how this sum was deposited on 10<sup>th</sup> June 2005, the petitioner has under the orders of the Court when petition itself was filed on 22<sup>nd</sup> August 2005. The petitioners in the amended petition in paragraph 14 (I) have averred that payment is made under the orders of the Revenue Minister dated 10<sup>th</sup> June 2005 and interim order dated 11<sup>th</sup>

October 2005 of this Court. This Court on 11<sup>th</sup> October 2005 has only issued Rule and observed that implementation of the order is subject to ultimate decision on the petition. Therefore the submission of the Petitioner that payment has been made under protest pursuant to the orders passed by this Court is on the face of the record unacceptable and in any case, has no relevance for the plea of Article 14 as canvassed by the Petitioner. We may also observe that in fact the petitioners have accepted that they are liable to pay duty under the Entertainment Duty Act. Therefore, the submission of the petitioners that they have made the payment under protest is misconceived.

25. In regard to next contention of the petitioners on unjust enrichment, the petitioners have contended that they have not collected the duty from their customers and, therefore, relief as prayed for should be granted. In our view, unjust enrichment can be treated by the petitioners only when the petitioners are in a position to satisfy the Court on materials that the State had illegally or without authority of law levied and has appropriated the duty from the petitioners. There is no scope for the petitioners to argue that merely because the petitioners have not collected the duty from its customers and has deposited duty with the

State Government, can in no manner attract any argument of unjust enrichment, for the reason, that petitioner under the terms and conditions of its licence and as per the provisions of law is primarily liable to deposit the duty. The State Government has no control whatsoever on the activities of the petitioners, much less in regard to the petitioners collecting the said amounts from its customers. Thus, on such count itself, the plea of unjust enrichment as sought to be urged by the petitioners needs to fail.

26. Now we consider plea of the petitioners on the issue of legislative debate. The petitioners have relied on legislative debate to contend that its activities are not intended to be taxed. The petitioners contended that it is only water activities by amusement/water park which is sought to be taxed based on the legislative debates for construing the levy. The Petitioner has relied upon the legislative debates, when the bill No.29 of 1998 was introduced in the Assembly to amend the Bombay Entertainment Duty Act, to contend that it is the water activities in the amusement park, which were intended to be covered for the purpose of levy of entertainment duty and not the activities conducted by the petitioners.

27. In considering such plea, the first and foremost approach of the Court would be to plainly look at the legal provisions as contained in the provisions of the statute as they stand, and if there is any need for an external aid, so as to attribute any meaning to the legislative provisions then recourse can be had to such external material which in a given case may include legislative debates.

28. The Act itself distinguishes between amusement park and the water activities. There are separate provisions dealing with the amusement park and the water sports activity. If the legislative intent was to cover only water sports activity by amusement park then the Acts would not have made a distinction between the amusement park and water sports activity. The levy is on the activities and not on the entity carrying on the activities. Therefore, whether water sports activity is carried on by amusement park or by non amusement park, both would be liable to pay the entertainment duty. Section 2 (a-1) defines “amusement park” to mean a place wherein various types of amusements are provided on permanent basis on payment for admission. Section 2(a) defines “entertainment” to include amusement or sport to which persons are admitted for payment. Explanation (iii) to Section 2(a) defines

“temporary amusement.” Section 3(1) which levies duty on payment for admission to entertainment classifies amusement park and water activities as two different activities. Similarly, second proviso to Section 3(1) deals with amusement park and third proviso to Section 3(1) deals with water sports activity. It is also important to note that third proviso to Section 3(1) expressly provides that water sports activity whether situated within or outside the amusement park would be liable for entertainment duty. Therefore, the scheme of the Act clearly negatives the contention raised by the petitioners by relying on legislative debate that only water activities by amusement park are liable for duty.

29. It is important to note that the petitioners have admitted that they are covered by the Entertainment Duty Act. After having admitted the same, the petitioners cannot turnaround and contend at the fag end of the proceedings that since the intention of the legislature is to cover water activities in amusement park and since their activities are not in amusement park, they are not liable for duty. Section 3(1) of the Act which is charging section imposes levy, not only on entertainment as defined by Section 2(a) of the Act but also covers various other activities including water sports activity and admittedly, the activities of the

petitioners like water skiing, wind surfing, sailing, kayaking, Jet boating etc. are water sports activities and hence covered by charging section. It is also important to note that the petitioners themselves made an application under Section 3(5A) of the Act for taking benefit of the said provision which provides that for the first three years from the date of commencement of the water sports activity, there would be no duty, for subsequent two years, the duty will be at the rate of 50% and from the sixth year, full amount of entertainment duty would be leviable. The petitioners having made an application and having taken benefit of no duty for the first three years now cannot turnaround, on expiry of three years when they are liable to pay duty at the rate of 50% and full amount thereafter, that their activities are not covered by the Bombay Entertainment Duty Act and therefore, the petitioners rightly began the arguments by stating that they are covered by the provisions of the Bombay Entertainment Duty Act. The petitioners are now estopped from contending otherwise. The claim of refund by the Petitioner is made of the duty which they themselves and rightly so paid. On these facts, in our view, the petitioners now cannot contend that their activities are not covered by the Entertainment Duty Act.

30. We also note the legal position on this aspect. The Supreme Court in case of Supreme Court in case of ***State of Travancore-Cochin and Ors. Vs. Bombay Company Limited, Alleppey***<sup>16</sup> held that speeches made by the Members of Constituent Assembly in the course of debates on the draft constitution is unwarranted. The Supreme Court observed in the said judgment that this form of extrinsic aid cannot be used for interpreting any provisions of the statute and same has been generally accepted in England and in the construction of Indian Statutes as well. In a 9 Judge Constitution Bench decision of the Supreme Court in the case of ***Indra Sawhney Etc. Vs. Union of India & Ors.***<sup>17</sup>, the Supreme Court held that what is said during such debates is not conclusive or binding upon the Court because several members may have expressed several views, all of which may not be reflected in the provision finally enacted. In the light of the settled position, the petitioners are not justified in relying upon the views of some members in the course of the debates in the Legislative Assembly for interpretation of provisions of Entertainment Duty Act when the Act itself is clear on this issue, as analysed by us in above paragraphs.

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16 AIR 1952 SC 366

17 AIR 1993 SC 477

31. In view of above discussion, the petition is dismissed. No order as to costs.

***JITENDRA JAIN, J.***

***G. S. KULKARNI, J.***