R.N.R.

Before Mukul Mudgal, C.J., M.M. Kumar and Jasbir Singh, JJ.

DLF GOLF RESORTS LTD.,—*Petitioner*

versus

STATE OF HARYANA AND OTHERS,—*Respondents*

C.W.P. No. 9476 of 2009

3rd January, 2011

Constitution of India, 1950—Art. 226—Punjab Entertainment Duty Act, 1955—Ss.2(d) & 2(e)(iii)—Punjab Entertainment Duty Rules, 1956—Levy of entertainment duty on Sports Clubs—Whether exclusion of 'sport' as a subject from taxing Entry 62 and inclusion of same in non-taxing Entry 33 of State List of 7th Schedule of Constitution is intentional so as to deprive State Legislature their competence to tax 'sport' and leave that competence to Parliament under residuary Entry 97 of Union List—Held, yes—State Legislature is competent to impose entertainment duty/tax on entertainments and amusements, which include sports.

Held, that there is no entry in List I and List III dealing with taxes on 'sports' or 'sports club'. There is no overlapping which may necessitate the application of the doctrine of 'pith and substance'. It would not be possible to sweep the field of taxation on 'sports' or 'sports club' under the residuary Entry 97 of List I particularly when such a field is covered by the expression 'entertainment' used in Entry 62 of List II.

(Para 29)

Further held, that imposition of entertainment duty is not only on sport but on the 'sports club', which is embroiled in score of other activities which included partying, wining and dining. The State Legislature is competent to impose entertainment duty/tax on entertainments and amusements, which include sports.

(Paras 30 & 31)

Further held, that (a) the video games are subject to entertainment tax. Even if a person is entertained in a video parlour by his own performance, there is no legal requirement that the owner of the video parlour should organize some entertainment programme like performance in theatre, amusement, games or any sport. In other words, it is no longer *sin qua non* that performance by a third party organized at the instance of the assessee is imperative in order to attract entertainment tax; (b) the mode of payment is wholly immaterial whether made at the entry or at the time of playing games. Therefore, a lump sum amount paid in the beginning or annual subscription given year after year would hardly make any difference; and (c) a performance becomes public in character when people come to play the game by displaying their own skill for consideration at a place where the members of the public are invited to pay and enjoy the facilities.

(Para 39)

Soli J. Sorabjee, Senior Advocate, with Ashwani Chopra, Senior Advocate, with Ashim Aggarwal, Advocate, Ajay Aggarwal, Advocate, Aashish Chopra, Advocate, Ms. Rupa Pathiana, Advocate.

Anil Divan, Senior Advocate, with L.L. Bhushan, Advocate, Anupam Bansal, Advocate, Ms. Swaty S. Malik, Advocate.

Arvind Nigam, Senior Advocate, with Arun Monga, Advocate.

Tribhuvan Dahiya, Advocate.

Hemant Saini, Advocate.

Ms. Munisha Gandhi, Advocate.

Avneesh Jhingan, Advocate.

D.S. Narula, Advocate, *for the petitioner.*

H.S. Hooda, Advocate General, Haryana with Randhir Singh, Additional Advocate General, Haryana; and

Vinod S. Bhardwaj, Additional Advocate General, Haryana, *for the respondents.*

M. M. KUMAR, J.

(1) A Division Bench of this Court, of which one of us was a member (M.M. Kumar, J.), has made a reference in a bunch of petitions to this Full Bench raising significant and common questions of law cocerning validity of the levy of entertainment duty on Sports Clubs under the Punjab Entertainment Duty Act, 1955 (as applicable to Haryana) [for brevity, 'the Act'] and the Punjab Entertainment Duty Rules, 1956 (as applicable to Haryana) [for brevity, 'the Rules']. It would be apposite to advert to the reference order dated 3rd August, 2009, which reads thus :—

> "Challenge in this bunch of three petitions is to the levy of entertainment duty and its application to the Sports Clubs like the present petitioners who patronise the Sports of Golf. Learned senior counsel have, *inter alia,* submitted that Entry 62 of the State List in the 7th Schedule of the Constitution specifically omit the use of expression 'Sport', which authorises the State legislature to levy taxes on entertainments, amusements, betting and gambling. they have also drawn our attention to Entry 33, which in addition to other things used the expression 'Sports', 'entertainments' and 'amusements'. They have also submitted that the intention of the framers of the Constitution is to restrict the power of legislation concerning imposition of tax, which has been saved by Entry 97 of the First List for framing of legislation by the Parliament. The necessary intendment by omission of expression "sports' from Entry 62, is leaving the subject of taxing sports to the Parliament under residuary Entry 97 of the First List. They have also submitted that if clubs like the petitioners are taxed then educational institutions, universities and colleges where sport is played, would also be hit by the duty. Another argument raised is that in the Division Bench judgment of this Court in **M/s Chrysalis International (P) Ltd.** *versus* **State of Haryana and others, (1)** (C.W.P. No. 19345 of 2004, decided on 29.8.2008) the question of constitutional validity of the 'Entertainment Duty' was neither raised nor adjudicated and, therefore, the view of the Division Bench cannot be considered binding. It has also been submitted

(1) 2008 (4) P.L.R. 323

that the judgment of Hon'ble the Supreme Court in **M/s Geeta Enterprises** *versus* **State of U.P., (2)** which has been relied upon by the Division Bench of this Court in **M/s Chrysalis International (P) Ltd.,** *(supra)* lays down four tests and the Division Bench of this Court has applied only the first test whereas a perusal of the judgment shows that all the four tests have to be satisfied before entertainment duty could be imposed. The submission made is that the Division Bench judgment would require another look.

On the other hand, Ms. Ritu Bahri, learned State counsel has placed reliance on the judgment of Hon'ble the Supreme Court in the case of **Y.V. Srinivasamurthy** *versus* **State of Mysore, (3)** and argued that 'cinema' was included to be covered by entry 62 and, therefore, 'sports' can also be included.

During the course of arguments, on a specific reference being made by one of us (Jaswant Singh, J.) that he is member of three Golf clubs and occasionally plays Golf, learned State counsel has expressed no objection to the hearing of the cases by this Bench nor learned counsel for the petitioners has raised any such objection.

Heard.

Admitted.

Keeping in view the fact that imposition of entertainment duty is likely to affect the larger public interest and the Division Bench judgment in the case of M/s Chrysalis International (P) Ltd. *(supra)* would require a re-look, we are of the considered view that the matter requires consideration at length by a larger Bench. The constitutional validity of various provisions of the Punjab Entertainment Duty Act, 1955 (as applicable to Haryana) and the rules framed thereunder has also been challenged. Accordingly, we direct that the papers be placed before Hon'ble the Chief Justice for constituting a larger Bench.

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(2) AIR 1983 S.C. 1098 = (1983) 4 S.C.C. 202

(3) AIR 1959 S.C. 894

In the meanwhile, the interim arrangement made by order dated 30th May, 2009 shall continue and the aforesaid order is made absolute."

(2) A perusal of the aforesaid reference order shows that following substantive questions of law would arise for determination by the Full Bench :—

(A) Whether exclusion of 'sport' as a subject from taxing Entry 62, and inclusion of the same in non-taxing Entry 33 of the State List of the Seventh Schedule of the Constitution is intentional so as to deprive the State Legislature their competence to tax 'sport' and leave that competence to Parliament under the residuary Entry 97 of the Union List ?

(B) Whether the Division Bench judgment of this court in **M/s Chrysalis International Pvt. Ltd.** *versus* **State of Haryana** *(supra),* has been correctly decided by applying the law laid by Hon'ble the Supreme Court in **M/s Geeta Enterprises** *versus* **State of U.P.,** *(supra)*. The question is *'does the Homer nod'* ?

Facts :

(3) In order to put the controversy in its proper perspective leading to the legal issues carved out in the preceding para, it would be necessary to notice the facts in brief, which for the sake of illustrative convenience are taken from **C.W. P., No. 9476 of 2009 (DLF Golf Resorts Ltd.** *versus* **State of Haryana and others).** The petitioner therein, which is a registered company, is managing and running a club in Gurgaon. The club is owned by DLF Commercial Developers Ltd., which has an independent indentity being incorporated under the Companies Act, 1956. It has been claimed that apart from other activities it provides facilities for playing the sport of Golf to its members on payment of membership fee and other charges. the petitioner has claimed that the club is not open to general public and its activities are private in nature. There are no exhibition matches to entertain viewers nor general public are allowed entry on payment of fee. Once the club is not rendering any entertainment, it is not subject to levy of 'entertainment duty' under the provisions of the Act

or the Rules. In support of their claim reliance has been placed on the view taken by the respondents in Memo. No. 718/T-1, Chandigarh, dated 16th May, 1991 in the case of Meadows Golf and Country Club, Gurgaon, clarifying that under Sections 2(d) and 2 (e)(iii) of the Act only that entertainment which is either performed for others and is shown to others would attract levy of entertainment duty and no duty is payable by the clubs where members of the club play Golf to entertain themselves (P-2). On the basis of that communication the petitioner claimed that they did not collect any fee or pay any duty under the Act and/or the Rules. Even the respondents did not ever raised demand for entertainment duty from the petitioner for the last over 18 years. However, on 31st March, 2009, Memo, dated 16th May, 1991 has been withdrawn with retrospective effect (P-3). On 27th January, 2009, the officer of the State issued notices in Form PED-4 as prescribed under Rule 17 of the Rules in respect of Assessment Years 2004-05, 2005-06, 2006-07 and 2007-08. They have been asked to appear before the competent officer to answer the allegation that they have not been correctly paying the amount of entertainment duty. They have been called upon to explain cases of free, surreptitious, unauthorised and concessional entries (P-4),. Eventually, their reply has been rejected and they have been held liable to pay entertainment duty in respect of the Assessment Years 2004-05, 2005-06, 2006-07 and 2007-08 and the amount has been assessed. These orders further provide that penal action would be initiated separately (P-5). Consequently, fresh demand notices dated 26th May, 2009, under Form PED-7 have been issued under Rule 18 of the Rules demanding the duty as per assessment (P-6). The petitioners have sent replies stating that by virtue of Rule 18 of the Rules, notice of demand must have given a clear period of thirty days from the date of its receipt. Therefore, it has been urged that the notices were illegal. they further submitted that the matter was subjudice and, therefore, it must await the disposal of various petitions.

(4) In their written statements the respondents have taken the stand that the petitioner has been admitting the general public as members on payment of membership fee although on monthly, yearly or lump sum basis which is in addition to other charges like cart fee, caddie fee, green fee and subscription money. Such members visit the club premises, play Golf and are entertained; and the whole activity is covered by the exclusive

definition of the expression 'entertainment' as used in Section 2(d) of the Act. According to the respondents a Division Bench of this Court in the case of M/s Chrysalis International (P) Ltd. *(supra)* or in **Wet-N-Wild Resort *versus* State of Haryana (CWP No. 443 of 2005, decided on 29.8.2008),** has held that the activities of Bowling Alley, Video Games, Billiards, Pool Table and Swimming Pool though restricted to members who have paid the subscription either in lump sum or on monthly or yearly basis, provide amusement to them and, therefore, satisfy test No. 4 laid down by Hon'ble the Supreme Court in the case of M/s Geeta Enterprises *(supra).* Therefore, the demand of duty from the petitioner is wholly sustainable in the eyes of law.

(5) The written statement further highlights that order dated 9th April, 2009 passed by the Entertainment Tax Officer, Gurgaon, raising demand from the petitioner was subject matter of challenge in CWP No. 6957 of 2009 and the same was dismissed on 7th May, 2009 by following the jugments of the Division Bench rendered in the cases of M/s Chrysalis International (P) Ltd. *(supra)* and Wet-N-Wild Resort (supra). Accordingly, there is an outstanding demand approximately to the tune of Rs. 9.80 crores in respect of the Assessment Years 2003-04, 2004-05, 2006-07 and 2007-08. Another issue raised by the respondents is that a statutory remedy of appeal under Section 11-A and revision under Section 12 of the Act have not been availed and the writ petition would not be competent without availing such alternative remedies. The respondents have also taken the stand that there is no lack of legislative competence and the State legislature is fully competent by virtue of Entry 62, List-II of the Seventh Schedule. The communication dated 16th May, 1991, rendered in the case of Meadows Golf and Country Club, Gurgaon, was against the statutory provisions and has been rightly withdrawn by them on 31st March, 2009 (P-2 Colly), especially when that communication was examined in the light of the Division Bench judgment rendered in the case of M/s Chrysalis International Pvt. Ltd. *(supra).* The respondents have taken support of Entry 62, List-II of the Seventh Schedule under which the Act has been enforced by the State of Punjab and has later been adopted by the State of Haryana.

(6) On the basis of the judgments of Hon'ble the Supreme Court rendered in the cases of **R. K. Garg *versus* Union of India, (4)** and

(4) (1981) 4 S.C.C. 675

Government of A.P. *versus* **P. Laxmi Devi, (5),** it has been pleaded that greater latitude is given to the legislature by the Court in respect of fiscal or taxing statute or economic measures. The further pleaded case of the respondents is that a Constitution Bench of Hon'ble the Supreme Court in the case of **Y. V. Sirinivasamurthy** *versus* **State of Mysore, (6),** while dealing with a challenge to the validity of the Mysore Cinematograph Show Act, 1951, considered the scope of Entry 62 List II, which deals with 'taxes on luxuries' including taxes on entertainments, amusements, betting and gambling corresponding to entry 50, List-II of the Seventh Schedule of Government of India Act, 1935. The Constitution Bench has held that the words "entertainments' and 'amusements' are wide enough to include theatres, dramatic performances, cinemas, sport and the like and it is complete answer to the case set up by the petitioner. Therefore, the force of the Act and the Rules framed thereunder has no basis as the State legislature is fully competent to frame taxing laws on 'sports' as well and that the writ petition is liable to be dismissed. The other factual position concerning raising of demand has been admitted.

(7) It is significant to highlight that entertainment duty in the instant case is not on any particular sport or even on sports but it is on 'sports clubs'. The activities of sports clubs are ordinarily expanded to mean more ancillary activities than confining itself to sprots. During the course of arguments rules and regulations of DLF Golf and Country Club were shown to us (Mark 'A'). A random look at these rules and regulations would show that there is no condition that a person or a corporate body seeking membership of the club must be a Golf lover or a Golf player. Membership has been offered to corporate members, individual members, resident and non-resident Indians and even the foreign nationals. Apart from playing the game of Golf, these clubs have a regular bar and provision for breakfast, lunch and dinner. These clubs permit celebration of birthdays. Anniversary, New Year parties etc. for its members. These activities are not confined to members alone but even the family/friends of the members are permitted to join for consideration. Therefore, on fact it may not be possible to conclude that the whole activities of these clubs are wholly confined to 'sports'.

(5) (2008) 4 S.C.C. 720
(6) AIR 1959 S.C. 894

(8) It is further significant to notice that arguments in these petitions before the Full Bench have continued on various dates. However, the State of Haryana amidst the arguments has issued a notification dated 17th September, 2010 exercising the power of exemption under sub-section (3) of Section 11 of the Act and has consequently exempted them from payment of entertainment duty on admission fee. The exemption has been confined to those person playing sports in registered clubs having sports activities as an item in their 'Memorandum of Association. We, therefore, pointed out to the learned counsel that the question which survives is concerning the payment of arrears of entertainment duty only up to 17th September, 2010. They have submitted that the question of legislative competence of State Legislature and consequently correctness of Division Bench Judgment would still survive.

(9) Mr. Soli Sorabjee, learned senior counsel appearing for the petitioner has led the arguments and has raised some fundamental issues before us which we proceed to notice. the first argument raised by the learned senior counsel is that the State legislature completely lacks legislative competence to tax 'sports' because taxing Entry 62 of the State List of Seventh Schedule does not expressly include the subject of 'sports'. According to the learned counsel the intention of the founding fathers is clear from a close scrutiny of Entry 33 of the State List which confers legislative competence on the State Legislature to frame law for regulating 'theatres', 'dramatic performances' and 'cinemas' subject to the provisions of Entry 60 of List-I; sports entertainments and amusements in contra-distinction confer competence on State Legislature to tax 'sports' because the subject of sports has been deliberately excluded from entry 62. Mr. Sorabjee has referred to other taxing entries 52 to 66, which confer competence on the State legislature to frame law concerning imposition of tax on various subjects. According to the learned counsel there has to be express power conferred on the State legislature for acquiring competence to tax particular subject and it cannot be assumed by implication. It has been emphasised that the tax by State legislature could be levied on luxury, entertainment, amusement, betting and gambling but no tax could be imposed on 'sports' as there is intentional and pointed omission of expression 'sports from Entry 62 of List II. It has, therefore, been urged that subject of 'sport' for the purposes of levying of tax has been reserved for Parliament to frame law under the residuary Entry 97 of List-I of the Seventh Schedule.

(10) Mr. Sorabjee has then referred to para 3 of the Constitution Bench judgment of Hon'ble the Supreme Court in the case of **Y.V. Srinivasamurthy** *(supra)* and argued that these lines alone would not lead to an interpretation that the expression 'sports' stood included in entertainment or that these lines could confer legislative competence on the State legislature. Learned counsel has submitted that the judgments should not be read like statutes because it would lead to undesirable and un-warranted consequences. Mr. Sorabjee has also contended that in the case of **Y.V. Srinivasamurthy** *(supra)* the counsel for that petitioner had agreed to the legal proposition and it was not a contested matter but based on a concession on a legal issue.

(11) Another submission made by the learned counsel is that on a true construction of various provisions of the Act, no levy of tax would be attracted which could be realised from the petitioner. In that regard, reference has been made to definitions of expression 'admission to an entertainment' [S. 2(a)], 'entertainment' [S. 2(b)], 'payment for admission' [S. 2(e)] and 'ticket' [S. 2(i)], read with Section 3 and it has been submitted that when a member enters the portals of a Golf Club then he does not make any payment for entertainment. Such a member simply goes to the club to play his game of Golf. It is maintained that under Section 4 a lump sum payment which is made by a member of the club is not correct. It is not comparable to what a person pays to view a video show. According to the learned counsel Section 2(i) defines the expression 'ticket'. It shows that on entry to an entertainment a ticket is issued like entry to cinema or one day cricket match. However, in a club such as the petitioner's no such thing happens. A specific reference has also been made to Section 3A to submit that a proprietor of a video set exhibiting shows on payment is also under obligation to pay enterainment duty because it is exhibited to public on payment against a ticket. Mr. Sorabjee has also placed heavy reliance on the circular dated 16th May, 1991 issued by the respondent State contemplating that no tax is leviable on the Golf clubs or such other sports clubs. The circular has taken the view that Section 2(d) and 2(e)(iii) of the Act does not confine the expression 'entertainment' and under those provisions the levy of entertainment duty would be attracted if there is any performance of entertainment for others and shown to other. Once the members of the club come for playing a game of Golf to entertain themselves, no entertainment

duty would be attracted. Mr. Sorabjee has also placed reliance of the provisions of Section 10 of the Act and argued that no person on payment is permitted to enter to any entertainment without a duly stamped ticket issued by the Government for the purposes of revenue denoting that entertainment duty has been paid. Referring to Rule 9 of the Rules, learned counsel has drawn our attention to the form of the ticket in 'Form PED-I'and argued that the admission to entertainment has to be by issuance of ticket which is duly stamped by the Government whereas in the present case neither issuance of a ticket nor any payment of duty thereon is involved.

(12) Learned counsel has further elaborated his submission by urging that in order to have amusement and entertainment there have to be viewers who would be entertained and such a situation would arise if the members are playing a match to which general public is invited to view the same on payment. Learned counsel has pointed out that without payment to view the match there cannot be entertainment and in the absence of entertainment there cannot be any tax by virtue of Enrty 62 of List II. Therefore, no entertainment duty would be payable and the same cannot be realised. In that regard learned counsel has placed reliance on the last few lines of para 13 of the judgment delivered by a Division Bench of this Court in the case of **M/s Chrysalis International Pvt. Ltd.** *(supra)*, although the judgment is apparently against the assessee like the petitioner. The submission in nutshell is that levy of entertainment duty from a member of the club would not be workable as it would necessarily imply that the duty can be levied only on the viewer who is admitted to entertainment like an entry to a Cricket match where the tickets are sold and the viewers are permitted entry to watch the sport event, which would be true even in respect of any other type of amusement and entertainment.

(13) Mr. Sorabjee has then argued that the judgment of the Constitution Bench of Hon'ble the Supreme Court rendered in the case of **M/s Geeta Enterprises** *(supra)* would not be attracted to the facts of the present case because in that case the owners of the Video Parlour who charged fee for playing video games, were to be taxed and levy of such tax on the players of the games was upheld. According to the learned counsel, the Division Bench in **M/s Chryaslis International Pvt. Ltd.** *(supra)* did not correctly apply the ratio of the judgment of Hon'ble the Supreme Court in **M/s Geeta Enterprises's case** *(supra)*. Firstly, the

judgment in **M/s Geeta Enterprises** *(supra)* proceeded entirely on a different plane, secondly assuming the judgment is applicable then four tests laid down in para 12 thereof have to apply cumulatively. It is laid down in the case of **M/s Geeta Enterprises** *(supra)* that a video parlour show must pass the said tests to come within the ambit of the provisions of the charging section. Learned counsel has submitted that the Division Bench has taken incorrect view by opining that if one of the four tests is satisfied then levy of tax on sports would be attracted.

(14) Mr. Sorabjee has also placed reliance on the Rules of the DLF Club which show that it is not a place for public entertainment where people are invited to an entertainment which is conceptually incorporated in the Act. Learned counsel has referred to Rule 6 of the Club and argued that a sum of Rs. 4,00,000 for four years is prescribed to use the facilities in this private club. In a public entertainment no attire can be prescribed which could be done in a private club like the petitioner.

(15) Mr. Arvind K. Nigam, learned Senior counsel appearing in some other petitions has argued that those petitioners are the members of the clubs and the burden of tax is clearly felt by them who play Golf. The activities of the members who play Golf is not exposed to public exhibition to entertain others. Learned counsel has drawn our attention to the long title of the Act where the expression 'public entertainment' has been used and has argued that the incidence of duty is on the payment for 'public entertainment'. Mr. Nigam has supported his submission by placing reliance on para 104 of the judgment rendered in the case of **Vasu Dev Singh** *versus* **Union of India, (7),** and argued that preamble of a statute is a key to understand it. According to the learned senior counsel, a member of the club does not entertain any public nor any such public is subjected to any payment and without authorization of law no tax can be levied as provided by Article 265 of the Constitution. The only possibility of charging entertainment duty would arise when a sports match is played and general public is invited to witness the same because it is likely to be entertained by the sports event and that the entry of the general public is by a priced ticket on which duty is chargeable and the provisions of the Act is attracted. Learned counsel has insisted that if the view point projected by the State is accepted then it would lead to ridiculous consequences because a member

(7) (2006) 12 S.C.C. 753

of the club who play Golf would end up paying for playing the game of Golf, for making payment to Caddy etc. In respect of the constitutional validity of the Act and its Rules, Mr. Nigam has made similar submissions to that of Mr. Sorabjee. However, Mr. Nigam has placed reliance of the judgment of Hon'ble the Supreme Court rendered in the case of **Godfrey Phillips India Ltd.** *versus* **State of U.P., (8),** and has referred us to the observations made in para 37 to argue that the expression 'luxury' used in Entry 62 of List-II of the Seventh Schedule of the Constitution would refer to the activities of indulging, enjoyment or pleasure. It has been pointed out that only such activities could be subject matter of tax under Entry 62, List-II and not goods or aticles of luxuries. In other respect Mr. Nigam has adopted the argument of Mr. Sorabjee.

(16) Mr. Anil Diwan, learned senior counsel has at the outset stated that he would adopt all the arguments advanced by Mr. Soli Sorabjee. In addition, learned senior counsel has argued that he would like to adopt as his argument the view of the Division Bench of Bombay High Court expressed in the case of **State of Bombay** *versus* **R.M.D. Chamarbaugwalia, (9).** In para 24 of the judgment the Division Bench has observed that entertainment and amusement contemplated by Entry 33 of List-II with regard to legislation and Entry 62 of List-II with regard to taxes is not to cover the subjective entertainment or amusement which a person may receive by solving a crossword puzzle or by indulging in mental or intellectual pleasure. According to the learned counsel the Division Bench has correctly opined that entertainment or amusement contemplates something objective outside the person amused or entartained and with regard to the tax on entertainment and amusement, the tax is also on the spectator who witnesses some amusement or entertainment and, therefore, although a person who solves a crossword puzzle is amusing or entertaining himself but this is not the amusement which the Constitution contemplates on placing the topic of entertainments and amusements in the relevant entries. The argument of Mr. Diwan, learned senior counsel is that entertainment could only be possible if it is perceived by the viewers and the subjective entertainment confined to the person who solves a crossword puzzle is not covered by the constitutional scheme. Mr. Diwan has submitted that the

(8) (2005) 2 S.C.C. 515
(9) AIR 1956 Bombay 1

Division Bench Judgment was though reversed by the Constitution Bench in the case of **State of Bombay** *versus* **R.M.D. Chamarbaugwalia, (10),** but this part of the judgment was not reversed or differed from.

(17) Mr. Diwan has then submitted that the Division Bench judgment in **M/s Chrysalis International Pvt. Ltd.** *(supra)* has been wrongly decided on account of complete misapplication of the judgment of Hon'ble the Supreme Court in the case of **M/s Geeta Enterprises** *(supra)*. Mr. Diwan further submitted that the meaning of expression 'entertainment' would include any exhibitional performance, amusement, game or sport to which persons are admitted for payment. Placing reliance on para 4 and 7 of the judgment in the case of **M/s Geeta Enterprises** *(supra)* it has been submitted that when the expression 'entertainment' is construed in its widest sense even in such a situation the presence of the viewer who are to be entertained on payment of an amount is a *sine qua non*. The argument appears to be that the machines takes the place of a performer and the player on the video game as in the case of **M/s Geeta Enterprises** *(supra)* assume the character of a viewer on account of operation of the video games a player has to pay and the machine is operated on his payment and then he entertains himself by operating the machine. Mr. Diwan has elaborated his argument by referring to para 12 of the judgment that in order to bring any event within the sweep of expression 'entertainment', it must pass four tests, namely, (1) the show/performance, game or sport must contain a public colour, inasmuch as, it should be open to public in a hall where members of the public are invited or attend the show; (2) such a show may provide some kind of amusement whether sport, game or even a proformance which requires some amount of skill; (3) admission to the hall may be free but if the exhibitor derives some benefit in terms of money then it would be deemed to be an entertainment; and (4) the duration of the show or the identity of the person who operates the machine and derives pleasure is wholly irrelevant in judging the actual meaning of the expression 'entertainment'. According to the learned counsel the judgment in **M/s Geeta Enterprises case** *(supra)* revolves around the interpretation of expression 'payment for admission to entertainment' and it has been held that merely because payment is not made at the time of entering the premises is irrelevant. As long as payment is made although at a later stage by

(10) AIR 1957 S.C. 699

inserting a coin in the video game machine it would none-the-less be regarded as payment on admission to a place of entertainment. It was under these situation that contrary view taken by the Madhya Pradesh High Court in **Harris Wilson** *versus* **State of Madhya Pradesh, (11),** was overruled. It is on the aforesaid premises learned counsel has urged that the judgment in **M/s Chrysalis International Pvt. Ltd.** *(supra)* proceeds on an incorrect assumption.

(18) Mr. H.S. Hooda, learned Advocate General, Haryana, has vehemently argued that once expression 'sport' has been employed by the framers of the Constitution amidst expression entertainment and amusement in Entry 33 of List-II then it cannot be concluded that expression 'entertainment' would not include sport as per Entry 62 of List-II. According to the learned Advocate General the expression 'entertainment' is wide enough to include 'sport' under Entry 62 of List-II of seventh Schedule. Mr. Hooda has placed firm reliance on paras 3 and 4 of the Constitutional Bench judgment of Hon'ble the Supreme Court rendered in the case of **Y.V. Sirinivasamurthy** *(supra)* and argued that the Constitution Bench has interpreted the word 'entertainment' to include 'sports' and, therefore, the State legislature has been clothed with full competence to frame tax law under Entry 62 of List-II of Seventh Schedule of the Consitution. Mr. Hooda has supproted the view taken by the Division Bench of this Court in the cases of **M/s Chrysalis International Pvt. Ltd.** *(supra)*/**Wet-N-Wild Resort** *(supra)* and argued that those cases have been correctly decided. According to the learned Advocate General various tests laid down by Hon'ble the Supreme Court in the case of **M/s Geeta Enterprises** *(supra)* have to be applied intependently because there is nothing in paras 4, 8 and 16 which suggest that such tests are to be applied cumulatively. Mr. Hooda has extensively referred to the provisions of the Act to argue that the expression public entertainment cannot be construed narrowly because the members of the general public are also invited to join the club on payment. The membership of the club is open to public and mode of payment does not make any difference. The provision of the Act shows that payment for entertainment could be made in lump sum or by any other mode.

(11) AIR 1982 M.P. 171

(19) After hearing the arguments of the learned counsel for the parties, noticing the facts from their pleadings and bestowing our consideration on various aspects we proceed to answer two substantive questions of law framed in para two of this judgment.

RE : QUESTION '(A)'

(20) Our Constitution has asdopted a distinctive federal form of polity. This peculiar federal pattern of distribution of legislative powers could assume unitary character in order to cope with a situation like an emergency. When a declaration of emergency is in operation in pursuance to Article 352 or Article 356 then by virtue of Article 250 of the Constitution, the Parliament is expressly clothed with the power to make laws with respect to any of the matter enumerated in the State List. A random look at Articles 249 to 252 would establish that the Parliament has been accorded primacy in framing of laws.

(21) It is trite to observe that various 'fields' of legislation exhaustively stand demarcated, allocated and distributed between 'Parliament' and 'Legislatures of States'. Both the institutions reflect the 'Will' of the people, but yet they derive their competence to make laws from the fountainhead i.e. Article 245 of the Constitution. It categorically provides that subject to other provisions of the Constitution, the Parliament is competent to make laws for whole or any part of the territory of India and the Legislature of a State may make laws for whole or any part of the State. Article 246 of the Constitution puts it beyond any doubt that the Parliament has the exclusive power to make laws with respect to any of the 'fields' enumerated in List I in the seventh Schedule, which is known as 'Union List'. the Parliament has also been clothed with the power to make laws on any of the 'fields' enumerated in List-III in the Seventh Schedule, which is known as 'Concurrent List'. The States also have the power to make laws in respect of any of the 'fields' of 'Concurrent List', which is subject to the power of the Parliament under clause (1) of Article 245. However, the State Legislature has exclusive power to make laws with respect to any of the fields enumerated in List II in the Seventh Schedule, which is described as the 'State List'. However, in any of the residuary field, Parliament has been given the power to frame laws which again makes the Parliament more powerful. After referring to a wealth of Indian as well as

foreign cases, a 3-Judge Bench of Hon'ble the Supreme Court in paras 71, 74, 75 and 76 of the judgment rendered in the case of **Hoechst Pharmaceuticals Ltd.** *versus* **State of Bihar, (12),** has laid down various principles on this aspect. Those principles have been lucidly summed up by a 5-Judge Bench of Hon'ble the Supreme Court in the case of **State of West Bengal** *versus* **Kesoram Industries Ltd., (13),** in the following terms :—

"*(1)* The various entries in the three lists are not "powers" of legislation but "fields" of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. *There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.*

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List-II on the one hand and List I and List-III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) *Taxation is considered to be a distinct matter for purposes of legislative competence.* There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. *The power to tax cannot be deduced from a general legislative entry as an ancileary power.*

(4) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. the words and expressions employed in drafting the entries must be given the widest-possible interpretation. This is because, to

(12) (1983) 4 S.C.C. 45
(13) (2004) 10 S.C.C. 201

quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeration of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List-I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctine of pith and substance has to be applies to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encrachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of Pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three lists, List I has priority over Lists III and II and List III has priority over List II. However, *still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I."* (*Italics* in the original but not underlined)

(22) These principles summed up by the Constitution Bench are of general application. However, legislation in the field of taxation and economic activities have to be construed with greater latitude and flexibility. In the case of **R.K. Garg** *(supra),* a Constitution Bench of Hon'ble the Supreme Court emphasised for a greater latitude, like play in the joints, being allowed to the legislature because it has to deal with complex problems which do not admit of solution through any straitjacket formula. The Constitution Bench approved the following dictum of Frankfurter, J. in **Morey** *versus* **Doud, (14)** :—

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

(23) The Constitution Bench has approved the view of the Federal Court of United State dealing with a federal polity which is somewhat akin to the federal structure adopted by our Constitution. It appears to us that the rationale for the aforesaid approach in respect of law concerning tax is that any intervention by the Court would affect the collection of revenue which is so vital and significant to move the economy of the State. Morever, there is always a presumption for the constitutionality of a statute rather than declaring it ultra vires of the Constitution. It is equally well settled that the measure employed for assessing a tax must not be confused with the nature of the tax. In **Kesoram Industries Ltd.** *(supra)*, the Constitution Bench has held that *"a tax has two elements: first, the person, thing or activity on which the tax is imposed, and second, the amount of tax. The amount may be measured in many ways; but a distinction between the subject-matter of a tax and the standard by which the amount of tax is measured must not be lost sight of. These are described respectively*

(14) 354 U.S. 457

as the subject of a tax and the measure of a tax. " For these principles reliance may also be placed on the judgement of Hon'ble the Supreme Court rendered in the case of **Union of India** *versus* **Bombay Tyre International Ltd., (15).**

(24) It is in the aforesaid backdrop that the issue raised before us needs to be considered. Firstly, Entries 33 and 62 in the State List of the Seventh Schedule of the Constitution needs to be read in juxtaposition, which are as under :

Entry 33 of the State List	**Entry 62 of the State List**
"Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements."	"Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling."

(25) On the aforesaid entries, learned counsel for the parties have advanced several pleas but their fundamental submission is that omission of word 'sports' from, and retention of expression *'entertainments'* and *'amusements'* in entry 62 is deliberate when we compare the same with non-taxing Entry 33, which has used all these three words *'sports, entertainments and amusements'*. The omission of word 'sports' in taxing Entry 62 is indicative of the intention of the 'founding fathers' to leave taxation on sports to the competence of the Parliament under residuary entry 97 of the 'Union List'. However, the submission looses sight of the judgment rendered by a Constitution Bench of Hon'ble the Supreme Court in the case of **Y.V. Srinivasamurthy** *(supra)*. The Constitution Bench has dealt with a similar argument and rejected the same. In that case tax was sought to be levied under Section 3 of the Mysore Cinematograph Shows Tax Act, 1951. The expression *'Cinematograph Show'* was defined in Section 2 to mean any cinematograph exhibition held in any place to which persons are admitted on payment. The rates of taxes were prescribed in Section 2 in a rising scale according to the availability of seating accommodation and the cities where the cinematopraph show was held. The dispute was whether the State Legislature has competence under taxing Entry 62 to frame such a law as the expression *'cinemas'* used in Entry 33 was omitted

(15) (1983) 4 S.C.C. 210

in the taxing Entry 62. Their Lordships' of the Constitution Bench noticed and rejected the aforesaid argument in para 3, which reads as under :—

> "3. It is only necessary here to refer to an additional argument that was advanced by learned counsel for the appellants before us in support of his contention. He drew our attention to entry 33 of List II of the Seventh Schedule to the Constitution which runs as follows: "Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements." He contends that that entry covers laws made with respect to each of the items as a separate subject, but points out that Entry 62, which has been quoted above, permits imposition of tax only on luxuries inluding taxes on entertainments, amusements betting and gambling. Learned counsel concludes that law made with respect to Entry 62 cannot permit imposition of taxes on cinemas, for the word "cinemas" mentioned in Entry 33 has been omitted from Entry 62. We do not think there is any substance in this argument. Learned counsel agrees that the words "entertainments" and "amusements" are wide enough to include theatres, dramatic performances, cinemas, sports and the like. If his argument is correct, then, on a parity of reasoning, the State Legislature will have no competence to enact a law imposing a tax on theatres of dramatic performances or sports, for none of those words are mentioned in Entry 62. This is sufficient to repel this argument. The truth of the matter is that "cinema" had to be specifically mentioned in Entry 33 of List II in order to avoid any possible conflict between and Entry 60 in List I." (emphasis added).

(26) A perusal of the aforesaid position of law laid down by the Supreme Court would show that the Constitution Bench proceeded to interpret the 'fields' of Legislation, namely, entertainments and amusements to be wide enough to include theatres, dramatic performances, cinemas, sports and the like. In the cases of **Hoechst Pharmaceuticals Ltd.** *(supra)* and **Kesoram Industries Ltd.** *(supra)* it has been categorically laid down that entries in the lists are merely 'topics' or fields' of legislation and, therefore, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest possible

interpretation because the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere enumeration of broad categories.

(27) The use of word 'including' employed in Entry 62 preceded by expression 'luxuries' is also significant. It would imply that the expressions following the word 'including' are more extensive and illustrative; and not exhaustive. Therefore, it would include 'sports'. It is well settled that the word 'include' is generaly used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used those words or phrases must be construed us comprehending not only such things, as they signify according to their natural import, but also those thing which the interpretation clause declares that they should include. In **State of Maharashtra** *versus* **Labour Law Practitioners' Association, (16),** the inclusive definition of 'District Judge' in Article 236(a) of the Constitution has been very widely construed to include hierarchy of specialised Civil Court Viz. Labour Courts and Industrial Courts, which are not expressly included in the definition. Likewise, while construing the provisions of Article 129 of the Constitution in the case of **Delhi Judicial Service Association, Tis Hazari Court, Delhi** *versus* **State of Gujarat, (17),** a 3-Judge Bench of Hon'ble the Supreme Court observed that the expression *'including'* has been interpreted by Courts to extend and widening the scope of power and in para 29 proceeded to observe us under :—

> "29. Article 129 declares the Supreme Court a court of record and it further provides that the Supreme Court shall have all the powers of such a court *including the power to punish for contempt of itself* (emphasis supplied). The expression used in Article 129 is not restrictive instead it is extensive in nature. If the Framers of the Constitution intended that the Supreme Court shall have power to punish for contempt of itself only, there was no necessity for inserting the expression "*including the power to punish for contempt of itself*". The article confers power on the Supreme Court to punish for contempt of itself and in addition, it confers some additional power relating to contempt as would appear from the expression "including".

(16) (1998) 2 S.C.C. 688
(17) (1991) 4 S.C.C. 431

The expression "including" has been interpreted by courts, to extend and widen the scope of power. The plain language of Article 129 clearly indicates that this Court as a court of record has power to punish for contempt of itself and also something else which could fall within the inherent jurisdiction of a court of record. In interpreting the Constitution, it is not permissible to adopt a construction which would render any expression superfluous or redundant. The courts ought not to accept any such construction. While construing Article 129, it is not permissible to ignore the significance and impact of the inclusive power conferred on the Supreme Court. Since the Surpreme Court is designed by the Constitution as a court of record and as the Founding Fathers were aware that a superior court of record had inherent power to indict a person for the contempt of itself as well as of courts inferior to it, the expression "including" was deliberately inserted in the article. Article 129 recognised the existing inherent power of a court of record in its full plenitude including the power to punish for the contempt of inferior courts. If Article 129 is susceptible to two interpretations, we would prefer to accept the interpretation which would preserve the inherent jurisdiction of this Court being the superior court of record, to safeguard and protect the subordinate judiciary, which forms the very backbone of administration of justice. The subordinate courts administer justice at the grassroot level, their protection is necessary to preserve the confidence of people in the efficacy of courts and to ensure unsullied flow of justice at its base level." (emphasis in original).

(28) In this regard further reliance may be placed on various judgments of Hon'ble the Supreme Court including **Associated Indem Mechanical Pvt. Ltd.** *versus* **West Bengal Small Scale Industrial Development Corporation Ltd. (18)** (para 13); **Ramanlal Bhailal Patel** *versus* **State of Gujarat, (19)** (para 23); and **Karnataka Power Transmission Corporation** *versus* **Ashok Iron Works Pvt. Ltd. (20)** (paras 15 to 17).

(18) (2007) 3 S.C.C. 607
(19) (2008) 5 S.C.C. 449
(20) (2009) 3 S.C.C. 240

(29) In **Kesoram Industries Ltd.** *(supra)* the Constitution Bench in proposition No. 5 has observed that where the legislative competence of the legislature of State is questioned on the grounds that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether legislation relates to any of the entries in List I or III. If it does, no further question need be asked. In a situation like the one in hand the answer to the aforesaid question would be that there is no entry in List I and List III dealing with taxes on 'sports' or 'sports' club'. There is no overlapping which may necessitate the application of the doctrine of 'pith and substance'. It would not be possible to sweep the field of taxation on 'sports or 'sports' club' under the residuary Entry 97 of List I particularly when such a field is covered by the expression 'entertainment' used in Entry 62 of List II. On that score also the arguments advanced by learned senior counsel do not merit acceptance.

(30) We are further of the view that imposition of entertainment duty is not only on sport but on the 'sports club', which is embroiled in score of other activities which included partying, wining and dining. Therefore, the Constitution Bench judgment of Hon'ble the Supreme Court in the case of **Y.V. Srinivasamurthy** *(supra)* would be fully applicable and we are bound by and reiterate what the above judgment has held that the words 'amusements' and 'entertainments' would include 'sports' as well.

(31) The argument to the contrary advanced by the learned counsel for the petitioners would not require any serious discussion in view of the dicta of the judgment in **Y.V. Srinivasamurthy's case** (*supra*). The judgment cannot necessarily be overlooked merely as judgment because it is based on a concession and it is not being read like we read a statute. In fact, a full dressed argument was raised, as is evident from the perusal of para 3 extracted above and the same was repelled. Likewise, the other argument adopting paras 23 and 24 of the Division Bench judgment of Bombay High Court in the case of **R.M.D. Chamarbaugwalia** (*supra*) would also not be acceptable to conclude that the State Legislature lacks competence to tax sports, in view of the Constitution Bench judgment rendered in **Y.V. Srinivasamurth's case** *(supra).* The view expressed in para 3 of the judgment in **Y.V. Srinivasamurthy's case** *(supra)* cannot be brushed aside by accepting the argument that the judgment cannot be read like a statute or that it is based on consent. There is no dispute that even *obiter dictum*

of the Supreme Court judgment carries 'considerable weight' as has been laid down by Hon'ble the Supreme Court in **Director of Settlement** *versus* **M. R. Apparao, (21)** and **Shin-Etsu Chemical Co. Ltd.** *versus* **Aksh Optifibre Ltd. (22).** Therefore, those observation alongwith many other factors clearly point out that the State Legislature is competent to impose duty on 'sports'. The rationable adopted by the Bombay High Court in para 23 of the judgment highlights that entertainment or amusement contemplated is something objective and the tax is on the spectator who witnesses some amusement or entertainment. Such a construction, with utmost respect, cannot be accepted on account of contrary view expressed by the Constitution Bench in the case of **Kesoram Industries Ltd.** (*supra*). Therefore, we hold that the State Legislature is competent to impose entertainment duty/tax on entertainments and amusements, which include sports and accordingly question '(A)' is answered in favour of the revenue and against the assessee.

Re: Question '(B)'—Does the Homer nod

(32) In the preceding paras the competence of the State Legislature to impose tax in the field of entertainment, which includes 'sports' has been upheld. The other question which has been posed for the Full Bench to answer is whether the Division Bench of this Court in the case of **Chrysalis International (P) Ltd.** (*supra*), has correctly adopted and applied the judgement of Hon'ble the Supreme Court rendered by a 3-Judges Bench in **M/s Geeta Enterprises's case** (*supra*). The question 'Does the Homer nod'. The Division Bench view has been challenged principally by urging that it has wrongly applied the principles of law as laid down in **M/s Geeta Enterprises's case** (*supra*). In that case Hon'ble the Supreme Court was dealing with the conflicting views expressed by two Division Bench judgments of Allahabad and Madhya Pradesh High Courts. In the case of **Gopal Krishna Agarwal** *versus* **State of U.P., (23)** a Division Bench of Allahabad High Court has upheld imposition of entertainment tax on participation in a show which is screened in a video parlour by accepting that the definition of entertainment given in Section 2(3) of the United Provinces Entertainment and Betting Tax Act, 1937 (for brevity, 'the United Provinces Act') was

(21) (2002) 4 S.C.C. 638
(22) (2005) 7 S.C.C. 234
(23) 1982 All LJ 607

wide enough to include video parlour where video games were played. The Division Bench also referred to the general meaning of entertainment derived from various legal and Engilsh language dictionaries. On the contrary, a Division Bench of Madhya Pradesh High Court in the case of **Harris Wilson** *(supra)* had taken the opposite view holding that no entertainment tax was leviable by virtue of participation in playing the video games in a video parlour. However, the Hon'ble Supreme Court in **M/s Getta Enterprises's case** *(supra)* overruled the view taken by the Madhya Pradesh High Court as also a similar view taken by the Gujarat High Court in the case of **H. T. Gursahanev** *versus* **State (24).** The Division Bench of this Court in the case of **Chrysalis International (P) Ltd.** *(supra)*, has also upheld the imposition of entertainment tax on the sports clubs, which has been questioned in this reference to the Full Bench.

(33) In the aforesaid backdrop it would be first necessary to extract the facts and the law laid down in **M/s Geeta Enterprises's case** (*supra*). There, a partnership firm had a video parlour. It had permitted a manaufacturer to instal his video machine in the parlour to screen shows mainly of sports, games, sea warfare, space warfare including many other such like things. The Enterprise had claimed that the shows were both educational and provided entertainment to the participants. The Enterprise would permit persons to enter the video parlour without any fee or charges to enable them to play the video games. However, if they were to play the video games then payment was required to be made by them. The payment was made by participants by inserting a coin of 50 paise into strong box built within the machine. The keys of the machine were held by the manufacturer who had installed the machine. After the show, a representative of the manufacturer would come, open the box, collect the money and pay the share of the Enterprise out of the total sale proceeds. The Enterprise claimed that no admision or entry fee at the gate was charged from anyone to enter the parlour. The shows in the video parlour were operated by one of the participant from the audience and the charges of 50 paise for a show of 30 seconds was realised only from those who wanted to play.

(34) The Hon'ble Supreme Court rejected the argument advanced by the Enterprise that the manner in which the game was shown to the participants and operated by person playing the game was not entertainment

(24) 1982 (2) 23 Guj. L.R. 526

within the meaning of Section 2(3) of the United Provinces Act. It was held that *"the word 'entertainment' has been used in a very wide sense so as to include within its ambit, entertainment of any kind including one which may be purely educative. Sub-section 3 itself by using the word 'entertainment' as "any exhibitional, performance, amusement, game or sport to which persons are admitted for payment" has extended the scope of entertainment to expressly include any kind of amusement, game or sport. It cannot be disputed in the present case that by operating the video, the operator of the video pays 50 paise per 30 seconds for playing the games, sports and other kind of performances which are shown on the machine and which can be watched by interested spectators".*

(35) Another argument that no admission fee was charged, also failed to find favour with the Supreme Court. Learned counsel for the petitioners in these matters have laid strees that when a number of people enter the hall for entertainment and enjoy the game then it becomes a public hall for a public show, which element is missing in the instant cases. However, we are unable to subscribe to the aforesaid argument for the reasons to follow. The classical examples of theatre performance, shows in cinemas, entry to cricket matches are not necessarily the only events providing entertainment to the audience which enter the theatre or halls or the play grounds respectively. In those cases highly skilled performers display their talent and entertain the public at large, yet, that is not the only by way of entertaining oneself. The modern scientific advances have now provided ways and means when a person can entertain oneself by use of his own skill. Therefore, in the present time it is not possible to lay down any general principles that a person cannot amuse himself and entertain himself by his own skill and playing game or that he can be entertained only when another person is there to entertain them. The element of public exhibition in such like cases is not imperative in the sense that the public should come and see as viewers. The element of public participation is adequate as against the private use of such like games in one's office or home. A person playing any game on his laptop or personal computer apparently would not be subjected to entertainment duty. However, if he is playing a video game at a video parlour or a club for a consideration, it loses its private character

and, therefore, the argument of the learned counsel for the petitioners confining entertainment to the classical examples would no longer be acceptable and his adoption of the argument on the basis of the observations made by the Division Bench of Bombay High Court in paras 23 and 24 of the **R.M.D. Chamarbaugwalia's case** (*supra*), would also meet the same fate because the argument, necessarily emerges from the same premise. In that regard propositions of law laid down in para 12 of the judgement in **M/s Geeta Enterprises's case** (*supra*) needs to be kept in view. In para 12, Hon'ble the Supreme Court went into the general meaning of expression 'entertainment' as defined in various books as also on true interpretation of the word as defined in Section 2(3) of the United Provinces Act and has held that the show must pass four tests to fall within the ambit of that section. The four tests are as under :—

> "(1) that the show, performance, game or sport, etc. must contain a public colour in that the show should be open to public in a hall, theatre or any other place where members of the public are invited to attend the show ;
>
> (2) that the show may provide any kind of amusement whether sport, game or even a performance which requires some amount of skill ; in some of the cases, it has been held that even holding of a tombola in a club hall amounts to entertainment although the playing of tombola does, to some extent, involve a little skill;
>
> (3) that even if admission to the hall may be free but if the exhibitor derives some benefit in terms of money it would be deemed to be an entertainment;
>
> (4) that the duration of the show or the identity of the person who operates the machine and derives pleasure or entertainment or that the operator who pays himself feels entertained is wholly irrelevant in judging the actual meaning of the word 'entertainment' as used in Section 2(3) of the Act. So also the fact that the income derived from, the show is shared by one or more persons who run the show."

(36) After extracting the aforesaid four tests, the Hon'ble Supreme Court quoted the following para with approval from the Division Bench judgment of Allahabad High Court in **Gopal Krishna Agarwal's case** (*supra*), which reads thus :

> "The context in which the word 'includes' has been used in the definition clauses of the Act does not indicate that the Legislature intended to put a restriction or a limitation on words like 'entertainment' or 'admission to an entertainment' or 'payment for admission.' With the advance of civilization and scientific development new forms of enterainment have come into existence. Video Games are probably the latest additions to the means of entertainment. These games require skill and precision as so many other games do. They are a source of amusement and enjoyment to those who participate in the games. Others who stand by and watch also derive some pleasure and amusement though not to the same degree. Admission to the premises where the video machines are installed may be free but payment is admittedly made if one wants to play game. The money charged for use of the video machine is an admission to entertainment and the payment made by the person who uses the machine is the payment for admission. In any case it is a payment connected with entertainment which a person is required to make as a condition of attending the entertainment."

(37) After making the aforesaid observations, the Hon'ble Supreme Court then proceeded to overrule the Division Bench judgment in **Harris Wilson's case** (*supra*) rendered by the Madhya Pradesh High Court. It has quoted with dis-approval the para which show that the arguments similar to the one advanced by the learned counsel for the petitioners have been rejected, namely, that what entertains a person in the video games parlour is his own performance and that it is not the exhibition, performance, amusement or any sport offered by the assessee. Hon'ble the Supreme Court also did not find any merit in the submission that payment made to derive pleasure from his own performance with the

help of the hired tools was not to be regarded as admission to entertainment. The para quoted with dis-approval makes an interesting reading which reads as under :

> "Therefore, what entertains a person in the video games parlour is his own performance and not the exhibition, performance, amusement, game or any sport offered by the petitioners. The payment made by a person to another to provide him with tools for deriving pleasure from his own performance with the help of the tools cannot be held to be payment to that another for admission to entertainment as contemplated by the Act. In our opinion, therefore, it cannot be held that the petitioners receive payment for admission to entertainment, when they collect amounts inserted by the persons in the slot".

(38) In the process, Hon'ble the Supreme Court also overruled the judgment of Gujarat High Court rendered in the case of **H.T. Gursahaney** (*supra*). It is also pertinent to notice that the judgment in **M/s Geeta Enterprises's case** (*supra*) has been followed and applied in the case of **Standard Games** *versus* **State of U.P. (25).** There was another bid to reopen the issue before a Constitution Bench of Hon'ble the Supreme Court in the case of **State of M. P.** *versus* **Abha Sethi, (26),** but the Constitution Bench reiterated the view taken in **M/s Geeta Enterprises's case** (*supra*) and approved the same.

(39) From the aforesaid discussion, following principles are deducible :

a. The video games are subject to entertainment tax. Even if a person is entertained in a video parlour by his own performance, there is no legal requirement that the owner of the video parlour should organise some entertainment programme like performance in theatre, amusement, games or any sport. In other words, it is no longer *sine qua non* that performance by a third party organised at the instance of the assessee is imperative in order to attract entertainment tax ;

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(25) (1996) 4 S.C.C. 467
(26) (1999) 4 S.C.C. 32

b. The mode of payment is wholly immaterial whether made at the entry or at the time of playing games. Therefore, a lump sum amount paid in the beginning or annual subscription given year after year would hardly make any difference; and

c. A performance becomes public in character when people come to play the game by displaying their own skill for consideration at a place where the members of the public are invited to pay and enjoy the facilities.

(40) Learned counsel for the petitioners have vehemently argued that until and unless all the four tests are cumulatively satisfied, the ratio laid down in **M/s Geeta Enterprises's case** *(supra)* would not be attracted. According to the learned counsel the judgment in the case of **Chrysalis International (P) Ltd.** (*supra)* has been wrongly decided because it has applied only one of the tests laid down in **M/s Geeta Enterprises's case** (*supra*). Placing reliance on para 13 of the judgment in the case of **Chrysalis International (P) Ltd. (*supra*),** learned counsel has argued that the Division Bench itself accepted that when the player or artist enjoy their own game which they play or the theatrical performance which they stage may entertain or amuse them but no entertainment duty would be payable by any such artist or player. The learned Division Bench in our view has correctly decided the issue, namely, that entertainment tax is leviable on 'sport' as it is included in the expression entertainment'. It is a wholly misplaced argument that all the four tests were not satisfied in the case of **Chrysalis International (P) Ltd.** (*supra).* It is a different matter that the learned Judges did not discuss every test individually in the case of **Chrysalis International (P) Ltd**. *(supra*). For example, the first test provides that the show should be open to public in a hall, theatre or any other place where members of the public are invited or general public attends the show. This test stand satisfied when members of the general public are invited to enroll themselves as member of the club. It is well settled that in taxing statute any pedantic approach needs to be avoided. [**see Kesoram Industries case** (*supra)*] The lists in the Seventh Schedule merely provide the 'fields' of legislation which are capable of being construed by enveloping even other areas. Therefore, public nature of the sport is satisfied when services in the

club are provided to general public by inviting them to become members. The second test also stands satisfied because by playing a sport the players entertain themselves although by employing their own skill. The example of Tombola' in club hall has been held public entertainment although the playing of Tombola also involves some skill. The third test is also satisfied because admission is for consideration and not free and the fourth test is also satisfied as the players pays fixed amount for playing the game for a limited time and entertain themselves. Therefore, it cannot be doubted that the judgment in the case of **Chrysalis International (P) Ltd.** *(supra)* has been correctly decided.

(41) In the case of **The Palace Administration Board** *versus* **Rama Varma Bharathan Thampuran, (27),** Justice Krishna Iyer has observed that Horace has written *"But if Homer, who is good, nods for a moment, I think it a shame"*. The learned Judge then went on to observe that *"we, in the Supreme Court, do 'nod' despite great care to be correct, and once a clear error in our judgment is revealed, no sense of shame or infallibility complex obsesses us or dissuades this court from the anxiety to be ultimately right, not consistently wrong."* We are happy to notice that we are saved of Homer's nod. Accordingly, the second question is also answered against the petitioners and in favour of the revenue.

(42) Having answered both the substantive questions of law the matter may now be listed before a Division Bench, which may consider the other submissions regarding application of the provisions of the Act because we have confined the discussion to the aforesaid substantive questions of law. Accordingly, the office shall place these matters before the Division Bench.

(43) A photocopy of this judgment be placed on the files of connected cases.

R.N.R.

(27) 1980 (Supp.) S.C.C. 234