The State Of West Bengal & Ors vs Purvi Communication Pvt. Ltd. & Ors on 16 March, 2005

Equivalent citations: AIR 2005 SUPREME COURT 1849, 2005 (3) SCC 711, 2005 AIR SCW 1447, (2005) 2 CTC 300 (SC), (2005) 3 JT 339 (SC), 2005 (4) SRJ 535, 2005 (3) SCALE 274, 2005 (2) CTC 300, 2005 (3) JT 339, 2005 (3) SLT 205, (2005) 3 SCJ 185, (2005) 2 SUPREME 750, (2005) 3 SCALE 274, (2005) 2 CAL HN 162, (2005) 140 STC 154, (2005) 2 MAD LW 37, (2005) 2 PAT LJR 273

Author: Ar. Lakshmanan

Bench: S.N. Variava, Ar. Lakshmanan, S.H. Kapadia

```
           CASE NO.:
Appeal (civil)  2508 of 2001

PETITIONER:
The State of West Bengal & Ors.

RESPONDENT:
Purvi Communication Pvt. Ltd. & Ors.

DATE OF JUDGMENT: 16/03/2005

BENCH:
S.N. Variava, Dr. AR. Lakshmanan &  S.H. Kapadia

JUDGMENT:
```

J U D G M E N T Dr. AR. Lakshmanan, J.

The State of West Bengal Department of Finance, Calcutta and two others are the appellants in this appeal. Leave was granted by this Court on 30.03.2001 and pending disposal of the appeal, stay of operation of the judgment and order under challenge was passed.

The above appeal is directed against the final judgment and order dated 04.08.2000 passed by the High Court at Calcutta in W.P.T.T. No. 338 of 2000 whereby the High Court allowed the writ petition filed by respondent Nos. 1 and 2 and declared clause (ii) of sub-section (4a) of Section 4A of the West Bengal Entertainment-cum-Amusement Tax Act, 1982 (as amended by the West Bengal Finance Act, 1998) is ultra vires to the Constitution.

Respondent No.1 carries on business as a Multi System Operator (hereinafter referred to as 'MSO') and is engaged in receiving and providing TV signals to individual cable operators of various localities. The respondents are receiving communication signals known as TV signals broadcast by

various satellite channels and are distributing the same to the sub-cable operators. The process involved in the business consists of establishment of state of the art control rooms and spreading the cable network. The said network signals are being given to various sub-cable operators with whom the respondents have franchise agreement. According to the respondents, there is a significant and qualitative difference between the functions performed by them and the activities of sub-cable operators who are franchisee of the respondent-company. According to the respondents, the object of the MSO is to capture signals from various satellites and to put all of them in proper format/frequencies so that all those signals can travel together in cables without encroaching upon and interfering with other signals for the reception and distribution by the so- called sub-cable operators. The signals are transmitted through the satellites by the various broadcasters from their earth uplinking stations at various parts of the world.

Respondent No.1 entered into Franchise Agreement with the individual cable operators of various localities and on the basis of the said agreement, respondent No.1 transmits the said TV signals to the said individual sub-cable operators against a price. The individual sub-cable operators on the basis of the monthly subscription provide the said TV signals to the individual subscribers of the locality.

The Parliament of India enacted the Cable Television Networks (Regulation) Act, 1995 which was given effect from 29.09.1994. The said Act seeks to regulate the operation of cable television network in the country and matters connected therewith and incidental thereto. The West Bengal Legislature sought to impose a tax on the MSOs and the cable operators by amending the West Bengal Entertainment-cum-Amusement Tax Act, 1982. The said Act was amended by omitting sub-section (4) of Section 4A and inserted a new sub-section (4a) reading as under:-

> "(4a) Where any owner, or any person for the time being in possession, of any electrical, electronic or mechanical device, is a cable operator and receives through such device the signal of any performance, film or any other programme telecast, and thereafter such owner or person, against payment received or receivable,-
>
> (i) exhibits such performance, film or programme through cable television network directly to customers, or
>
> (ii) transmits such signal to a sub-cable operator, who in turn provides cable service for exhibition of such performance, film or programme to the customers, such owner or person shall be liable to pay tax from the month in which he exhibits such performance, film or programme or transmits such signal to a sub-cable operator on the basis of his monthly gross receipt at such rate, not exceeding twenty five per centum of the monthly gross receipt, as may be specified by the State Government by notification published in the Official Gazette.

Entry 62 of List II of Seventh Schedule to the Constitution is also reproduced hereunder:-

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

Section 4A reads thus:

> "4A. Levy and collection of tax for exhibition.- (1) Subject to the provisions of sub-section (2) and other provisions elsewhere contained in this Act, there shall be levied on, and collected from, a holder of a video cassette recorder set or sets or a holder of a video cassette player set or sets a tax, in addition to the tax referred to in section 4, where such holder makes any public performance or exhibition of film through a video cassette recorder set or a video cassette player set against payments made or to be made by persons admitted to witness such performance or exhibition at the rates specified below "

Some of the relevant definitions are reproduced hereunder for the proper understanding and adjudication of the case:

> "cable operator" means any person who provides cable service directly to customers or transmits signal to sub-cable operator through a cable-television network and otherwise controls or is responsible for the management and operation of a cable television network; "Sub-cable operator" means person, other than any owner or person who is cable operator referred to in this sub-section, who, on the basis of an agreement, contract or any other arrangement made between him and such cable operator, receives signal from such cable operator and provides cable service for exhibition of performance, film or any programme to the customers;
>
> "Cable Service" means transmission or retransmission of programmes including broadcast television channel signals or satellite television channel signals or both through or any other means;
>
> "Cable Television Network" means any system consisting of a set closed transmission paths and associated signals generation, control and distribution equipment, designed to provide cable service for reception by multiple customers;
>
> "gross receipt", in relation to any month or part thereof, shall mean the aggregate of amounts received or receivable by owner, or a person for the time being in possession, of any electrical, electronic or mechanical device who exhibits any performance, film or any other programme through cable television network directly to customers or who transmits the signal for exhibition of any performance, film or any other programme telecast to a sub-cable operator."

2(d) "Subscriber" means a person who receives the signals of cable television network at a place indicated by him to the cable operator, without further transmitting it to any other person.

In addition to the incorporation of sub-section (4a) in Section 4A, the said Amending Act of 1998 also inserted Sub-section (4b) which reads as under:-

> (4b) The prescribed authority shall, after making such enquiry as he may think necessary and after giving the owner or the person, referred to in sub-section (4a) of Section 4A, a reasonable opportunity of being heard, fix the date on and from which such owner or person shall become liable to pay tax under the said sub-Section."

According to the respondents that the so-called sub-cable operators who are in reality the cable operators are willing to get themselves registered and to pay the tax. According to them, it is the said local operators who have direct contractual nexus with the consumers/viewers/households are taxed for the purpose of entertainment tax and it is only in West Bengal that such a situation has been created.

Aggrieved by the imposition of entertainment tax and the demand notices issued, the respondents challenged the vires of 1998 amendment in the 1992 Act as well as these demand notices before the West Bengal Taxation Tribunal. The case was heard by a three-Member Bench. The Chairman of the Tribunal was of the opinion that the State Legislature was not competent to levy the tax on the "entertainer" i.e., the "sub-cable operator" and/or the "entertainee", namely, the viewer or the customer having regard to the administrative convenience and other relevant factors. The Chairman declared that clause (ii) of sub-section (4a) of Section 4A is ultra vires to the Constitution because the Legislature of the State of West Bengal is not competent to enact the provisions under Entry 62 of List II of the Seventh Schedule to the Constitution.

Another Technical Member and Judicial Member took the opposite view. According to them, the cable operator is the exhibitor and that he is the provider of the entertainment to the customer and hence he can be asked to pay tax on the entertainment that has resulted from the exhibition. Accordingly, they refused to quash the impugned demand.

Being aggrieved by and dis-satisfied with the judgment of the Tribunal, the respondents preferred a writ petition under Article 226 of the Constitution of India before the High Court. The writ petition was contested by the appellant-State by filing a detailed reply to the writ petition. The writ petition filed by the respondents was allowed by the High Court by their judgment dated 04.08.2000 for the reasons recorded in their judgment. The Bench was of the opinion that clause (ii) of sub-section (4a) of Section 4A of the Act is ultra vires to the Constitution. Accordingly, the Division Bench allowed the writ petition filed by the respondents herein. Aggrieved by the same, the State of West Bengal has preferred the above civil appeal.

We heard Mr. V.R. Reddy, learned senior counsel for the appellants and Mr. Dushyant Dave, learned senior counsel for respondent Nos. 1 & 2 and Dr. A.M. Singhvi, learned senior counsel for the Applicants in IA No.1. I.A. No.1 was allowed to the limited extent that the applicant therein should have the liberty of addressing the Court in support of the respondents but without filing any pleadings.

Mr. V.R. Reddy, learned senior counsel for the appellant, after inviting our attention to the relevant sections and of the definitions, judgments and annexures, submitted that the High Court has erred in declaring clause (ii) of sub-Section (4a) of Section 4A of the Act is ultra vires. According to him, clause (i) of sub-section (4a) of the Act falls within the legislative competence of the State Legislature and is not ultra vires to the Constitution. Respondent No. 1 who is engaged in receiving and providing TV signals to individual sub-cable operators is liable to pay tax under clause (ii) of sub-section (4a) of Section 4A of the Act which has come into force on 01.04.1998. The said sub-section (4a) has been substituted by an amendment made by the West Bengal Finance Act, 1998. According to the provisions of the said clause (ii) of sub-section (4a), any owner or person having in possession, of any electrical, electronic or mechanical device who receive through such device the signal of any performance, film or any other programme telecast and thereafter transmits such signals to a sub-cable operator against payment received and receivable by him is liable to pay tax on his monthly gross receipt for transmitting such signals of any performance, film or any other programme telecast to a sub- cable operator. It was submitted that respondent No.1 is a multi-system operator who receives TV signals and transmits such signals to his sub-cable operators through his cable television network, is a cable operator within the meaning assigned by the explanation of sub-section (4a) of Section 4A of the Act. After transmission of such signal by respondent No.1 to their sub- cable operator they, in turn, provide cable service for exhibition of such performance, film or programme to individual customers and entertain them. It was further submitted that respondent No.1 admittedly controls and is responsible for the management and operation of the cable television network.

Our attention was also invited to certain terms and conditions of the franchise agreement entered into between the cable operator and sub-cable operator. According to Mr. V.R.Reddy, learned senior counsel, the services rendered by respondent No.1 is not restricted only to receiving signals but also extends to sending certain visual images and audio and other information by means of telecommunication network for presentation to members of public and in the present case respondent No.1 sends visual images and audio signals for presentation to the individual subscribers through their feeder line i.e. coaxial cable or any other device used for transmitting audio and visual signals in terms of clause 2 of the agreement. The franchisee has access to the signals provided by respondent No.1. Therefore, it cannot be disputed that the price or prices received or receivable by respondent No.1 is the amount received or receivable by him for transmitting the signal for exhibition of any performance, film or any other programme telecast and the aggregate of such prices or amounts is the gross receipt of respondent No. 1 in relation to any month or part thereof. It was further submitted that sub-cable operators, as franchise, cannot render any service to any subscriber or various independent of or contrary to, any terms and conditions laid down in the agreement. A franchisee is merely an executor within the meaning given by respondent No. 1 in the agreement. The films, programmes performance can be telecast to the viewers only when the respondents receive signals and sends image and audio signals to their sub-cable operator for immediate presentation to such viewers. Therefore, whatever entertainments are derived by the members of public or viewers in houses, flats, being the subscribers, against payment is possible only because of their receiving signals and transmission of image and audio signals by the respondent and, as such, the source of entertainments is respondent No. 1 and the entire network is controlled and regulated by him.

Mr. V.R.Reddy submitted that the High Court has failed to appreciate that the taxable event need not necessarily be the actual utilisation or the actual consumption of the luxury or entertainment and that a luxury or entertainment which can reasonably be said to be amenable to a potential consumption does provide the nexus. It was further urged that the High Court ought to have seen that the very signal transmitted through cable operator's cable instantly reaches the sub-cable operator and also the viewer's television threshold. Thus the ready entertainment in the form of audio visual signal, which is transmitted by the cable operator, reaches instantly in fact from them to the threshold of the television of the viewer. Therefore, the signal of the sub-cable operator, which reaches television as the entertainment itself, is the very signal i.e. the ready entertainment, which has been transmitted by the cable operator. Thus providing the cable link up to the viewer's end is the only role sub-cable operator has to play. It is, therefore, inconceivable that despite putting forth the ready entertainment in the form of signal on the cable line the cable operator cannot be said to be providing the entertainment within the meaning of Entry 62 of List II of the Seventh Schedule of the Constitution of India.

It was submitted that sub-cable operators are not independent of, or can act contrary to, any terms and conditions laid down in the agreement. A franchisee is merely an executor within the meaning given by respondent Nos. 1 and 2 themselves in the agreement. It was further submitted that no viewers could be entertained by the sub-cable operators alone.

Elaborating further, Mr. V.R. Reddy submitted that it is the cable operator not the sub-cable operator, who decides the programme that should be included to the bunch of programmes. Out of the large number of programmes available from satellite, the cable operator chooses those programmes that he will put on his cable network. Cable Operator decides the bunch of programmes that viewers, the householder, connected to him will be able to see. The sub-cable operator cannot change the composition of these bunches; he can neither take out any channels nor add a new one. Secondly, it is the cable-operator, and not the sub-cable operator, who makes signals received from satellite ready whenever necessary, for reception by the TV set of the consumer. Many of the more popular channels transform the signals in such a way that the signal cannot be transformed into legible image and sound unless the signals are just made to pass through a decoder. For getting for a suitable decoder, the cable operator has to approach the agency controlling the channel for negotiating the charge to be paid for the decoder, for getting it after payment and completing other formalities. In other words, the bunch of programmes has not only to be assembled, it has to be made ready for reception by the ultimate consumer. Thirdly, the cable operator puts the bunch of channels on his "Cable TV Network" which has been defined in clause (d) of the Explanation under sub-section (4a) of Section 4A of the Act to mean any system "designed to provide cable services for reception by multiple consumer". Once this movement is done, the show is on. It is not at all like a roll of cinematic film lying in a can in the go-down of a distributor waiting for an exhibitor to take to his cinema hall and put it in show when the exhibitor feels like it. What has gone on the TV network is in the process of being exhibited and cannot be postponed in time.

Per contra, Mr. Dushyant Dave, learned senior counsel for the respondent submitted that the respondent is engaged in receiving and providing TV signals to individual sub-cable operators of various localities and such cable-operators on their part transmit the signals to their respective

subscribers, who are the actual consumers who get the benefit of the amusement or entertainment from those signals. According to him, in technological terms, it may be stated that respondent No.1 actually acts as the nodal, technical and scientific receptionist and supplier of signals and that the signals provided to the sub-cable operators are utilised by the said sub-cable operators for providing information and entertainment to their customers. According to Mr. Dushyant Dave there is a significant and qualitative difference between the functions performed by respondent No.1 cable-operator and the activities of the local sub-cable operators who are the franchisee of the respondent company. He would further submit that it is particularly important to note that due to recent technological developments, the MSOs like the respondent-company are not only providing the input to the localised cable operators in their business of providing cable TV connections and transmission of programme through cables, but the MSOs are also concerned with the value added services like internet, telephony, and transmission of data. The respondent-company by the use of the state of art bi-directional network of 550 MHZ bandwidth is able to receive and transmit signals telecast on about 40 to 50 channels as at present.

According to Mr. Dushyant Dave, under sub-section (4a) of Section 4A of the said Act of 1982, the tax is payable by a person provided the following conditions are fulfilled:

> a) He is an owner or a person for the time being in possession of any electrical, electronic or mechanical device;
>
> b) He is a cable operator as defined in Explanation (a) of the sub- section;
>
> c) He receives through such device the signal telecast and thereafter exhibits the same through cable television network directly to customers or transmits the same to a sub-cable operator who in turn provides cable service for exhibition to the customers;
>
> d) The said owners or the person does the same against payment received or receivable.

It was further argued that the activities carried on by the respondents do not in any view of the matter constitute amusement or entertainment. At best the respondents may be providing one of the inputs for the ultimate creation of an output, which may be said to be entertainment. The State Legislature by an artificial definition has treated the respondents as "Cable Operators". While in fact and also in law, as per the Cable Television Networks (Regulation) Act, 1995, the respondents are not "Cable Operators". Those who are actually "Cable Operators" within the meaning of the said Act of 1995 have been artificially excluded from the said category and termed as "Sub-cable Operators" only for the purpose of enlarging the scope of the said impost. It is those sub-cable operators as they are called by the said definition that may be providing the entertainment to the ultimate consumers but surely the respondents are not doing so. That the impugned legislation insofar as the same seeks to impose a tax on MSOs like the respondents by treating them as "Cable Operators" is ultra vires the Constitution being in excess of the legislative competence of the State Legislature under Entry 62 of List II of the Seventh Schedule. That the power to enact a law in respect of entertainment or

amusement must, in order to be intra vires, be one relating to entertainment as understood in common parlance. A law made under Entry 62 of List II of the Seventh Schedule should have a direct and sufficient nexus with the factum of entertainment. In other words, there must exist a close and direct connection between the person who provides the entertainment to the person who is thus entertained and pays for such entertainment. An activity, which is remotely connected with such entertainment, cannot come within the ambit of the said legislative entry. It was submitted that until and unless such a direct and proximate nexus between the transaction sought to be taxed and the person who is required to pay the tax is clearly established, the levy cannot be held to be constitutionally valid.

It was submitted that for the purpose of levy of entertainment tax it is the person who directly and ultimately provides the entertainment by exhibition to the viewers, is liable to pay the entertainment tax. In the case of exhibition of a movie in the cinema hall, it is the proprietor of the hall, who is taxed, as he obviously is the person who provides the entertainment by charging the necessary monetary compensation. All other persons who had participated in the production and distribution of the movie are not liable to pay entertainment tax. Similarly, the Cable operator in a locality who is actually providing the entertainment to this subscribers may be liable to pay tax but those who function at an intermediary stage, cannot be held liable to pay the said tax.

Explaining further, Mr. Dave submitted that the impugned legislation is broad sweep seeks to convert everyone into a cable operator so much so that the respondents as well as persons with whom the respondent Company has franchise agreements would be cable operators. Again, those who are cable operators within the meaning of the said Central Act of 1995 and are in franchise agreement with the respondent Company would be sub-cable operator as also cable operators, at one and the same time.

It was further submitted that the impugned legislation has made an irrational classification by putting the respondent Company and its franchisees holders who are called cable operators under the said Central Act of 1995 in one class even though they are differently circumstanced. This amounts to treating unequals as equals which is a fact of hostile discrimination.

The said provision of the charging section suffers from the vice of unreasonable classification insofar as it seeks to impose the tax on the person who provides entertainment to the viewers directly as also on those who merely sends the signal received by them to the other operators who in their turn transmits the signals to the consumers. Even though the said two functions are distinct and different in nature, they are placed in the same category by impugned legislation.

That the levy of the said amusement tax suffers from illegality in as much as it fails to specify the exact nature of receipt which will be termed as gross receipts. A major component of the receipts of signals providers like the respondent Company is absorbed in reimbursing the charges directly payable to pay channels, software providers, intellectual properties right holders and hence do not constitute receipts of the respondent Company. In the absence of any definition of 'gross receipt' the incidence of tax is rendered unreasonable, indeterminate and ultra vires.

The legislative provision is bad in law because of vagueness, ambiguous and uncertainty. This leave enough scope for the authorities under the Act to be arbitrary since they can pick and choose any persons or event or action at their whims and fancies for the purpose of levying tax in the guise of 'luxury' or 'entertainment' or 'amusement'. In the instant case the same has led to discrimination amongst persons similarly placed.

That the imposition of the tax on the gross receipts and/or gross income of the respondent Company which has no direct and proximate relationship with the provision of entertainments make the impost ultra vires the Constitution as the State Legislature has no power to impose a tax on income.

Dr. A.M. Singhvi, learned senior counsel appearing on behalf of the intervenor made the following submissions:-

> A) Assuming without conceding that Multi System Operators (MSOs) are also Cable Operators (COs), the impugned levy is unconstitutional because it travels beyond the very concept and scope of the word "Entertainment" under Entry 62 List II.
>
> B) Any State levy on entertainment and/or amusement, to be valid, must necessarily fall within Entry 62 List II, which gives exclusive state competence, in so far as taxation on these subjects is concerned. C) The taxable event is thus the act or activity of entertainment. This taxable event must have a direct and proximate connection with the assessee on which it falls and must itself constitute entertainment.

The activity in question must be examined and unless it qualifies as entertainment itself, the taxable event of entertainment cannot arise. In the present case, so far as the MSO (assuming without conceding that MSOs are also COs) are concerned, they do not do the activity of entertainment in any manner themselves. They are engaged merely in the receipt and transmission of telecommunication signals and do not themselves conduct shows, exhibitions or entertainment of any kind.

D) If the activity in question by itself is not the taxable event (here entertainment), the impugned levy cannot constitute it to be so and deem it to be so.

E) Unless the assessee is itself doing the entertainment, to tax the assessee would amount to unconstitutional enlargement of the concept of entertainment.

(i) It would be beyond legislative competence under Entry 62 List II.

(ii) There would be no logical and legal line of demarcation if the activity in question (here entertainment) could be enlarged by a process of backward integration. There would be no logical basis then to not treat distributors, producers, broadcasters and even the writer, author and creator of the film, show or serial in question as being an entertainer and hence exigible to entertainment tax. Such enlargement would be clearly ultra vires and beyond the legislative competence.

F) A close, direct and proximate connection must necessarily exist between the transaction in question and the person made liable for the tax in question. Such nexus must be fair and reasonable. The impugned tax cannot involve those not connected directly or intimately with the taxable transaction.

G) It must be remembered that the MSO has no privity or direct dealing with the subscriber. There is no contractual, statutory or other common law relationship between the MSO and the subscriber. The MSO cannot sue and is not suable by the subscriber. The MSO has no connection with the subject of entertainment i.e. (subscriber) but is yet made subject to tax. The MSO does not know the identity and whereabouts of the subscriber.

H) The dominant position and intention of the MSO is to act as a conduit for receipt and transmission of telecommunication and broadcasting signals. The dominant object is that of a conduit and the MSO performs the role of a telecommunicator and not an entertainer. He receives signals on the one hand from the broadcaster and transmits and passes them, on the other hand, to the cable operator and/or the sub cable operator who then gives it to the subscriber. There is neither intent to entertain nor the taxable fact of entertainment. Both animus and factum are thus missing.

I) Indeed, in view of the MSOs role as a conduit, the impugned levy would de facto amount to a tax upon expenditure in the hands of the assessee. Admittedly, the aggregate of all collection by MSOs from cable operator or sub cable operators is passed back to the broadcaster and what is retained in the hands of MSO is only a service charge. The impugned levy is a tax on the gross receipt of the assessee/MSO. It is not a tax on the aforesaid service charge only. Since the overwhelming proportion is given back by the MSO to the broadcaster, such a tax constitutes a tax on expenditure of the MSO and is therefore perverse, unreasonable and unconstitutional. J) In view of the foregoing, a tax on mere receiving and/or transmitting of signals will not fall under Entry 62 List II at all and would be the subject of exclusive parliamentary competence under Entry 31 read with Entry 97 of List I. K) Without prejudice, in the alternative, in any event the respondent assesses are MSOs and not cable operators and do not fall under the impugned Act of 1982. To fall within sub-Section (4a) of Section 4A of the 1982 Act, the assessee must separately and independently be "a cable operator". A MSO is not a cable operator and in particular, do not "exhibit" programmes "direct to customers" as per Section 4A(4a)(i) and does not "transmit such signals to a sub cable operator"

> under Section 4A(4a)(ii). The impugned Act of 1982 will cover only a cable operator who is also an MSO and not an MSO simplicitor. To that extent, the impugned provision is severable and should be declared and held to apply only to an entity(any entity (MSO or others) who is also a cable operator).
>
> L) Given the nature of activity of MSOs summarized above, it is clear that MSOs have not recovered any of the impugned tax amounts either from subscribers or from cable operators/sub cable operators.

Levy and recovery upon MSO would be unreasonable since they have no means of recovery from subscriber/cable operator/sub cable operator.

M) Without prejudice, in the alternative, the impugned levy and/or recovery should be prospective, if at all from after the judgment of the apex Court in the event that the judgment allows the appeal of the State of West Bengal. After the levy in 1998, tax was paid for sometime after which payment was stopped by the assessee and legal challenges were mounted. In different cases from mid 2000 onwards up to date from different dates, there has been no payment of the tax in question and no recovery from cable operator/sub cable operator/subscribers. It would be impossible to recover or pass the burden of the tax at least for the past period on to any subscriber or operator.

In this background of facts and circumstances of the case and of the arguments of the respective counsel, the following questions of law arise for consideration by this Court:-

> 1. Whether clause (ii) of sub-section (4a) of Section 4A of the West Bengal Entertainment-cum-Amusement Tax, 1982 (as amended by the West Bengal Finance Act, 1998) is beyond the legislative competence of the State Legislature?
>
> 2. Whether respondent Nos. 1 and 2 would come within the purview of clause (ii) of sub-section (4a) of Section 4A of the West Bengal Entertainment-cum-Amusement Tax Act, 1982 (as amended by the West Bengal Finance Act, 1998) as they are the persons who exhibit such performance through cable Television Network through the sub-Cable Operator?

We have very carefully considered the rival submissions made by learned counsel appearing on either side. Even though the arguments advanced by Mr. Dushyant Dave and Dr. A.M. Singhvi, the Intervenor appear to be very attractive at the First Blush, yet on deeper examination, it doesn't appear to be correct and sustainable.

In the instant case, respondent No.1 is engaged in receiving and providing TV signals to individual cable operators is liable to pay tax under sub-section (4a) of Section 4A of the Act. The expression "cable operator"

> has been defined by explanation to sub-section (4a) of Section 4A as aforesaid for the purpose of the sub-section only. Similarly, the meaning of sub-cable operator is given in the said explanation. There is no dispute that the respondent No.1 being a cable operator within the meaning assigned by the explanation to sub-section (4a) of Section 4A receives TV signals and transmits such signals to their sub-cable operator through their multi-system operator which is, in other words, a cable television network. There is also no dispute that after transmission of such signals by respondent No.1 to their sub-cable operators they, in turn, provide cable service for exhibition of such performance, film or programme to individual customers. The respondents have, in fact, admitted this position. The respondents are carrying on business as Multi System Operator (MSO) being engaged in receiving and providing

TV signals only to the individual cable operators of various localities.

The Cable Television Networks (Regulation) Act, 1995, a central legislation has been enacted to regulate the operation of cable television networks in the country and for matters connected therewith. This enactment does not, in our opinion, fetter the legislative power or competence of the State to levy tax on luxuries including taxes on entertainments, amusements, betting and gambling falling under Entry 62 of List II of Seventh Schedule to the Constitution. The power of regulation or control under the said central enactment is separate and distinct from the power of taxation by the State legislature under Entry 62 of List II being a specific power, the power of taxation cannot be cut down or fettered by the general power or regulation as exercised by the Parliament in enacting the said 1995 Act. Under the Legislative field exclusively reserved for the State Legislature, the levy of tax by more than one statute on different taxable objects and taxable persons is not prohibited by the Constitution of India. The Bengal Amusement Act, 1922 and the West Bengal Entertainment and Luxurious (Hostel and Restaurants) Act, 1972 are two statutes which have been enacted under the same legislature field i.e. Entry 62 of List II of Seventh Schedule to the Constitution of India, and the two statutes apply admittedly to levy of tax on amusements, entertainments and luxuries in their respective area but the area of application of the said 1982 Act is different as would evident from the provisions of 1922 Act and the 1972 Act as aforesaid. The said 1982 Act was, for the first time, enacted by the State Legislature in 1982 and its area of application was initially confined to levy and collection of tax from the holders of television set or sets under Section 4 of that Act. Thereafter, under Section 4A of that Act, inserted by the West Bengal Taxation Laws (second Amendment) Act, 1983, the area of its application was extended to levy and collection of tax from the holders of video cassette recorder. The purpose of sub-Section 4(a) of Section 4A of the Act is to levy and collection of tax from any person who provide cable service directly to consumers or transmits to a sub-cable operator through a cable television network and otherwise controls or is responsible for the management and operation of a cable television network and such person has been defined as "Cable Operator" being a taxable person exclusively for the purpose of levy and collection of entertainment tax only when a cable operator so defined receives through any electrical, electronic and mechanic device the signal of any performance, film or any other programme telecast and provides cable service directly to consumers or transmits signals to a sub-cable operator through a cable television network and otherwise controls or is responsible for the management and operation of a cable television network. The person who has been defined as cable operator exclusively for the purpose of levy and collection of entertainments tax has a direct and proximate nexus with the amusements and entertainments to the viewers at every home or place inasmuch as he is the person directly connected with presentation of entertainments to the subscribers. A person is also a "cable operators" for the purpose of sub-Section 4(a) of Section 4A of the said 1982 Act when he receive the signal of any performance, film, or any other programme telecast and transmits such signal to a sub-cable operator through cable television network or

otherwise control or is responsible for the management and operation of cable television network against payment received or receivable by him. Therefore, a cable operator is the source of entertainment to the individual subscribers because, it is he who receives the signal of performance, film, and any programme which transmitted or given to a large number sub-cable operator (although they call them as cable operator). The viewers enjoy, or are entertained by such performance, film, or programme because of receiving and transmitting video or audiovisual signals through coaxial cable or any other device by the respondents. No entertainment can be presented to the viewers unless a cable operator transmits the video and audio signals to a sub-cable operator for instantaneous presentation of any performance, film or any programme on their T.V. screen. The sub-cable operators are mere franchisees who receives signals for transmission to the viewers only on payment of price promised or paid in terms of agreements entered by and between them. This is clear from the below set out terms of the Franchise Agreement:

GRANT The NETWORK hereby grants to the FRANCHISEE and the FRANCHISEE accepts the right to receive signals through a Feeder Line for further instant transmission/communication in the TERRITORY on the terms and conditions set out in this agreement. PRICE The price payable by the FRANCHISEE for access to the signals provided by the NETWORK shall be as follows:

(a) Rs. 25/- per subscriber per month to be paid before the 7th day of the month.

(b) The FRANCHISEE will keep an interest free deposit of Rs. 50/- per subscriber with the NETWORK.

(c) The price mentioned in (a) above is liable to change depending upon the market conditions and by mutual understanding between the parties of the area.

TERMS AND CONDITIONS

(a) The NETWORK shall not provide any connections direct to home in the territory where the FRANCHISEE is operating.

(b) The FRANCHISEE would provide a list of subscribers within seven days of signing this agreement with full name, address and other information of relevance as required by the NETWORK. Subsequently any change in the subscriber list would be communicated to the NETWORK within seven days.

The FRANCHISEE would submit complete information and not withhold the name of subscribers or declare less number of subscribers to the NETWORK.

(d) The FRANCHISEE is authorised to receive and immediately re-transmit and/or communicate the signals of the NETWORK. Recording and then retransmission of the signals by the

FRANCHISEE is not allowed. However for any such intentions the FRANCHISEE will have to take written permission from the NETWORK.

(j) The FRANCHISEE shall not transmit or restraint any signals to his subscribers which are not transmitted by the NETWORK without the prior written consent of the NETWORK.

(m) The FRANCHISEE shall be liable to pay all applicable taxes, charges etc. levied or imposed by the Government or which may be imposed in future by the Govt. or any other statutory or regulatory body of the region.

Therefore, the respondents as a cable operator have direct and proximate nexus with the entertainments provided by them through their cable television network and, as such, they are the taxable person in respect of their gross receipts in relation to any month for providing entertainments to the individual viewers. Therefore, the respondents have a direct and proximate nexus with the entertainments presented to the viewers inasmuch as in terms of the respondent's agreement vide clause 4(d) "Recording and then retransmission of the signals by the franchisee is not allowed". That apart, the name of every subscriber having connection with the respondent's network must be on their records and the franchisee must furnish information of business honestly and completely to the respondents pursuant to clause 4(c) of the said agreement. In the event, any charge received from a subscriber is not paid to the respondent, the franchisee shall pay a sum equivalent to three times of the amount that the franchisee has saved by not paying the requisite amount to the respondents in respect of such subscriber.

In our view, the respondents as a cable operator, for the purpose of levy and collection of tax under sub-section (4a) of Section 4A of the Act have direct and close nexus with the entertainments made available to the viewer through their cable television network. The performance, film or programmes shown to the viewers through the cable television network come within the meaning of entertainments and therefore within the legislative competence of the State Legislature under Entry 62 of List II of Seventh Schedule to the Constitution of India to make law for the levy and collection of tax on such entertainments.

A tax under Entry 62 of List II of Seventh Schedule to the Constitution of India may be imposed not only on the person spending on entertainment but also on the act of a person entertaining, or the subject of entertainment. It is well settled by this Court that such tax may be levied on the person offering or providing entertainment or the person enjoying it. The respondents admittedly engaged in the business of receiving broadcast signals and the instantaneously sending or transmitting such visual or audio visual signals by coaxial cable, to subscribers homes through their various franchise. It has been made possible for the individual subscribers to choose the desired channels on their individual T.V. sets because of cable television technology of the respondents and of sending the visual or audio visual signals to sub-cable operators, and instantly re-transmitting such signals to individual subscribers for entertaining them through their franchise. The respondents' act is, no doubt, an act of offering entertainment to the subscribers and/or viewers. The respondent is very much directly and closely involved in the act of offering or providing entertainment to subscribers who are on his record. For the fact of offering or providing entertainment to the subscribers and/or

viewers, the respondents receive charges, which are realised or collected by their franchise from the ultimate subscribers. Their franchise, called as sub-cable operator under the said 1982 Act having no independent role to offer or provide entertainments to the subscribers inasmuch as franchise have to depend entirely on the respondents communication network and this communication network of the respondents consists of receiving and sending visual images and audio and other information for preparation of the subscribers and/or viewers, without the communication network service of the respondents, no entertainments can be offered or provided to the subscribers and/or viewers.

In the tax matters, the State Legislature is free to, if it has legislative competence, to choose the persons from whom the tax levied on entertainments is to be collected. In other words, what are taxed are the entertainments, which is very much within the ambit of Entry 62 of List II of Seventy Schedule. It is the respondents who as cable operator for the purpose of the said 1982 Act is engaged in the business of providing or offering entertainments which include showing of films, various serials, cricket matches and dramatic performances to the subscribers, and the tax is imposed on the act of offering such entertainments in this way to such subscribers and/or viewers. The entire communication network service is built up and controlled by the respondents. Whatever amount is received or receivable by the respondent in respect of providing such entertainments is taxable under sub-Section 4(a) of Section 4A of the said 1982 Act which has a direct and sufficient nexus with the entertainments.

The charging section is very clear and unambiguous in as much as there is no vagueness about the incidence of tax and the person who is liable to pay tax. So far as the declaration of liability to pay tax is concerned, the charging section does not suffer from any vagueness. The provision does not lead to any discrimination amongst persons. There is no scope of any discrimination in as much as either an owner, or person who having in possession of electrical, electronic or mechanical device receive signals and instantly transmits such signals of visual image and audio to a sub-cable operator for presentation of any performance, film or any other programme to the subscriber and/or viewers against payment, and as such owner or person exhibits such performance, film or any other programme through his cable television network directly to customers he is liable to pay tax. Except that owner or person of the class referred to in sub-section (4a) of Section 4A of the said 1982 Act, no other person can be held liable to pay such tax. There is clear indication of the character of tax from the incidence of such tax or taxable event which takes place on the happening of the event of offering entertainments to the subscribers. The person on whom the legal liability to pay tax falls he has also been clearly and unambiguously mentioned in the charging section. The rates of tax has been sought to be specified by the notification. The measure of tax is the "gross receipt" on the basis of which the person is saddled with the liability to pay tax. There is no uncertainty or vagueness of the legislative scheme. The tax levied by sub-section (4a) of Section 4A of the said 1982 Act does not interfere with the fundamental rights guaranteed under Article 19(1)(g) of the Constitution or is violative of Article 19(1)(g).

We also see no substance in the submission that the impugned legislation impinges on the field occupied by the central legislation. The aforesaid central legislation has been enacted to regulate the operation of cable television network in the country and matters connected therewith or incidental thereto whereas the State Legislation is for levy of entertainment tax on entertainment within the

legislative field exclusively assigned to the State Legislature under Entry 62 of List II of Seventh Schedule of the Constitution. Thus the objects sought to be achieved by two different Acts enacted under two different legislative fields exclusively assigned to the respective Legislatures are entirely distinct and separate. The Cable Television Networks (Regulation) Act, 1995 of the Union Legislature does not denude the State Legislature for levying entertainment tax on entertainment.

It is thus clear that the cable operator- respondent No. 1 is the exhibitor in this case and also the provider of the entertainment to the customer. Hence, he alone can be asked to pay the tax on the entertainment that has resulted from this exhibition. This provision, therefore, does not cross the bounds of the entry No. 62 of List II of the Seventh Schedule to the Constitution and is intra vires. Providing a cable link up to the viewers end is the only role of sub-cable operator. It is, therefore, unconceivable that despite put forth the ready entertainment in the form of signal on the cable line, the cable operator cannot be said to be providing the entertainment within the meaning of Entry 62 of List II of the Seventh Schedule of the Constitution. So long as the State Act remains within the ambit of Entry 62 of List II and is not offending the provisions of Article 286 of the Constitution or the laws made thereunder, the State Act validity is beyond question. Thus, respondent No.1 who is engaged in receiving and providing TV signals to individual cable operators is liable to pay tax under clause (ii) of sub-section (4a) of Section 4A of the Act. From the definition of "Communication network" given in the agreement between the cable operator and sub-cable operator (termed as Franchise in the agreement), will be clear that the service rendered by respondent No.1 is not restricted only to receiving signals but also extends to sending visual images and audio and other information by means of telecommunication network for presentation to members of public. In the present case, respondent No.1 sends visual images and audio signals for presentation to the individual subscribers at various homes through their Feeder Line i.e. coaxial cable or any other device used for transmitting audio and visual signals in terms of clause 2 of the said agreement. The franchisee has access to the signals provided by respondent No.1. Therefore, it cannot be disputed that the price or prices received or receivable by the respondent No. 1 is the amount received or receivable by him for transmitting the signal for exhibition of any performance, film or any other programme telecast and the aggregate of such prices or amounts is the gross receipt of the respondent No.1 in relation to any month or part thereof.

Who will be considered the giver of the entertainment the Cable operator or the sub-cable operator?

We do not find any reason to consider the sub-cable operator as the only giver. Even though the sub-cable operator may be the giver of the entertainment in as much as he has a direct connection with the viewer, still in cases like the present where he does not select the show, or make the show ready, or does not put the show on and the exhibition is done by the cable operator through mere franchisees it cannot be said that the cable operator is not the giver. It is true that the cable used to get in touch with the TV set of the consumer has been provided by the sub-cable operator, but that fact alone by itself cannot make the sub-cable operator, the only exhibitor or the giver, of the entertainment. In a world of indirect links between individuals made possible by the electronic age, the indirect meeting between the cable operator and the consumer through a technical link has been made possible.

Sub-section (4a) of Section 4A of the Act recognizes the reality that entertainment is possible through such contact. Clause (i) of sub-section (4a) speaks of a situation where the cable operator "Exhibits directly". Clause (ii) speaks of the situation where the cable operator does not exhibit directly, but transmits the signals to the sub-cable operator. Significantly, the clause does not say that the sub-cable operator exhibits, it rather says that the sub-cable operator "provides cable service for exhibition". It is reasonable to conclude that these provisions imply that the exhibition is being held here also by the cable operator, only the technical link of the cable service has been provided by the sub-cable operator. The cable operator is also the exhibitor in this case; he is the provider of the entertainment to the customer. Hence he can be asked to pay tax on the entertainment that has resulted from this exhibition. The provision, therefore, does not cross the bounds of the Entry NO. 62 of List II of the Seventh Schedule of the Constitution and is intra vires.

It must finally be mentioned that learned counsel for the respondents placed reliance upon the case of The Western India Theatres Ltd. vs. The Cantonment Board, Poona, Cantonment reported in [1959] Supp. (2) SCR

63. In this context, it is important to refer to the case of Express Hotels Private Ltd. vs. State of Gujarat and Another reported in (1989) 3 SCC 677 in which the Constitution Bench had dealt elaborately with Western India Theatres Ltd. case (supra). In the said case, with reference to Entry 50 in Schedule VII of the Government of India Act, 1935 which is identical to Entry 62, contention was raised that levy with respect to luxuries, entertainments or amusements can be made on person's receiving such luxuries or entertainment and that there can be no levy of tax on those who are givers or providers of such luxuries, entertainments etc. While rejecting such a contention that it is only the receivers who can be taxed and not the giver, the learned Judges observed that there can be no reason to "differentiate between the giver and the receiver of entertainments & amusements and both may with equal propriety be made amenable to tax."

The said observation that both giver and receiver be made amenable to the tax was sought to be relied on in the Western India Theatres Ltd. case in support of the contention that unless there is actual utilization of luxury no tax can be levied on the mere existence of the provisions made, for the prospective or the potential utilization of the luxury (para 24) The counsel in the above case further relied on decision of High Court of Bombay in Ramesh Waman Toke's case wherein the context of levy on entertainment it was observed that the levy can be only on entertainment which is actually held and not on entertainment which is theoretically capable of being sold.

The Constitution Bench did not accept the counsel's understanding of the ratio in Western India Theatres case and did not also approve the reasoning of the High Court at Bombay. (See page 692, para 24, 25).

Therefore, there is no substance in the contention that taxable event is entertainment and there can be no tax if there is no entertainment. As held by Constitution Bench existence of means of providing entertainment would be sufficient to support a law imposing tax thereon and that means of providing entertainment provides the nexus between the taxing power and the subject of tax.

If we are looking at the means of providing entertainment, both the cable operator and the sub cable operator play equally significant role in providing such means of entertainment, namely, transmission of signals received from the satellites in one sense the cable operator plays a more pivotal role than the sub cable operator since the signals are received by him through his devices and transmitted while a sub cable operator makes provision for continued instantaneous transmission of the signals.

The arguments advanced by learned senior counsel for the respondents with reference to Entry 31 of List I is misplaced since the impugned legislation cannot by any stretch of imagination be said to be one in pith and substance relating to Broadcasting. If, levy of tax upon the sub cable operator treating him as provider of entertainment admittedly falls under Entry 62 making cable operator liable can by no means take it out of the purview of Entry 62.

Accordingly, we find merit and substance in the arguments advanced by learned senior counsel for the appellant assisted by Mr. Tara Chand Sharma. We find no substance in the contention of the respondents counsel. The judgment and order dated 04.08.2000 in W.P.T.T. No. 338 of 2000 passed by the High Court at Calcutta stands set aside and the Civil Appeal is allowed without any order as to costs.