**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**BENCH AT AURANGABAD**

**WRIT PETITION NO.10949 OF 2016**

Pandharinath S/o Madhavrao Lute,
Age : 56 years, Occ. Business,
R/o Chari No.15, At post Rahata,
Tq. Rahata, District Ahmednagar ..PETITIONER

VERSUS

1. The State of Maharashtra,
Through its Secretary,
Revenue and Forest Department,
Mantralaya, Fort, Mumbai – 32

2. The Additional District Collector
at Ahmednagar,
(Entertainment Tax Division),
District Ahmednagar

3. The Tahsildar,
Rahata, Tq. Rahata,
District Ahmednagar

4. The Divisional Commissioner,
Nashik Division, Nashik ..RESPONDENTS

Mr A.A. Mukhedkar, Advocate for petitioner;
Mr A.P. Basarkar, A.G.P. for respondents

**CORAM : NITIN W. SAMBRE, J.**

**DATE : 28th September, 2017**

**ORAL ORDER:**

The petitioner, an assessee under the Bombay Entertainments Duty Act, 1923 (for short "Act"), was served with show cause notices dated 24th August, 2015 and 9th December, 2015, alleging that on perusal of report dated 10th August, 2015, submitted by a squad appointed by Tahsildar, Rahata, for carrying out random survey of local cable operators, it was noticed that the petitioner had not disclosed 305 cable connections and thereby evaded entertainment duty. Accordingly, the petitioner was called upon to pay difference of entertainment duty under Section 4 (2) (b) along with interest and penalty under Section 5 of the Act from the date of license i.e. from February, 2000 to June, 2015. He was also called upon to pay penalty of Rs.50,000/- for not complying the order under Section 4 as provided under Section 5 of the Act. As such, he was called upon to pay total amount of Rs.9,08,636/-.

2. The petitioner, vide communication dated 19th September, 2015, sought from respondents, details of cable connections as were found to have been provided by him, which were accounted for and also allegedly un-accounted for. The said information appears to have not been supplied to the petitioner. However, the authority i.e. Additional Collector, in exercise of powers under Sections 4 and 5 of the Act passed an order levying entertainment duty of Rs.1,41,825/- and Rs.2,836/- towards interest. The petitioner was further called upon to pay penalty ten times the amount of entertainment duty evaded i.e. Rs.14,46,610/- and as such was called upon to pay total amount of Rs.15,91,271/- inclusive of amount of Rs.50,000/- towards penalty.

3. The aforesaid order was confirmed by respondent no.4 Divisional Commissioner, in Entertainment/Appeal No.4 of 2016 preferred at the

behest of the present petitioner, by order dated 19th September, 2016, Thus, the present petition.

4. Mr Mukhedkar, learned Counsel appearing on behalf of the petitioner, while assailing the orders impugned herein would submit that by taking recourse to the provisions of Section 4 of the Act the authority first should have issued show cause notice to the petitioner while assessing the entertainment duty against him. According to him, bare perusal of show cause notice dated 24th August, 2015 would show that the authority, with a predetermined mind has issued the same not only for the proposed entertainment duty, but also for the penalty to be recoverred, which indicates bias approach on the part of the authority. He would then submit that for want of supply of the information as sought by the petitioner, the petitioner was unable to defend himself properly before the authority and as such there is denial of principles of natural justice.

5. Per contra, learned Asstt. Government Pleader, upon instructions, submits that both the orders impugned are within the framework of the Act, as show cause notice was not properly replied by the petitioner, although sufficient opportunity was given. According to him, once the entertainment duty was assessed, based on mathematical formula, penalty to the extent of 10 times from the date of license to June, 2015, is calculated and for that matter, there is no predetermined view. He, therefore, sought dismissal of the petition.

6. From the rival submissions, it is required to be noted that this Court had an occasion to consider the similar issue, in relation to operation of a theater, in the matter of **Mahendrakumar Moolchand Jain vs. State of Maharashtra & ors**., reported in **2004 (3) Mh.L.J. 474**. Paragraphs 8, 9, 10 and 11 of the said judgment read thus :-

> “8. Section 4B of the said Act reads as under :—
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> “Section 4B. (1) If the State Government is satisfied that the returns required to be furnished by or under this Act in respect of any entertainment in respect of which the entertainment duty is payable under section 3 are correct and complete, it shall assess the amount of entertainments duty due on the basis of such returns.
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> (2) If the State Government is not satisfied that the returns furnished by a proprietor of any entertainment are correct and complete, and the State Government think it necessary to require the presence of the proprietor, or the production of further evidence, the State Government shall serve on such proprietor a notice in the prescribed manner requiring him on a date and at a place to be therein specified either to attend and produce or to cause to be produced all evidence on which such proprietor relies in support of his returns, or to produce such evidence, as is specified in the notice.
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> On the date specified in the notice, or as soon as may be thereafter, the State Government shall, after considering all the evidence which may be produced, assess the amount of entertainments duty due from the proprietor.

(3) If the proprietor fails to comply with the terms of the notice, the State Government shall assess, to the best of its judgment the amount of entertainments duty due from him after considering the amount of duty paid by the proprietor during the period of one year immediately before the submission of the unsatisfactory return, the monthly expenses for running the place of entertainment and any other relevant factors required to be considered for arriving at the amount of such duty.

(4) If a proprietor does not furnish returns in respect of any entertainment referred to in sub-section (1) within the time prescribed in that behalf, the State Government shall, after giving the proprietor a reasonable opportunity of being heard and after considering the amount of duty paid by the proprietor during the period of one year immediately before the non-submission of the returns, the monthly expenses for running the place of entertainment and any other relevant factors required to be considered in that behalf, assess to the best of the judgment, the entertainments duty due from him, and may also direct that the proprietor shall pay, by way of penalty, in addition to the amount of duty so assessed a sum not exceeding one and a half times that amount."

9. From the perusal of the scheme of section 4B, it is thus clear that firstly a proprietor is required to file his returns to the State Government and if the State Government is satisfied that the returns which are required to be furnished under the Act in respect of any entertainment in respect of which the entertainment duty is payable, then the State Government is required to assess the amount of the entertainment duty on the basis of such returns. When the State Government is satisfied that the returns furnished by a

proprietor are incorrect and incomplete and the State Government thinks it necessary to require the presence of the proprietor or the production of further evidence, the State Government is required to serve a notice to such a proprietor in the prescribed manner requiring him on a date and at a place to be specified therein either to attend and produce or to cause to be produced all evidence on which such proprietor relies in support of the return, as is specified in the notice. The State Government thereafter on the dates specified or on some other date, after considering all the evidence which is produced assess the amount of the entertainment duty due from the proprietor.

10. Thereafter, if the proprietor fails to comply with the terms of the notice, the State Government can take recourse to the best judgment, the amount of entertainment duty due from such a proprietor. Perusal of sub-section (4) would also show that only on failure to furnish returns in respect of any entertainment referred to in sub-section (1) within the time prescribed in that behalf, the State Government can take a penal action.

11. Thus, the scheme of the Act is very clear. Firstly, the assessment is to be done on the basis of the returns furnished by the proprietor if the State Government is satisfied that the returns are satisfactory. If the State Government is not satisfied with the returns, then it is required to give notice in writing in the prescribed form, requiring the proprietor to attend and to produce all the evidence on which the proprietor relies in support of his return or to produce such evidence as is specified in the notice. On production of such evidence, the State Government is required to assess the amount of

entertainment duty due from the proprietor. Only on failure to comply with the notice as contemplated under sub- section (2) of section 4B, the State Government can assess the duty taking recourse to the 'best judgment'. Thus, it can be seen that the scheme provides that before a recourse could be taken to 'best judgment', it is necessary that an opportunity is given to the proprietor to produce all the evidence on which he relies or such other evidence as is specified in the notice and give an opportunity of hearing to the proprietor. Only in case the proprietor fails to comply with the notice, it is permissible to take recourse to the assessment by 'best judgment'. "

7. In the wake of aforesaid observations, what was expected of the authority is to first issue show cause notice to the assessee for entertainment duty due and payable and upon such assessment, if it was noticed that there was intentional evasion, should have issued another notice under Section 4-B of the Act, calling upon him to produce all evidence on which he relies in support of his returns, or to produce such evidence, as is specified in the notice. Section 5 of the Act, as amended though is brought into operation by virtue of Ordinance issued on 12th June, 2015, it is to be noted that the said Ordinance does not speak of getting away with the principles of natural justice.

8. It is a matter of fact that though asked for by the petitioner, respondent no.3 has failed to supply the information viz. list of 305 cable connections of which entertainment duty is alleged to have been evaded by the petitioner. The petitioner, in his reply, has categorically stated that

unless the information sought by him is supplied he would not be in a position to demonstrate as to whether such connections are provided by him or by the other cable operators, who are working in the same area.

9. The aforesaid act on the part of the respondents of not supplying the information though asked for by the petitioner is nothing less than denying opportunity to defend his case, as it was expected of respondent no.3 to supply such information, when statute contemplates an opportunity of hearing to the petitioner. It is settled principle of law that when an adverse order is to be passed against a party, such party should be put to notice and be heard in the matter. The fact remains that the petitioner was handicapped in absence of the information being made available by the respondents and as such, it has to be held that there is a violation of principles of natural justice.

10. There is one more angle to consider the conduct of the respondents in passing the impugned order by issuing show cause notice, without assessing as to whether the entertainment duty was evaded by the petitioner or not, by an independent order. It appears that in the first show cause notice, the respondents have issued the order of evasion of entertainment duty and also that of penalty, pre-supposing that there was evasion and the penalty has to be levied. There is yet one more angle to the matter and that is, the show cause notice was issued for recovery of amount of Rs.9 Lacs and odd, whereas by impugned order more amount i.e. amount of Rs.15 Lacs is sought to be recoverred towards

entertainment duty and penalty thereon.

11. One can understand if the authority had issued a show cause notice for higher amount and recovering lower amount. However, while assessing the amount of entertainment duty and penalty, without supplying the requisite information as sought by the petitioner, it will not be open for the authority to levy such amount, which is more than the one mentioned in the show cause notice. A plain reading of the show cause notice does not provide that it shall be open for the authority to levy higher amount than the one which is mentioned therein. On this count as well, the order impugned is not sustainable.

12. In that view of the matter, in my opinion, petition needs to be allowed in terms of prayer clause (B).

13. In the circumstances, it will be appropriate, in my opinion, to direct the respondent authority to issue fresh notice to the petitioner, first on the issue of evasion of entertainment duty along with requisite information as is sought for by him, as is reflected in the communication issued to that effect. If such notice is issued, the petitioner shall reply the same. The respondent to supply the requisite information asked by the petitioner and the authority shall first pass an order of assessment of the entertainment duty. If the authority is satisfied that there is evasion of duty, then it may issue notice to the petitioner, calling upon him as to why penalty be not imposed and recoverred from him.

14. So far as amount of Rs.5 Lacs deposited by the petitioner is concerned, it be handed over to the Additional Collector (Entertainment), Ahmednagar and the said amount along with earlier amount of Rs.2 Lacs as is claimed by the petitioner deposited against the demand made, shall be adjusted against the final order of assessment or liability towards entertainment duty.

15. Needless to mention, if the amount of entertainment duty and penalty, if any, is found to be less than Rs.7 Lacs, the petitioner would be entitled to refund of the balance amount within a period of eight weeks from the date of such order passed by the Additional Collector (Entertainment).

16. In view of above, Civil Application No.16292 of 2016 does not survive and stands disposed of accordingly.

**(NITIN W. SAMBRE, J.)**

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