The State of Bombay

Vs

R. M. D. Chamarbaugwala

Civil Appeal No. 134 of 1956

(CJI S. R. Dass, P. B. Gajendragadkar, T. L. Venkatarama Ayyar, B. P. Sinha, S. K. Das JJ)

09.04.1957

JUDGMENT

DAS C.J. -

This is an appeal by the State of Bombay from the judgment and order passed on January 12, 1955, by the Court of Appeal of the High Court of Judicature of Bombay confirming, though on somewhat different grounds, the judgment and order passed on April 22, 1954, by a single Judge of the said High Court allowing with costs the present respondents' petition under Art. 226 of the Constitution of India. The said petition was presented before the High Court of Judicature at Bombay on December 18, 1952. In the said petition there were two petitioners who are now the two respondents to this appeal. The first petitioner is an individual who claims to be a citizen of India and the founder and Managing Director of the second petitioner, which is a company incorporated in the State of Mysore and having its registered head office at 2, Residency Road, Bangalore in that State. That petition was further supported by an affidavit sworn by the first petitioner on the same day.

The allegations appearing in the said petition and affidavit may now be shortly stated. In July, 1946 the first petitioner applied for and obtained from the then Collector of Bombay a licence, being Licence No. 84 of 1946, for the period ending March 31, 1947, to conduct what was known as the Littlewood's Football Pool Competitions in India. That licence was granted to the first petitioner under the provisions of the Bombay Prize Competitions Tax Act, (Bom. XI of 1939) (hereinafter referred to as the 1939 Act), which was then in force. The said licence was renewed for a period of one year from April 1, 1947 to March 31, 1948. During that period the first petitioner paid, by way of competition tax, to the Bombay Provincial Government a sum of rupees one lakh per annum. The Government of Bombay having declined to renew the first petitioner's licence for a further period, the first petitioner filed a petition under s. 45 of the Specific Relief Act in the High Court of Bombay, which was eventually, after various proceedings, dismissed by the court of appeal on or about March 28, 1949.

In the meantime, in view of the delay and difficulty in obtaining a renewal of the licence in Bombay, the first petitioner in or about August, 1948, shifted his activities from Bombay to the State of Mysore, where he promoted and on February 26, 1949, got incorporated a company under the name of R.M.D.C. (Mysore) Limited, which was the second petitioner in the High Court and is the second respondent before us. The first petitioner, who was the promoter of the second petitioner became the Managing Director of the second petitioner. All the shareholders and Directors of the second petitioner are said to be nationals and citizens of India. The second petitioner also owns and runs a weekly newspaper called "Sporting Star", which was and is still printed and published at

Bangalore in a Press also owned by the second petitioner. It is through this newspaper that the second petitioner conducts and runs a Prize Competition called the R.M.D.C. Crosswords for which entries are received from various parts of India including the State of Bombay through agents and depots established in those places to collect entry forms and fees for being forwarded to the head office at Bangalore.

The 1939 Act was replaced by the Bombay Lotteries and Prize Competition Control and Tax Act (Bom. LIV of 1948), (hereinafter referred to as the 1948 Act) which came into force on December 1, 1948. The 1939 Act as well as the 1948 Act, as originally enacted, did not apply to prize competitions contained in a newspaper printed and published outside the Province of Bombay. So the Prize Competition called the R.M.D.C. Crosswords was not affected by either of those two Acts.

On June 21, 1951, the State of Mysore, however, enacted the Mysore Lotteries and Prize Competition Control and Tax Act, 1951, which was based upon the lines of the said 1948 Act. That Mysore Act having come into force on February 1, 1952, the second petitioner applied for and obtained a licence under that Act and paid the requisite licence fees and also paid and is still paying to the State of Mysore the tax at the rate of 15% (latterly reduced to 12 1/2%) of the gross receipts in respect of the R.M.D.C. Crosswords Prize Competition and continued and is still continuing the said Prize Competition through the said weekly newspaper "The Sporting Star" and to receive entry forms with fees from all parts of the territory of India including the State of Bombay. It is said, on the strength of the audited books of account, that after distribution of prizes to the extent of about 33% of the receipts and after payment of taxes in Mysore amounting to about 15% and meeting the other expenses aggregating to about 47%, the net profit of the second petitioner works out to about 5% only.

On November 20, 1952, the State of Bombay passed The Bombay Lotteries and Prize Competitions Control and Tax (Amendment) Act (Bom. XXX of 1952). This Act amended the provisions of the 1948 Act in several particulars. Thus, the words "but does not include a prize competition contained in a newspaper printed and published outside the Province of Bombay", which occurred in the definition of Prize Competition in s. 2(1)(d) of the 1948 Act, were deleted and the effect of this deletion was that the scope and the application of the 1948 Act so amended became enlarged and extended so as to cover prize competitions contained in newspapers printed and published outside the State of Bombay. After cl. (d) of s. 2(1) the Amending Act inserted a new cl. (dd) which defined the word "Promoter". A new section was substituted for the old s. 12 and another new section was inserted after s. 12 and numbered as s. 12A. By this new s. 12A provision was made for the levy in respect of every prize competition contained in a newspaper or a publication printed outside the State of Bombay for which a licence was obtained under the Act of a tax at such rates as might be specified not exceeding the rates specified in s. 12 or in a lump sum having regard to the circulation or distribution of the newspaper or publication in the State of Bombay. It is pointed out that the margin of net profit being only 5%, if tax has to be paid to the State of Bombay under the 1948 Act, as amended, (hereinafter referred to as the impugned Act) the second petitioner will be unable to carry on its prize competition except at a loss.

Reference is also made to the rules framed by the State of Bombay called the Bombay Lotteries and Prize Competition Control and Tax Rules, 1952 (hereinafter called the said Rules), which came into force on and from December 8, 1952. The said Rules require the petitioner to apply for and obtain a licence in Form "H" which imposes certain onerous conditions. The petitioners point out that it would be impossible for them, in a commercial sense and from a practical point of view, to run the prize competitions in the territory of India if they are required to comply not only with the

restrictions and conditions imposed by the Mysore State where the newspaper is printed and published but also with the varying and different restrictions, conditions and taxes imposed by the State of Bombay and other States in the territory of India where the said newspaper containing the advertisements of the said prize competitions are circulated. The petitioners submit that the provisions of the impugned Act and the Rules, in so far as they apply to prize competitions contained in newspapers and other publications printed and published outside the State of Bombay, are ultra vires void and inoperative in law.

Upon the presentation of the petition a Rule was issued calling upon the State of Bombay to appear and show cause, if any it had, why the writ or orders prayed for should not be issued or made. The State of Bombay filed an affidavit raising several technical legal objections to the maintainability of the petition and refuting the allegations and submissions contained therein and in the supporting affidavit. It submitted that, as the second petitioner was a corporation and the first petitioner, who was a Managing Director thereof, had no rights independent of the second petitioner, neither of them could lay any claim to any fundamental right under Art. 19(1)(g) and no question could arise of any violation of the petitioner's alleged fundamental rights. It further submitted that, having regard to the fact that lotteries and prize competitions were opposed to public policy, there could be no "business" in promoting a lottery or a prize competition and the question of the violation of the petitioners' alleged rights under Art. 19(1)(g) of the Constitution did not arise. It was also contended that if the provisions of the Act and the Rules operated as restrictions, then the same were reasonable and in the interest of the general public. Likewise it was submitted that, having regard to the fact that lotteries and prize competitions are opposed to public policy, there could be no "business" in promoting a lottery or a prize competition and the question of the violation of the provisions of Art. 301 of the Constitution did not arise. It was denied that ss. 10 and 12 of the Act violated the equal protection clause of the Constitution. An affidavit in reply was filed by the first petitioner traversing the allegations, submissions and contentions set forth in the affidavit in opposition filed on behalf of the State of Bombay.

The main contentions of the present respondents before the trial Judge were :-

> (a) The impugned Act and particularly its taxing provisions were beyond the competence of the State Legislature and invalid inasmuch as they were not legislation with respect to betting and gambling under Entry 34 or with respect to entertainments and amusements under Entry 33 or with respect to taxation on entertainments and amusements, betting and gambling under Entry 62 of the State List. The legislation was with respect to trade and commerce and the tax levied by the impugned Act was a tax on the trade or calling of conducting prize competitions and fell within Entry 60 of the State List.
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> (b) The respondents' prize competition was not a lottery and could not be regarded as gambling inasmuch as it was a competition in which skill, knowledge and judgment had real and effective play.
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> (c) The impugned Act itself contained distinct provisions in respect of prize competitions and lotteries thereby recognising that prize competitions were not lotteries.
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> (d) The said tax being in substance and fact a tax on the trade or business of carrying on prize competitions it offended against s. 142A(2) of the Government of India Act,

1935 and Art. 276(2) of the Constitution which respectively provide that such a tax shall not exceed fifty rupees and two hundred and fifty rupees per annum.

(e) The impugned Act was beyond the legislative competence of the Bombay Legislature and invalid as it was legislation with respect to trade and commerce not within but outside the State.

(f) The impugned Act operated extra-territorially inasmuch as it affected the trade or business of conducting prize competitions outside the State and was, therefore, beyond the competence of the State Legislature and invalid.

(g) The impugned Act offended against Art. 301 of the Constitution inasmuch as it imposed restrictions on trade, commerce and intercourse between the States and was not saved by Art. 304(b) of the Constitution.

(h) The restrictions imposed by the impugned Act on the trade on business of the petitioners were not reasonable restrictions in the interests of the general public and, therefore, contravened the fundamental right of the petitioners, who were citizens of India, to carry on their trade or business under Art. 19(1)(g) of the Constitution.

(i) That ss. 10, 12 and 12A of the said Act offended against Art. 14 of the Constitution inasmuch as they empowered discrimination between prize competitions contained in newspapers or publications printed and published within the State and those printed and published outside the State.

The State of Bombay, which is now the appellant before us, on the other hand, maintained that

(a) The prize competitions conducted by the petitioners were a lottery.

(b) The provisions of the impugned Act were valid and competent legislation under Entries 33, 34 and 62 of the State List.

(c) The impugned Act was not extra-territorial in its operation.

(d) The prize competitions conducted by the petitioners were opposed to public policy and there could therefore be no trade or business of promoting such prize competitions.

(e) As the petitioners were not carrying on a trade or business, no question of offending their fundamental rights under Art. 19(1)(g) or of a violation of Art. 301 of the Constitution could arise.

(f) The second petitioner being a Corporation was not a citizen and could not claim to be entitled to the fundamental right under Art. 19(1)(g) of the Constitution.

(g) In any event the restrictions on the alleged trade or business of the petitioners imposed by the Act were reasonable restrictions in the public interest within the meaning of Art. 19(6) and Art. 304(b) of the Constitution.

The trial Judge held :

(a) The tax levied under ss. 12 and 12A of the Act was not a tax on entertainment, amusement, betting or gambling but that it was a tax on the trade or calling of the respondents and fell under Entry 60 and not under Entry 62 of the State List.

(b) The prize competition conducted by the petitioners was not a lottery and it could not be said to be either betting or gambling inasmuch as it was a competition in which skill, knowledge and judgment on the part of the competitors were essential ingredients.

(c) The levy of the tax under the said sections was void as offending against Art. 276(2) of the Constitution.

(d) The restrictions imposed by the impugned Act and the Rules thereunder offended against Art. 301 of the Constitution and were not saved by Art. 304(b) inasmuch as the restrictions imposed were neither reasonable nor in the public interest.

(e) The second petitioner, although it was a company, was citizen of India and was entitled to the protection of Art. 19 of the Constitution.

(f) The restrictions imposed by the impugned Act and the Rules made thereunder were neither reasonable nor in the interests of the general public and were void as offending against Art. 19(1)(g) of the Constitution.

In the result the rule nisi was made absolute and it was further ordered that the State of Bombay, its servants and agents, do forbear from enforcing or taking any steps in enforcement, implementation, furtherance or pursuance of any of the provisions of the impugned Act and the 1952 Rules made thereunder and particularly from enforcing any of the penal provisions against the petitioners, their Directors, officers, servants or agents and that the State of Bombay, its servants and agents, do allow the petitioners to carry on their trade and business of running the Prize Competition mentioned in the petition and do forbear from demanding, collecting or recovering from the petitioners any tax as provided in the impugned Act or the said Rules in respect of the said Prize Competition and that the State of Bombay do pay to the petitioners their costs of the said applications.

Being aggrieved by the decision of the trial Judge, the State of Bombay preferred an appeal on June 8, 1954. The Court of Appeal dismissed the appeal and confirmed the order of the trial Judge, though on somewhat different grounds. It differed from the learned trial Judge on the view that he had taken that there was no legislative competence in the Legislature to enact the legislation. It held that the topic of legislation was 'gambling' and the Legislative was competent to enact it under Entry 34 of the State List. It, however, agreed with the learned trial Judge that the tax levied under s. 12A was not a tax on gambling but that it was a tax which fell under Entry 60. It held that there was legislative competence in the Legislature to impose that tax but that the tax was invalid because it did not comply with the restriction contained in Art. 276(2) of the Constitution. It also took the view that the tax, even assuming it was a tax on betting or gambling, could not be justified because it did not fall under Art. 304(b). It differed from the learned trial Judge when he found as a fact that the scheme underlying the prize competitions was not a lottery and came to the conclusion that the Act applied to the prize competitions of the respondents. It held that the challenge of the petitioners to the impugned provisions succeeded because the restrictions contained in the impugned Act controlling the business of the petitioners could not be justified as the requirements of the provisions of Art. 304(b) had not been complied with. The High Court agreed with the learned trial Judge that

the petitioners' prize competitions were their "business" which was entitled to the protection guaranteed under the Constitution. It took the view that although the activity of the petitioners was a lottery, it was not an activity which was against public interest and, therefore, the provisions of Part XIII of the Constitution applied to the respondents' business.

Being aggrieved by the said judgment of the Court of Appeal, the appellant applied for and obtained under Arts. 132(1) and 133(1) of the Constitution a certificate of fitness for appeal to this Court and hence this appeal before us.

The principal question canvassed before us relates to the validity or otherwise of the impugned Act. The Court of Appeal has rightly pointed out that when the validity of an Act is called in question, the first thing for the court to do is to examine whether the Act is a law with respect to a topic assigned to the particular Legislature which enacted it. If it is, then the court is next to consider whether, in the case of an Act passed by the Legislature of a Province (now a State), its operation extends beyond the boundaries of the Province or the State, for under the provisions conferring legislative powers on it such Legislature can only make a law for its territories or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extra territorial operation. If the impugned law satisfies both these tests, then finally the courts has to ascertain if there is anything in any other part of the Constitution which places any fetter on the legislative powers of such Legislative. The impugned law has to pass all these three tests.

Taking the first test first, it will be recalled that the 1948 Act was enacted by the Provincial Legislature of Bombay when the Government of India Act, 1935, was in force. Under ss. 99 and 100 of that Act the Provincial Legislature of Bombay had power to make laws for the Province of Bombay or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule to that Act. It will also be remembered that the 1948 Act was amended by Bombay Act XXX of 1952 after the Constitution of India had come into operation. Under Arts. 245 and 246, subject to the provisions of the Constitution, the Legislature of the State of Bombay has power to make laws for the whole or any part of the State of Bombay with respect to any of the matters enumerated in List II of the Seventh Schedule to the Constitution. The State of Bombay, which is the appellant before us, claims that the impugned Act including s. 12A is a law made with respect to topics covered by Entries 34 and 62 of List II in the Seventh Schedule to the Constitution which reproduce Entries 36 and 50 of List II in the Seventh Schedule to the Government of India Act, 1935. On the other hand, the petitioners, who are respondents before us, maintain that the impugned Act is legislation under Entries 26 and 60 in List II of the Seventh Schedule to the Constitution corresponding to Entries 27 and 46 of List II in the Schedule to the Government of India Act, 1935, and that, in any event, s. 12A of the impugned Act, in so far as it imposes a tax, comes under Entry 60 of List II in the Seventh Schedule to the Constitution corresponding to Entry 46 of List II in the Seventh Schedule to the Government of India Act, 1935, and not under Entry 62 of List II in the Seventh Schedule to the Constitution corresponding to Entry 50 of List II in the Seventh Schedule to the Government of India Act, 1935, and that as the tax imposed exceeds Rs. 250/- it is void under Art. 276(2) which reproduces s. 142A of the Government of India Act, 1935. Reference will hereafter be made only to the relevant Entries of List II in the Seventh Schedule to the Constitution, for they are substantially in the same terms as the corresponding Entries of List II in the Seventh Schedule to the Government of India Act, 1935. For easy reference, the relevant Entries in List II in the Seventh Schedule to the Constitution are set out below :

> "26. Trade and commerce within the State subject to the provisions of Entry 33 of List III.

34. Betting and gambling.

60. Taxes on professions, trades, callings, and employments.

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

In order to correctly appreciate the rival contentions and to come to a decision as to the particular Entry or Entries under which the impugned Act including s. 12A thereof has been enacted, it is necessary to examine and to ascertain the purpose and scope of the impugned legislation. It may be mentioned that the 1939 Act was enacted to regulate and levy a tax on prize competitions in the Province of Bombay. It did not deal with lotteries at all. That Act was repealed by the 1948 Act which was enacted to control and to levy a tax not only on prize competitions but on lotteries also. It is not unreasonable to conclude that the clubbing together of lotteries and prize competitions in the 1948 Act indicates that in the view of the Legislature the two topics were, in away, allied to each other. As already indicated, the 1948 Act was amended in 1952 by Bombay Act XXX of 1952 so as to extend its operation to prize competitions contained in newspapers printed and published outside the State of Bombay. In s. 2(1)(d) of the impugned Act will be found the definition of "prize competition" to which reference will be made hereafter in greater detail. Clause (dd) was inserted in s. 2(1) in 1952 defining "promoter". Section 3 declares that subject to the provisions of the Act, all lotteries and all prize competitions are unlawful. This is a clear indication that the Legislature regarded lotteries and prize competitions as on the same footing and declared both of them to be unlawful, subject, of course, to the provisions of the Act. Section 4 creates certain offences in connection with lotteries and competitions punishable as therein mentioned. We may skip over ss. 5 and 6 which deal exclusively with lotteries and pass on to s. 7. Section 7 provides that a prize competition shall be deemed to be an unlawful prize competition unless a licence in respect of such competition has been obtained by the promoter thereof. There are two provisos to the section which are not material for our present purpose. Section 8 imposes certain additional penalty for contravention of the provisions of s. 7. Section 9 regulates the granting of licences on such fees and conditions and in such form as may be prescribed, that is to say prescribed by rules. Section 10 makes it lawful for the Government, be general or special order, to, inter alia, prohibit the grant of licences in respect of a lottery or prize competition or class of lotteries or prize competitions throughout the State or in any area. Section 11 empowers the Collector to suspend or cancel a licence granted under this Act in certain circumstances therein specified. Section 12 authorises the levy of a tax on lotteries and prize competitions at the rate of 25% of the total sum received or due in respect of such lottery or prize competition. This section directs that the tax shall be collected from the promoter of such lottery or prize competition as the case may be. Sub-section (2) of s. 12 empowers the State Government by a Notification in the official Gazette, to enhance the rate of tax up to 50% of the total sum received or due in respect of such prize competition as may be specified in the Notification. Section 12A, which is of great importance for the purpose of this appeal, runs as follows :

"12A. Notwithstanding anything contained in section 12, there shall be levied in respect of every lottery or prize competition contained in a newspaper or publication printed and published outside the State, for which a licence has been obtained under section 5, 6 or 7, a tax at such rates as may be specified by the State Government in a notification in the Official Gazette not exceeding the rates specified in section 12 on the sums specified in the declaration made under section 15 by the promoter of the lottery or prize competition as having been received or due in respect of such lottery

or prize competition or in a lump sum having regard to the circulation or distribution of the newspaper or publication in the State."

Section 15 requires every person promoting a lottery or prize competition of any kind to keep and maintain accounts relating to such lottery or prize competition and to submit to the Collector statements in such form and at such period as may be prescribed. It is not necessary for the purpose of this appeal to refer to the remaining sections which are designed to facilitate the main purpose of the Act and deal with procedural matters except to s. 31 which confers power on the State Government to make rules for the purpose of carrying out the provisions of the Act. In exercise of powers so conferred on it, the State Government has, by Notification in the Official Gazette, made certain rules called the Bombay Lotteries and Prize Competitions Control and Tax Rules, 1952, to which reference will be made hereafter.

The petitioners contend that the object of the impugned Act is to control and to tax lotteries and prize competitions. It is not the purpose of the Act to prohibit either the lotteries or the prize competitions. They urge that the impugned Act deals alike with prize competitions which may partake of the nature of gambling and also prize competitions which call for knowledge and skill for winning success and in support of this contention reliance is placed on the definition of "prize competition" in s. 2(1)(d) of the impugned Act. We are pressed to hold that the impugned Act in its entirety or at any rate in so far as it covers legitimate and innocent prize competition is a law with respect to trade and commerce under Entry 26 and not with respect to betting and gambling under Entry 34. They also urge that in any event the taxing provisions, namely ss. 12 and 12A, are taxes on the trade of running prize competitions under Entry 60 and not taxes on betting and gambling under Entry 62. We are unable to accept the correctness of the aforesaid contentions for reasons which we proceed immediately to state.

As it has already been mentioned, the impugned Act replaced the 1939 Act which dealt only with prize competitions. Section 2(2) of the 1939 Act defined "prize competition" in the terms following :-

2(2) "Prize Competition" includes -

(a) crossword prize competition, missing words competition, picture prize competition, number prize competition, or any other competition, for which the solution is prepared beforehand by the promoters of the competition or for which the solution is determined by lot;

(b) any competition in which prizes are offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or not yet generally known; and

(c) any other competition success in which does not depend to a substantial degree upon the exercise of skill, but does not include a prize competition contained in a newspaper or periodical printed and published outside the Province of Bombay."

The 1948 Act s. 2(1)(d), as originally enacted, sub-stantially reproduced the definition of "prize competition" as given in s. 2(2) of the 1939 Act. Section 2(1)(d) of the 1948 Act, as originally enacted, ran as follows :

"2(1)(d) "Prize Competition" includes -

(i) cross-word prize competition, missing words prize competition, picture prize competition, number prize competition, or any other competition for which the solution is prepared beforehand by the promoters of the competition or for which the solution is determined by lot;

(ii) any competition in which prizes are offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or not yet generally known; and

(iii) any other competition success in which does not depend to a substantial degree upon the exercise of skill, but does not include a prize competition contained in a newspaper or periodical printed and published outside the Province of Bombay."

The collocation of words in the first category of the definitions in both the 1939 Act and the 1948 Act as originally enacted made it quite clear that the qualifying clause "for which the solution is prepared beforehand by the promoters of the competition or for which the solution is determined by lot" applied equally to each of the five kinds of prize competitions included in that category and set out one after another in a continuous sentence. It should also be noted that the qualifying clause consisted of two parts separated from each other by the disjunctive word "or". Both parts of the qualifying clause indicated that each of the five kinds of prize competitions which they qualified were of a gambling nature. Thus a prize competition for which a solution was prepared beforehand was clearly a gambling prize competition, for the competitors were only invited to guess what the solution prepared beforehand by the promoters might be, or in other words, as Lord Hewart C.J. observed in Coles v. Odhams Press Ltd. [L.R. (1936) 1 K.B. 416], "the competitors are invited to pay certain number of pence to have the opportunity of taking blind shots at a hidden target." Prize competitions to which the second part of the qualifying clause applied, that is to say, the prize competitions for which the solution was determined by lot, was necessarily a gambling adventure. On the language used in the definition section of the 1939 Act as well as in the 1948 Act, as originally enacted, there could be no doubt that each of the five kinds of prize competitions included in the first category to each of which the qualifying clause applied was of a gambling nature. Nor has it been questioned that the third category, which comprised "any other competition success in which does not depend to a substantial degree upon the exercise of skill", constituted a gambling competition. At one time the notion was that in order to be branded as gambling the competition must be one success in which depended entirely on chance. If even a scintilla of skill was required for success the competition could not be regarded as of a gambling nature. The Court of Appeal in the judgment under appeal has shown how opinions have changed since the earlier decisions were given and it is not necessary for us to discuss the matter again. It will suffice to say that we agree with the Court of Appeal that a competition in order to avoid the stigma of gambling must depend to a substantial degree upon the exercise of skill. Therefore, a competition success wherein does not depend to a substantial degree upon the exercise of skill is now recognised to be of a gambling nature. From the above discussion it follows that according to the definition of prize competition given in the 1939 Act as in the 1948 Act as originally enacted, the five kinds of prize competitions comprised in the first category and the competition in the third category were all of a gambling nature. In between those two categories of gambling competitions were squeezed in, as the second category, "competitions in which prizes were offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or is not yet generally known." This juxtaposition is important and significant and will hereafter be discussed in greater detail.

As already stated the 1948 Act was amended in 1952 by Bombay Act XXX of 1952. Section 2(1)(d)

as amended runs as follows :

> "Prize competition" includes -
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> (i) (1) cross-word prize competition,
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> (2) missing word prize competition,
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> (3) picture prize competition,
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> (4) number prize competition, or
>
> (5) any other prize competition, for which the solution is or is not prepared beforehand by the promoters or for which the solution is determined by lot or chance;
>
> (ii) any competition in which prizes are offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or not yet generally known; and
>
> (iii) any other competition success in which does not depend to a substantial degree upon the exercise of skill;"

It will be noticed that the concluding sentence "but does not include a prize competition contained in a newspaper printed and published outside the Province of Bombay" has been deleted. This deletion has very far reaching effect, for it has done away with the exclusion of prize competitions contained in a newspaper printed and published outside the State of Bombay from the scope of the definition. In the next place, it should be noted that the definition of prize competition still comprises three categories as before. The second and the third categories are couched in exactly the same language as were their counterparts in the earlier definitions. It is only in the first category that certain changes are noticeable. The five kinds of prize competitions that were included in the first category of the old definitions are still there but instead of their being set out one after another in a continuous sentence, they have been set out one below another with a separate number assigned to each of them. The qualifying clause has been amended by inserting the words "or is not" after the word "is" and before the word "prepared" and by adding the words "or chance" after the words "lot". The qualifying clause appears, as before, after the fifth item in the first category. It will be noticed that there is a comma after each of the five items including the fifth item. The mere assigning a separate number to the five items of prize competitions included in the first category does not, in our judgment, affect or alter the meaning, scope and effect of this part of the definition. The numbering of the five items has not dissociated any of them from the qualifying clause. If the qualifying clause were intended to apply only to the fifth item, then there would have been no comma after the fifth item. In our opinion, therefore, the qualifying clause continues to apply to each of the five items as before the amendment. There is grammatically no difficulty in reading the qualifying clause as lending colour to each of those items.

Accepting that the qualifying clause applies to each of the five kinds of prize competitions included in the first category, it is urged that the qualifying clause as amended indicates that the Legislature intended to include innocent prize competitions within the definition so as to bring all prize competitions, legitimate or otherwise, within the operation of the regulatory provisions of the Act including the taxing sections. The arguments is thus formulated. As a result of the amendment the

qualifying clause has been broken up into three parts separated from each other by the disjunctive word "or". The three parts are (1) for which the solution is prepared beforehand by the promoters, (2) for which the solution is not prepared beforehand by the promoters and (3) for which the solution is determined by lot or chance. The first and the third parts of the qualifying clause, it is conceded, will, when applied to the preceding five kinds of prize competitions, make each of them gambling adventures; but it is contended that prize competitions to which the second part of the qualifying clause may apply, that is to say prize competitions for which the solution is not prepared beforehand, need not be of a gambling nature at all and at any rate many of them may well be of an innocent type. This argument hangs on the frail peg of unskilful draftsmanship. It has been seen that in the old definitions all the five kinds of prize competitions included in the first category were of a gambling nature. We find no cogent reason - and none has been suggested - why the Legislature which treated lotteries and prize competitions on the same footing should suddenly enlarge the first category so as to include innocent prize competitions. To hold that the first category of prize competitions include innocent prize competitions will go against the obvious tenor of the impugned Act. The 1939 Act dealt with prize competitions only and the first category in the definition given there comprised only gambling competitions. The 1948 Act clubbed together lotteries and prize competitions and the first category of the prize competitions included in the definition as originally enacted was purely gambling as both parts of the qualifying clause clearly indicated. Section 3 of the Act declared all lotteries and all prize competitions unlawful. There could be no reason for declaring innocent prize competitions unlawful. The regulatory provisions for licensing and taxing apply to all prize competitions. If it were intended to include innocent prize competitions in the first category, one would have expected the Legislature to have made separate provisions for the legitimate prize competitions imposing less rigorous regulations than what had been imposed on illegitimate prize competitions. It will become difficult to apply the same taxing sections to legitimate as well as to illegitimate competitions. Tax on legitimate competitions may well be a tax under Entry 60 on the trader who carries on the trade of innocent and legitimate competition. It may be and indeed it has been the subject of serious controversy whether an illegitimate competition can be regarded as a trade at all and in one view of the matter the tax may have to be justified as a tax on betting and gambling under Entry 62. Considering the nature, scope and effect of the impugned Act we entertain no doubt whatever that the first category of prize competitions does not include any innocent prize competition. Such is what we conceive to be the clear intention of the Legislature as expressed in the impugned Act read as a whole and to give effect to this obvious intention, as we are bound to do, we have perforce to read the word "or" appearing in the qualifying clause after the word "promoter" and before the word "for" as "and". Well known canons of construction of Statutes permit us to do so. (See Maxwell on the Interpretation of Statutes, 10th edition, page 238).

A similar argument was sought to be raised on a construction of cl. (ii) of s. 2(1)(d). As already stated, in between the first and the third categories of prize competitions which, as already seen, are of a gambling nature the definition has included a second category of competitions in which prizes are offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or not yet generally known. It is said that forecasts of such events as are specified in the section need not necessarily depend on chance, for it may be accurately done by the exercise of knowledge and skill derived from a close study of the statistics of similar events of the past. It may be that expert statisticians may form some idea of the result of an uncertain future event but it is difficult to treat the invitation to the general public to participate in these competitions as an invitation to a game of skill. The ordinary common people who usually join in these competitions can hardly be credited with such abundance of statistical skill as will enable them, by the application of their skill, to attain success. For most, if not all, of them the forecast is nothing better than a shot

at a hidden target. Apart from the unlikelihood that the Legislature in enacting a statute tarring both lotteries and prize competitions with the same brush as indicated by s. 3 would squeeze in innocent prize competitions in between two categories of purely gambling varieties of them, all the considerations and difficulties we have adverted to in connection with the construction of the first category and the qualifying clause therein will apply mutatis mutandis to the interpretation of this second clause.

Reliance is placed on s. 26 of the English Betting and Lotteries Act, 1934 (24 and 25 Geo. V. c. 58) in aid of the construction of the second category of prize competitions included in the definition given in the impugned Act. The relevant portion of s. 26 of the aforesaid Act runs thus :

> "26. (1) It shall be unlawful to conduct in or through any newspaper, or in connection with any trade or business or the sale of any article to the public -
>
> (a) any competition in which prizes are offered for forecasts of the result either of a nature event, or of a past event the result of which is not yet ascertained or not yet generally known;
>
> (b) any other competition success in which does not depend to a substantial degree upon the exercise of skill."

It will be noticed that this section is not a definition section at all but is a penal section which makes certain competitions mentioned in the two clauses unlawful. Clauses (a) of that section which corresponds to our second category is not sandwiched between two categories of gambling prize competitions. In Elderton v. Totalisator Co. Ltd. [[1945] 2 A.E.R. 624] on which the petitioners rely the question was whether the football pool advertised in newspapers by the appellant company came within the wide language of cl. (a) of that section which was in Part II of the Act. Whether the appellant company's football pool called for any skill on the part of the "investors" or whether it was of a gambling nature was not directly relevant to the discussion whether it fell within cl. (a). The penal provisions of the English Act and the decision to the Court of Appeal throw no light on the construction of our definition clause. Seeing that prize competitions have been clubbed together with lotteries and dealt with in the same Act and seeing that the second category of the definition of "prize competition" is sandwiched in between the other two categories which are clearly of a gambling nature and in view of the other provisions of the impugned Act and in particular s. 3 and the taxing sections, we are clearly of opinion the definition of "prize competition" on a proper construction of the language of s. 2(1)(d) in the light of the other provisions of the Act read as a whole comprises only prize competitions which are of the nature of a lottery in the wider sense, that is to say, of the nature of gambling. The Court of Appeal took the view that although as a matter of construction the definition did include innocent prize competitions, yet by the application of another principle, namely, that a literal construction will make the law invalid because of its overstepping the limits of Entry 26, which comprises only trade and commerce within the State, the definition should be read as limited only to gambling prize competitions so as to make it a law with respect to betting and gambling under Entry 34. It is not necessary for us in this case to consider whether the principle laid down by Sir Maurice Gwyer C.J. in the Hindu Women's Right to Property Act case [(1941) F.C.R. 12] can be called in aid to cut down the scope of a section by omitting one of two things when the section on a proper construction includes two things, for we are unable, with great respect, to agree with the Court of Appeal that on a proper construction the definition covers both gambling and innocent competitions. In our view, the section, on a true construction, covers only gambling prize competitions and the Act is a law with respect to betting and gambling under Entry

34. As, for the foregoing reasons, we have already arrived at the conclusion just stated, it is unnecessary for us to refer to the language used in the third category and to involve the rule of construction which goes by the name of noscitur a sociis relied on by learned counsel for the appellant.

The next point urged is that although the Act may come under Entry 34, the taxing provisions of s. 12A cannot be said to impose a tax on betting and gambling under Entry 62 but imposes a tax on trade under Entry 60. Once it is held that the impugned Act is on the topic of betting and gambling under Entry 34, the tax imposed by such a statute, one would think, would be a tax on betting and gambling under Entry 62. The Appeal Court has expressed the view that s. 12A does not fall within Entry 62, for it does not impose a tax on the gambler but imposes a tax on the petitioners who do not themselves gamble but who only promote the prize competitions. So far as the promoters are concerned, the tax levied from them can only be regarded as tax on the trade of prize competitions carried on by them. This, with respect, is taking a very narrow view of the matter. Entry 62 talks of taxes on betting and gambling and not of taxes on the men who bet or gamble. It is necessary, therefore, to bear in mind the real nature of the tax. The tax imposed by s. 12A is, in terms, a percentage of the sums specified in the declaration made under s. 15 by the promoter or a lump sum having regard to the circulation and distribution of the newspaper or publication in the State. Under s. 15 the promoter of a prize competition carried on in a newspaper or publication printed and published outside the State is to make a declaration in such form and at such period as may be prescribed. Form 'J' prescribed by r. 11(c) requires the promoter to declare, among other things, the total number of tickets/coupons received for the competition from the State of Bombay and the total receipts out of the sale of the tickets/coupons from the State of Bombay. The percentage under s. 12A is to be calculated on the total sums specified in the declaration. It is clear, therefore, that the tax sought to be imposed by the impugned Act is a percentage of the aggregate of the entry fees received from the State of Bombay. On ultimate analysis it is a tax on each entry fee received from each individual competitor who remits it from the State of Bombay. In gigantic prize competitions which the prize competitions run by the petitioners undoubtedly are, it is extremely difficult and indeed well nigh impossible for the State to get at each individual competitor and the provision for collecting the tax from the promoters after the entry fees come into their hands is nothing but a convenient method of collecting the tax. In other words, the taxing authority finds it convenient in the course of administration to collect the duty in respect of the gambling activities represented by each of the entries when the same reaches the hands of the promoters. The tax on gambling is a well recognised group of indirect taxes as stated by Findlay Shirras in his Science of Public Finance, vol. II p. 680. It is a kind of tax which, in the language of J.S. Mill quoted by Lord Hobhouse in Bank of Toronto v. Lambe [L.R. (1887) 12 A.C. 575], is demanded from the promoter in the expectation and intention that he shall indemnify himself at the expense of the gamblers who sent entrance fees to him. That, we think, is the general tendency of the tax according to the common understanding of men. It is not difficult for the promoters to pass on the tax to the gamblers, for they may charge the proportionate percentage on the amount of each entry as the seller of goods charges the sales tax or he may increase the entrance fee from 4 annas to 5 annas 6 pies to cover the tax. If in particular circumstances it is economically undesirable or practically impossible to pass on the tax to the gamblers, that circumstance is not a decisive or even a relevant consideration for ascertaining the true nature of the tax, for it does not affect the general tendency of the tax which remains. If taxation on betting and gambling is to be regarded as a means of controlling betting and gambling activities, them the easiest and surest way of doing so is to get at the promoters who encourage and promote the unsocial activities and who hold the gamblers' money in their hands. To collect the tax from the promoters is not to tax the promoters but is a convenient way of imposing the tax on betting and

gambling and indirectly taxing the gamblers themselves. It is to be noted that the tax here is not on the profits made by the petitioners but it is a percentage of the total sum received by them from the State of Bombay as entrance fees without the deduction of any expense. This circumstance also indicates that it is not a tax on a trade. According to the general understanding of men, as stated by Lord Warrington of Clyffe in Rex v. Caledonian Collieries Ltd. [L.R. (1928) A.C. 358], there are marked distinctions between a tax on gross collection and a tax on income which for taxation purposes means gains and profits. Similar consideration may apply to tax on trade. There is yet another cogent reason for holding that the tax imposed by s. 12A is a tax on betting and gambling. In enacting the statute the Legislature was undoubtedly making a law with respect to betting and gambling under Entry 34 as hereinbefore mentioned. By the amending Act XXX of 1952 the Legislature by deleting the concluding words of the definition of 'prize competition', namely, "but does not include etc., etc.," extended the operation of the Act to prize competitions carried on in newspapers printed and published outside the State of Bombay. They knew that under Art. 276 which reproduced s. 142A of the Government of India Act, 1935, they could not impose a tax exceeding the sum of Rs. 250 on any trade or calling under Entry 60. If the tax can be referable either to Entry 60 or to Entry 62, then in view of the fact that s. 12A will become at least partially, if not wholly, invalid as a tax on trade or calling under Entry 60 by reason of Art. 276(2), the court must, in order to uphold the section, follow the well established principle of construction laid down by the Federal Court of India and hold that the Legislature must have been contemplating to make a law with respect to betting and gambling under Entry 62, for there is no constitutional limit to the quantum of tax which can be imposed by a law made under that Entry. For reasons stated above, we are satisfied that s. 12A is supportable as a valid piece of legislation under Entry 62.

The next point urged by the petitioners is that under Arts. 245 and 246 the Legislature of a State can only make a law for the State or any part thereof and, consequently, the Legislature overstepped the limits of its legislative field when by the impugned Act it purported to affect men residing and carrying on business outside the State. It is submitted that there is no sufficient territorial nexus between the State and the activities of the petitioners who are not in the State. The doctrine of territorial nexus is well established and there is no dispute as to the principles. As enunciated by learned counsel for the petitioners, if there is a territorial nexus between the person sought to be charged and the State seeking to tax him the taxing statute may be upheld. Sufficiency of the territorial connection involves a consideration of two elements, namely (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection. It is conceded that it is of no importance on the question of validity that the liability imposed is or may be altogether disproportionate to the territorial connection. In other words, if the connection is sufficient in the sense mentioned above, the extent of such connection affects merely the policy and not the validity of the legislation. Keeping these principles in mind we have to ascertain if in the case before us there was sufficient territorial nexus to entitle the Bombay Legislature to make the impugned law. The question whether in a given case there is sufficient territorial nexus is essentially one of fact. The trial court took the view that the territorial nexus was not sufficient to uphold the validity of the law under debate. The Court of Appeal took a different view of the facts and upheld the law. We find ourselves in agreement with the Court of Appeal. The newspaper "Sporting Star" printed and published in Bangalore is widely circulated in the State of Bombay. The petitioners have set up collection depots within the State to receive entry forms and the fees. They have appointed local collectors. Besides the circulation of the copies of the "Sporting Star", the petitioners print over 40,000 extra coupons for distribution which no doubt are available from their local collectors. The most important circumstance in these competitions is the alluring invitation to participate in the competition where very large prizes amounting to thousands of rupees and sometimes running into a

lakh of rupees may be won at and for a paltry entrance fee of say 4 annas per entry. These advertisements reach a large number of people resident within the State. The gamblers, euphemistically called the competitors, fill up the entry forms and either leave it along with the entry fees at the collection depots set up in the State of Bombay or send the same by post from Bombay. All the activities that the gambler is ordinarily expected to undertake take place, mostly if not entirely, in the State of Bombay and after sending the entry forms and the fees the gamblers hold their soul in patience in great expectations that fortune may smile on them. In our judgment the standing invitations, the filling up of the forms and the payment of money take place within the State which is seeking to tax only the amount received by the petitioners from the State of Bombay. The tax is on gambling although it is collected from the promoters. All these, we think, constitute sufficient territorial nexus which entitles the State of Bombay to impose a tax on the gambling that takes place within its boundaries and the law cannot be struck down on the ground of extra territoriality.

Assuming that the impugned Act is well within the legislative competence of the Bombay Legislature and that it is not invalid on the ground of extra territorial operation, we have next to examine and see if there is anything else in the Constitution which renders it invalid. The petitioners contend that even if the prize competitions constitute gambling transactions, they are nevertheless trade or business activities and that that being so the impugned Act infringes the petitioners' fundamental right under Art. 19(1)(g) of the Constitution to carry on their trade or business and that the restrictions imposed by the Act cannot possibly be supported as reasonable restrictions in the interests of the general public permissible under Art. 19(6). The petitioners also point out that the trade or business carried on by them is not confined within the limits of the State of Mysore but extends across the State boundaries into other States within the territories of India and even into lands beyond the Union of India and they urge that in view of the inter-State nature of their trade or business the restrictions imposed by the impugned Act offend against Art. 301 which declares that, subject to the other provisions of Part XIII of the Constitution, trade, commerce and intercourse throughout the territory of India shall be free and cannot be supported under Art. 304(b), for the restrictions cannot be said to be reasonable or required in the public interest and because the procedural requirements of the proviso thereto had not been complied with. The State of Bombay repudiates these contentions and submits that as prize competitions are opposed to public policy there can be no "trade" or "business" in promoting a prize competition and the question of infraction of the petitioner's fundamental right to carry on trade or business guaranteed by Art. 19(1)(g) or of the violation of the freedom of trade, commerce or intercourse declared by Art. 301 does not arise at all and that in any event if Art. 19(1)(g) or Art. 301 applies at all, the restrictions imposed by the impugned Act are reasonable restrictions necessary in the interest of the general public and saved by Art. 19(6) and by Art. 304(b) of the Constitution. It is conceded that the bill which became Act XXX of 1952 and amended the 1948 Act in the manner hereinbefore stated was introduced in the Legislature of the State without the previous sanction of the President and, consequently, the condition precedent to the validity of the resulting Act as laid down in the proviso had not been complied with but it is submitted, we think correctly, that the defect was cured, under Art. 255, by the assent given subsequently by the President to the impugned Act. It is, however, admitted by learned counsel appearing for the appellant State that under Art. 255 the subsequent assent of the President will save the Act if the other condition embodied in Art. 304(b) as to the restrictions imposed by it being reasonable in the public interest is held to be satisfied but it will not save the rules framed under s. 31 of the impugned Act which had never been placed before the President or assented to or approved by him. We now proceed to examine and deal with these rival contentions.

The first branch of the argument on this part of the appeal raises a question of a very far reaching

nature. The question posed before us is : Can the promotion or prize competitions, which are opposed to public policy, be characterised as a "trade or business" within the meaning of Art. 19(1)(g) or "trade, commerce and intercourse" within Art. 301 ? The learned trial Judge has expressed the view that if he were able to hold that the prize competitions conducted by the petitioners were of a gambling nature, he would have had no difficulty in concluding that they were outside the protection of the Constitution. The Court of Appeal, however, took a different view. What weighed with the Court of Appeal was the fact that the legislature had not prohibited gambling outright but only made provisions for regulating the same and further that the State was making a profit out of these prize competitions by levying taxes thereon. It is necessary to consider the arguments that have been adduced before us by learned counsel for the parties in support of their respective contentions.

It will be noted that Art. 19(1)(g) in very general terms guarantees to all citizens the right to carry on any occupation, trade or business and cl. (6) of Art. 19 protects legislation which may, in the interest of the general public, impose reasonable restrictions on the exercise of the right conferred by Art. 19(1)(g). Likewise Art. 301 declares that trade, commerce and intercourse throughout the territory of India shall be free but makes such declaration subject to the other provisions of Part XIII of the Constitution. Arts. 302-305, which are in that Part, lay down certain restrictions subject to which the declaration contained in Art. 301 is to operate. Article 302 empowers Parliament by law to impose restrictions on the freedom of trade, commerce or intercourse not only between one State and another but also within the State, provided in either case such restrictions are required in the public interest. Article 304(b) authorises the State Legislatures to impose reasonable restrictions on the freedom of trade, commerce or intercourse with or within the States as may be required in the public interest, provided the formalities of procedure are complied with. Arts. 19(1)(g) and 301, it is pointed out are two facets of the same thing - the freedom of trade. Art. 19(1)(g) looks at the matter from the point of view of the individual citizens and protects their individual right to carry on their trade or business. Art. 301 looks at the matter from the point of view of the country's trade and commerce as a whole, as distinct from the individual interests of the citizens and it relates to trade, commerce or intercourse both with and within the States. The question which calls for our decision is as to the true meaning, import and scope of the freedom so guaranteed and declared by our Constitution. We have been referred to a large number of decisions bearing on the Australian and American Constitutions in aid of the construction of the relevant articles of our Constitution.

In the Common wealth of Australia Constitution Act (63 and 64 Vic. c. 12) there is s. 92 from which our Art. 301 appears to have been taken. The material part of s. 92 runs thus :

> "On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free".

It has been held in James v. Commonwealth of Australia [L.R. (1936) A.C. 578, 627] that the word "absolutely" adds nothing but emphasis to the width of the section. In the same case it has also been stated and decided that the section imposes a fetter on the legislative power not only of the Commonwealth Parliament but also of the Parliament of the States. It has been equally authoritatively held that the words "whether by means of internal carriage or ocean navigation" occurring in the section do not restrict its operation to such things and persons as are carried by land or sea but that the section extends to all activities carried on by means of inter-State transactions (Commonwealth of Australia v. Bank of New South Wales [L.R. (1950) A.C. 235, 302-303]). The Privy Council in the last mentioned case has also said at p. 299 that it is no longer arguable that

freedom from customs or other monetary charges alone is secured by the section. The idea underlying the section was that the Federation in Australia should abolish the frontiers between the different States and create one Australia and that conception involved freedom from customs duties, imports, border prohibitions and restrictions of every kind, so that the people of Australia would be free to trade with each other and to pass to and fro from one State to another without any let or hindrance, or without any burden or restriction based merely on the fact that they were not members of the same State (James v. Commonwealth of Australia [L.R. (1936) A.C. 578, 627]).

One cannot but be struck by the sweeping generality of language used in the section. Such a wide enunciation of the freedom of inter-State trade, commerce and intercourse was bound to lead to difficulties. The full import and true meaning of the general words had to be considered, as years went past, in relation to the vicissitudes of altering facts and circumstances which from time to time emerged. The changing circumstances and the necessities compelled the court to reach the conclusion that the conception of freedom of trade, commerce and intercourse in a community regulated by law presupposed some degree of restriction on the individual. Cases arose out of statutes enacted for restricting competition of privately owned motor vehicles with publicly owned railways, or to compel users of motor to contribute to the upkeep of the roads e.g. Willard v. Rawson [(1933) 48 C.L.R. 316]; R. v. Vizzard [(1933) 50 C.L.R. 30] and O. Gilpin Ltd. v. Commissioner of Road Transport and Tramways [(1935) 52 C.L.R. 189]. In each of these three cases the State law was upheld as not offending against s. 92. Cases arose under statutes which were sought to be supported on the ground of health. In Ex parte Nelson (No. 1) [(1928) 42 C.L.R. 209] a New South Wales statute prohibited entry of cattle from tick infected area until dipped. Applying the principle of pith and substance, it was held that the restrictions looked at in their true light, were aids to and not restrictions upon the freedom of inter-State trade, commerce and intercourse. In Tasmania v. Victoria [(1935) 52 C.L.R. 157] the absolute prohibition of imports of potatoes from Tasmania to Victoria could not on facts be supported as a health measures and consequently was struck down as a violation of s. 92. In James v. Commonwealth of Australia [L.R. (1936) A.C. 578, 627] came up for consideration the Dried Fruits Act 1928-35 which prohibited the carrying of any dried fruit from one State to another except under a licence and which provided for penalty for its contravention. The regulations authorised the Minister to direct the licensee to export a certain percentage of dried fruits from Australia. The Minister by an order determined that it would be a condition of the licence that the licensee should export a percentage of the dried fruits as therein mentioned. The appellant having refused to apply for a licence, his consignments of dried fruits shipped from Adelaide for delivery at Sydney in performance of contracts for sale were seized. The appellant brought an action for damages for what he alleged to be a wrongful seizure. After holding that the section bound the Parliament of Commonwealth equally with those of the States the Judicial Committee proceeded to say that the freedom declared in s. 92 must be somehow limited and the only limitation which emerged from the context and which could logically and realistically apply was freedom at what was the crucial point in inter-State trade, namely at the State barrier (p. 631). In the later case of Commonwealth of Australia v. Bank of New South Wales [L.R. (1950) A.C. 235, 302-303] it has been said that those words were to be read secundum subjectam materiam and could not be interpreted as a decision either that it was only the passage of goods which is protected by s. 92 or that it is only at the frontier that the stipulated freedom might be impaired (p. 308).

Learned counsel for the State has strongly relied on two decisions of the Australian High Court in both of which the validity of a New South Wales Statute called the Lotteries and Art Unions Act 1901-1929 was called in question. Section 21 of that Act provided : "Whoever sells or offers for sale or accepts any money in respect of the purchase of any ticket or share in a foreign lottery shall be liable to a penalty". In the first of those two cases - The King v. Connare [(1939) 51 C.L.R. 596]

- the appellant offered for sale in Sydney a ticket in a lottery lawfully conducted in Tasmania and was convicted of an offence under s. 21. He challenged the validity of the law on the ground that it interfered with the freedom of trade, commerce and intercourse among the States and consequently violated the provisions of s. 92. It was held by Starke, Dixon, Evatt and McTiernan JJ. (Latham C.J. and Rich J. dissenting) that the provisions of s. 21 did not contravene s. 92 and the appellant was properly convicted. Starke J. discussed the question as to whether the sale in question was an inter-State or intra-State transaction but did not think it necessary to decide that question. After referring to the observations of Lord Wright in James v. The Commonwealth [L.R. (1936) A.C. 578, 627] that the freedom declared by s. 92 meant freedom at the frontier, the learned Judge observed that the question whether that freedom had been restricted or burdened depended upon the true character and effect of the Act. He took the view (at p. 616) that the main purpose of the Act was to prevent or suppress lotteries and particularly, in ss. 19, 20 and 21, foreign lotteries and that it was aimed at preventing what he graphically described as "illegitimate methods of trading", if sales of lottery tickets were regarded as trading. The learned Judge took note of the fact that New South Wales law allowed State lotteries and concluded that the true character of the impugned Act was to suppress gambling in foreign lottery tickets and examined from the historical point of view, from the character of the Act, its function and its effect upon the flow of commerce, the Act did not, in his view, restrict or hinder the freedom of any trade across the frontier of the States. Dixon J., as he then was, gave two reasons for his opinion, namely that the transaction was not in itself a transaction of inter-State trade, commerce or intercourse but was a sale in New South Wales of a ticket then in New South Wales and that, apart from the State lottery and permitted charitable raffles, the Act suppressed uniformly the sale of all lottery tickets in New South Wales. Adverting to the argument which, in substance, asked the Court to declare that s. 92 had created an overriding constitutional right to traffic or invest in lotteries so long as the trafficker or investor could succeed in placing some boundary or other between himself and the conductor of the lottery Evatt J. said at pp. 619-20 :

> "In my opinion such a proposition cannot be supported in principle or by reference to authority. For it is obvious that the appellant's argument also involves the assertion of the constitutional right of a citizen, so long as he can rely upon, or if necessary artificially create, some inter-State connection in his business, to sell indecent and obscene publications, diseased cattle, impure foods, unbranded poisons, unstamped silver, ungraded fruit and so forth."

The obvious inconvenience and undesirability of the effects to be produced if such extravagant arguments were to prevail led the learned Judge to think (at p. 620) that in the interpretation of s. 92 it was permissible to accept some postulates or axioms demanded alike by the dictates of common sense and by some knowledge of what was being attempted by the founders of the Australian Commonwealth. Making these assumptions and concessions Evatt J. opined (at p. 621) that the guarantee contained in s. 92 had nothing whatever to say on the topic of inter-State lotteries and could not be invoked to prevent either the suppression or the restriction in the public interest of the practice of gambling or investing in such lotteries. The learned Judge did not think that lottery tickets could be regarded as goods or commodities which were entitled to the protection of s. 92 and concluded thus at p. 628 :

> "If they are goods or commodities they belong to a very special category, so special that in the interests of its citizens the State may legitimately exile them from the realm of trade, commerce or business. The indiscriminate sale of such tickets may be regarded as causing business disturbance and loss which, on general grounds of

policy, the State is entitled to prevent or at least minimize."

McTiernan J. was even more forthright in placing gambling outside the pale of trade, commerce and intercourse. At p. 631 he said :

> "Some trades are more adventurous or speculative than others, but trade or commerce as a branch of human activity belongs to an order entirely different from gaming or gambling. Whether a particular activity falls within the one or the other order is a matter of social opinion rather than jurisprudence..... It is gambling to buy a ticket or share in a lottery. Such a transaction does not belong to the commercial business of the country. The purchaser stakes money in a scheme for distributing prizes by chance. He is a gamester."

A little further down the learned Judge observed :

> "It is not a commercial arrangement to sell a lottery ticket; for it is merely the acceptance of money or the promise of money for a chance. In this case the purchase of a lottery ticket merely founds a hope that something will happen in Tasmania to benefit the purchaser."

Naturally enough learned counsel for the appellant State seeks to fasten upon the observations quoted or referred to above in support of his thesis that gambling is not trade, commerce or intercourse within the meaning alike of s. 92 of the Australian Constitution and our Art. 10(1)(g) and Art. 301.

In the second case - The King v. Martin [(1939) 62 C.L.R. 457] - the same question came up for reconsideration. The only difference in fact was that there was no actual sale by delivery of a lottery ticket in New South Wales but money was received by the agent of the Tasmania promoter in New South Wales and transmitted to Tasmania from where the lottery ticket was to be sent. The State law was again upheld. Latham C.J., Rich, Starke, Evatt and Mctiernan JJ. adhered to their respective opinions expressed in the earlier case of The King v. Connare [(1939) 61 C.L.R. 596]. Dixon J., as he then was, gave a new reason for his opinion that notwithstanding the inter-State character of the transaction s. 21 of the impugned Act was valid. Said the learned Judge at pp. 461-462 :

> "The reason for my opinion is that the application of the law does not depend upon any characteristics of lotteries or lottery transactions in virtue of which they are trade or commerce or intercourse nor upon any inter-State element in their nature. The only criterion of its operation is the aleatory description of the acts which it forbids. There is no prohibition or restraint placed upon any act in connection with a lottery because either the act or the lottery is or involves commerce or trade or intercourse or movement into or out of New South Wales or communication between that State and another State..... To say that inter-State trade, commerce and inter-course shall be free, means, I think, that no restraint or burden shall be placed upon an act falling under that description because it is trade or commerce or intercourse or involves inter-State movement or communication."

In this view of the matter Dixon J. now upheld s. 21 of the impugned Act on the ground that the criterion of its application was the specific gambling nature of the transactions which it penalised and not anything which brought the transactions under the description of trade, commerce or

intercourse or made them inter-State in their nature.

Then came the case of Commonwealth of Australia v. Bank of New South Wales [L.R. (1950) A.C. 235] commonly called the Bank case where it was held that s. 46 of the Banking Act, 1947, was invalid as offending against s. 92 of the Australian Constitution. Sub-section (1) of s. 46 provided that a private bank should not, after the commencement of the Act, carry on banking business in Australia except as required by the section. Sub-section (2) laid down that each private bank should carry on banking business in Australia and should not, except on appropriate grounds, cease to provide any facility or service provided by it in the course of its banking business on the fifteenth day of August one thousand nine hundred and forty seven. Sub-section (4) authorised that the Treasurer might, by notice published in the gazette and given in writing to a private bank, require that private bank to cease, upon a date specified in the notice, carrying on business in Australia. Sub-section (8) provided that upon and after the date specified in a notice under sub-s. (4) the private bank to which that notice was given should not carry on banking business in Australia. It also provided a penalty of Pounds 10,000 for each day on which the contravention occurred. The question was : Whether this section interfered with the freedom of trade, commerce or intercourse among the States declared by s. 92 of the Australian Constitution ? It was held that the business of banking which consisted of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred transactions was included among those activities described as trade, commerce and intercourse in s. 92 and, accordingly, the impugned s. 46 which while leaving untouched the Commonwealth and State Banks, prohibited the carrying on in Australia of the business of banking by private banks, was invalid as contraventing s. 92. Lord Porter delivering the judgment of the Judicial Committee pointed out that it was no longer arguable that freedom from customs or other monetary charges alone was secured by the section. Then after reviewing and explaining at some length the two cases of James v. Cowan [L.R. (1932) A.C. 542] and James v. The Commonwealth [L.R. (1936) A.C. 578, 627], his Lordships proceeded to make certain observations on the distinction between restrictions which are regulatory and do not offend against s. 92 and those which are something more than regulatory and do so offend. His Lordship deduced two general propositions from the decided cases, namely (1) that regulation of trade, commerce and intercourse among the States was compatible with absolute freedom and (2) that s. 92 was violated only when a legislative or executive act operated to restrict trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which might fairly be regarded as remote. The problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, his Lordship pointed out, not so much legal as political, social or economic considerations. Referring to the case of Australian National Airways Proprietary Ltd. v. The Commonwealth [(1945) 71 C.L.R. 29] his Lordship expressed his agreement with the view that simple prohibition was not regulation. A little further down, however, his Lordship made a reservation that he did not intend to lay down that in no circumstances could the exclusion of competition so as to create a monopoly, either in a State or Commonwealth agency, or in some body, be justified and that every case must be judged on its own facts and in its own setting of time and circumstances, and that it might be that in regard to some economic activities and at some stage of social development it might be maintained that prohibition with a view to State monopoly was the only practical and reasonable manner of regulation, and that inter-State trade, commerce and intercourse thus prohibited and thus monopolised remained absolutely free. His Lordship further added that regulation of trade might clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens. Referring to the doctrine of "pith and

substance" his Lordship observed that it, no doubt, raised in convenient form an appropriate question in cases where the real issue was one of subject matter as when the point was whether a particular piece of legislation was a law in respect of some subject within the permitted field, but it might also serve a useful purpose in the process of deciding whether an enactment which worked some interference with trade, commerce and intercourse among the States was, nevertheless, untouched by s. 92 as being essentially regulatory in character.

The last Australian case on the point cited before us is Mansell v. Beck [(Australian Law Journal, Vol. 30. No. 7 p. 346)]. In this case also the provisions of the Lotteries and Art Unions Act of New South Wales came up for consideration and the decisions in the King v. Connare [(1939) 61 C.L.R. 596] and the King v. Martin [(1939) 62 C.L.R. 457] were considered and approved. Dixon C.J. and Webb J. observed that the true content of the State law must be ascertained to see whether the laws that resulted from the whole impaired the freedom which s. 92 protected. Their Lordships pointed out that lotteries not conducted under the authority of Government were suppressed as pernicious. The impugned legislation was, in their Lordships' view, of a traditional kind directed against lotteries as such independently altogether of trade, commerce and intercourse between States. McTiernan J. reiterated the views he had expressed in the case of the King v. Connare [(1939) 61 C.L.R. 596] in the following words :

> "It is important to observe the distinction that gambling is not trade, commerce and intercourse within the meaning of s. 92 otherwise the control of gambling in Australia would be attended with constitutional difficulties."

Williams J. did not consider it necessary to express any final opinion on the question whether there could be inter-State commerce in respect of lottery tickets. He took the view that ss. 20 and 21 of the New South Wales Act were on their face concerned and concerned only with intra-State transactions and that their provisions did not directly hinder, burden or delay any inter-State trade, commerce or intercourse. His Lordship observed that there was nothing in the reasoning in the judgment in the Bank case or in subsequent decisions to indicate that the King v. Connare [(1939) 61 C.L.R. 596] and King v. Martin [(1939) 62 C.L.R. 457] were not rightly decided. He quoted, with approval, the observations of Dixon J. in Martin's case. Fullagar J. also took the view that the previous decisions of the High Court in Connare's case [(1939) 61 C.L.R. 596] and Martin's case [(1939) 62 C.L.R. 457] were rightly decided for the reasons given by Dixon J. Kitto J. dissented from the majority view. Taylor J. who was also in favour of the validity of the impugned law, observed :

> "No simple legislative expedient purporting to transmute trade and commerce into something else will remove it from the ambit of s. 92. But whilst asserting the width of the field in which s. 92 may operate it is necessary to observe that not every transaction which employs the forms of trade and commerce will, as trade and commerce, invoke its protection. The sale of stolen goods, when the transaction is juristically analysed, is no different from the sale of any other goods but can it be doubted that the Parliament of any State may prohibit the sale of stolen goods without infringing s. 92 of the Constitution ? The only feature which distinguishes such a transaction from trade and commerce as generally understood is to be found in the subject of the transaction; there is no difference in the means adopted for carrying it out. Yet it may be said that in essence such a transaction constitutes no part of trade and commerce as that expression is generally understood. Numerous examples of other transactions may be given, such as the sale of a forged passport, or, the sale of

> counterfeit money, which provoke the same comment and, although legislation prohibiting such transactions may, possibly, be thought to be legally justifiable pursuant to what has, on occasions, been referred to as a "police power", I prefer to think that the subjects of such transactions are not, on any view, the subjects of trade and commerce as that expression is used in s. 92 and that the protection afforded by that section has nothing to do with such transactions even though they may require, for their consummation, the employment of instruments, whereby inter-State trade and commerce is commonly carried on."

After referring to the history of lotteries in England the learned Judge concluded :

> "The foregoing observations give some indication of the attitude of the law for over two and a half centuries towards the carrying on of lotteries. But they show also that, in this country, lotteries were, from the moment of its first settlement, common and public nuisances and that, in general, it was impossible to conduct them except in violation of the law. Indeed it was impracticable for any person to conduct a lottery without achieving the status of a rogue and a vagabond."

In the Constitution of the United States of America there is no counterpart to Art. 301 of our Constitution or s. 92 of the Australian Constitution. The problem of gambling came up before the courts in America in quite different setting. Article 1, s. 8, sub-s. (3) of the Constitution of the United States compendiously called the commerce clause gives power to the Congress to regulate commerce with foreign nations and among the several States and with the Indian tribes. Congress having made law regulating gambling activities which extended across the State borders, the question arose whether the making of the law was within the legislative competence of the Congress, that is to say whether it could be brought within the commerce clause. The question depended for its answer on the further question whether the gambling activities could be said to be commerce amongst the States. If it could, then it was open to Congress to make the law in exercise of its legislative powers under the commerce clause. More often then not gambling activities extend from State to State and, in view of the commerce clause, no State Legislature can make a law for regulating inter-State activities in the nature of trade. If betting and gambling does not fall within the ambit of the commerce clause, then neither the congress nor the State Legislature can in any way control the same. In such circumstances, the Supreme Court of America thought it right to give a wide meaning to the word "commerce" so as to include gambling within the commerce clause and thereby enable the Congress to regulate and control the same. Thus in Champion v. Ames [[1903] 188 U.S. 321; 47 L. Ed. 492] the carriage of lottery tickets from one State to another by an express company was held to be inter-State commerce and the court upheld the law made by Congress which made such carriage an offence. In Hipolite Egg Co. v. United States [[1911] 220 U.S. 45; 55 L. Ed. 364] the Pure Food Act which prohibited the importation of adulterated food was upheld as an exercise of the power of the Congress to regulate commerce. The prohibition of transportation of women for immoral purposes from one State to another or to a foreign land has also been held to be within the commerce clause (see Hoke v. United States [[1913] 227 U.S. 308; 57 L. Ed. 523]). So has the prohibition of obscene literature and articles for immoral use. Reference has also been made to the cases of United States v. Kahriger [[1953] 345 U.S. 22; 97 L. Ed. 754] and Lewis v. United States [[1955] 348 U.S. 419; 99 L. Ed. 475] to support the contention of the appellant State that the Supreme Court of the United States looked with great disfavour on gambling activities. In the last mentioned case it was roundly stated at p. 480 that "there is no constitutional right to gamble".

In construing the provisions of our Constitution the decisions of the American Supreme Court on

the commerce clause and the decisions of the Australian High Court and of the Privy Council on s. 92 of the Australian Constitution should, for reasons pointed out by this Court in State of Travancore-Cochin v. The Bombay Co. Ltd. [(1952) S.C.R. 1112 at p. 1121], be used with caution and circumspection. Our Constitution differs from both American and Australian Constitutions. There is nothing in the American Constitution corresponding to our Art. 19(1)(g) or Art. 301. In the United States the problem was that if gambling did not come within the commerce clause, then neither the Congress nor any State legislature could interfere with or regulate inter-State gambling. Our Constitution, however, has provided adequate safeguards in cl. (6) of Art. 19 and in Arts. 302-305. The scheme of the Australian Constitution also is different from that of ours, for in the Australian Constitution there is no such provision as we have in Art. 19(6) or Arts. 302-304 of our Constitution. The provision of s. 92 of the Australian Constitution being in terms unlimited and unqualified the judicial authorities interpreting the same had to import certain restrictions and limitations dictated by common sense and the exigencies of modern society. This they did, in some cases, by holding that certain activities did not amount to trade, commerce or intercourse and, in other cases, by applying the doctrine of pith and substance and holding that the impugned law was not a law with respect to trade, commerce or intercourse. The difficulty which faced the judicial authorities interpreting s. 92 of the Australian Constitution cannot arise under our Constitution, for our Constitution did not stop at declaring by Art. 19(1)(g) a fundamental right to carry on trade or business or at declaring by Art. 301 the freedom of trade, commerce and intercourse but proceeded to make provision by Art. 19(6) and Arts. 302-305 for imposing in the interest of the general public reasonable restrictions on the exercise of the rights guaranteed and declared by Art. 19(1)(g) and Art. 301. As one of us said in P. P. Kutti Keya v. The State of Madras [A.I.R. (1954) Mad. 621] the framers of our Constitution, being aware of the problems with which the Australian Government had been confronted by reason of s. 92, sought to solve them by enacting limitations in Part XIII itself on the freedom guaranteed in Art. 301. Our task, therefore, will be to interpret our Constitution and ascertain whether the prize competitions falling within the definition of the impugned Act, all of which are of a gambling nature, can be said to be a "trade or business" within the meaning of Art. 19(1)(g) or "trade, commerce and intercourse" within the meaning of Art. 301 of our Constitution.

The scheme of our Constitution, as already indicated, is to protect the freedom of each individual citizen to carry on his trade or business. This it does by Art. 19(1)(g). This guaranteed right is, however, subject to Art. 19(6) which protects a law which imposes, in the interest of the general public, reasonable restrictions on the exercise of the fundamental right guaranteed by Art. 19(1)(g). Our Constitution also proclaims by Art. 301 the freedom of trade, commerce and intercourse throughout the territory of India subject to the provisions of Arts. 302-305 which permit the imposition of reasonable restriction by Parliament and the State Legislatures. The underlying idea in making trade, commerce and intercourse with, as well as within, the States free undoubtedly was to emphasise the unity of India and to ensure that no barriers might be set up to break up the national unity. One important point to note is that the language used in Art. 19(1)(g) and Art. 301 is quite general and that the provisions for restricting the exercise of the fundamental right and the declared freedom of the country's trade, commerce and intercourse are made separately, e.g., by Art. 19(6) and Arts. 302-305. This circumstance is fastened upon by learned counsel for the petitioners for contending that the right guaranteed by Art. 19(1)(g) and the freedom declared by Art. 301 should, in the first instance and to start with, be widely and liberally construed and then reasonable restrictions may be superimposed on that right under Art. 19(6) or Arts. 302-305 in the interest of the general public. According to him the words "trade" or "business" or "commerce" should be read in their widest amplitude as meaning any activity which is undertaken or carried on with a view to

earning profit. There is nothing in those two Arts. 19(1)(g) and 301, which, he says, may qualify or cut down the meaning of the critical words. He contends that there is no justification for excluding from the meaning of those words activities which may be looked upon with disfavour by the State or the Court as injurious to public morality or public interest. The argument is that if the trade or business is of the last mentioned character, then the appropriate Legislature may impose restrictions which will be justiciable by the courts and this restriction may, in appropriate cases, even extend to total prohibition. Our attention has been drawn to Art. 25 where the limiting words" subject to public order, morality and health" are used and it is pointed out that no such limiting words are to be found in Art. 19(1)(g) or Art. 301. In short the argument is that Art. 10(1)(g) and Art. 301 guarantee and declare the freedom of all activities undertaken and carried on with a view to earning profit and the safeguard is provided in Art. 19(6) and Arts. 302-305. The proper approach to the task of construction of these provisions of our Constitution, it is urged, is to start with absolute freedom and then to permit the State to cut it down, if necessary, by restrictions which may even extend to total prohibition. On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights until they are restricted by law. Thus there will be a guaranteed right to carry on a business of hiring out goondas to commit assault or even murder, of housebreaking, of selling obscene pictures, of trafficking in women and so on until the law curbs or stops such activities. This appears to us to be completely unrealistic and incongruous. We have no doubt that there are certain activities which can under no circumstance be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words. Learned counsel has to concede that there can be no "trade" or "business' in crime but submits that this principle should not be extended and that in any event there is no reason to hold that gambling does not fall within the words "trade" or "business" or "commerce" as used in the Articles under consideration. The question arises whether our Constitution makers ever intended that gambling should be a fundamental right within the meaning of Art. 19(1)(g) or within the protected freedom declared by Art. 301.

The avowed purpose of our Constitution is to create a welfare State. The directive principles of State policy set forth in Part IV of our Constitution enjoin upon the State the duty to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. It is the duty of the State to secure to every citizen, men and women, the right to an adequate means of livelihood and to see that the health and strength of workers, men and women, and the tender age of children are not abused, to protect children and youths against exploitation and against moral and material abandonment. It is to be the endeavour of the State to secure a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, to protect the weaker sections of the people from social injustice and all forms of exploitation, to raise the standard of living of its people and the improvement of public health. The question canvassed before us is whether the Constitution makers who set up such an ideal of a welfare State could possibly have intended to elevate betting and gambling on the level of country's trade or business or commerce and to guarantee to its citizens, the right to carry on the same. There can be only one answer to the question.

From ancient times seers and law givers of India looked upon gambling as a sinful and pernicious vice and deprecated its practice. Hymn XXXIV of the Rigveda proclaims the demerit of gambling. Verses 7, 10 and 13 say :

"7 Dice verily are armed with goads and driving hooks, deceiving and tormenting, causing grievous woe. They give frail gifts and then destroy the man who wins, thickly anointed with the player's fairest good.

10 The gambler's wife is left forlorn and wretched : the mother

mourns the son who wanders homeless.

In constant fear, in debt, and seeking riches, he goes by

night unto the home of others.

11 Play not with dice : no, cultivate they cornland.

Enjoy the gain, and deem that wealth sufficient.

There are thy cattle, there thy wife, O gambler. So this good

Savitar himself hath told me."

The Mahabharata deprecates gambling by depicting the woeful conditions of the Pandavas who had gambled away their kingdom. Manu forbade gambling altogether. Verse 221 advises the king to exclude from his realm gambling and betting, for those two vices cause the destruction of the kingdom of princes. Verse 224 enjoins upon the king the duty to corporally punish all those persons who either gamble or bet or provide an opportunity for it. Verse 225 calls upon the king to instantly banish all gamblers from his town. In verse 226 the gamblers are described as secret thieves who constantly harass the good subjects by their forbidden practices. Verse 227 calls gambling a vice causing great enmity and advises wise men not to practise it even for amusement. The concluding verse 228 provides that on every man who addicts himself to that vice either secretly or openly the king may inflict punishment according to his discretion. While Manu condemned gambling outright, Yajnavalkya sought to bring it under State control but he too in verse 202(2) provided that persons gambling with false dice or other instruments should be branded and punished by the king. Kautilya also advocated State control of gambling and, as a practical person that he was, was not adverse to the State earning some revenue therefrom. Vrihaspati dealing with gambling in chapter XXVI, verse 199, recognises that gambling had been totally prohibited by Manu because it destroyed truth, honesty and wealth, while other law givers permitted it when conducted under the control of the State so as to allow the king a share of every stake. Such was the notion of Hindu law givers regarding the vice of gambling. Hamilton in his Hedaya, vol. IV, book XLIV, includes gambling as a kiraheeat or abomination. He says : "It is an abomination to play at chess, dice or any other game; for it anything is staked it is gambling, which is expressly prohibited in the Koran; or if, on the other hand, nothing be hazarded it is useless and vain." The wagering contracts of the type which formed the subject-matter of the case of Ramloll v. Soojumnull [(1848) 4 M.I.A. 339] and was upheld by the Privy Council as not repugnant to the English Common Law were subsequently prohibited by Act XXI of 1948 which was enacted on the suggestion of Lord Campbell made in that case and introduced in India provisions similar to those of the English Gaming Act (8 & 9 Vict. c. 109). Bengal Gambling Act (Ben. II of 1867) provided for the punishment of public gambling and the keeping of common gaming house in the territories subject to the Lieutenant Governor of Bengal. Lottery has been, since 1870, made an offence under s. 294A of the Indian Penal Code. Gambling agreements have been declared to be void under the Indian Contract Act, 1872 (s. 30). This is short in how gambling is viewed in India.

Before the Legislature intervened, gambling and wagering were not prohibited by the English Common Law although the English courts looked upon it with disfavour and discouraged it on grounds of public policy by denying procedural facilities which were granted to other litigants. The Scottish courts, however, have always refused to recognise the validity of wagering contracts and have held that sponsiones ludicroe, as they style such contracts, are void by the Common Law of Scotland. Gambling and Betting Act, 1664 (16 Car. II, c. 7) was directed against fraudulent and excessive gambling and betting at games or sports. This was followed by the Gaming Act of 1710 (9 Anne. c. 19). The Marine Insurance Act 1745 (19 Geo. II c. 37) for the first time prohibited wagering policies on risks connected with British shipping. This was supplemented by the Marine Insurance Act 1788 (28 Geo. III c. 56). The Life Insurance Act, 1774 (14 Geo. III c. 48) though not intended to prohibit wagering in general, prohibited wagering under the cloak of a mercantile document which purported to be a contract of insurance. Then came the Gaming Act of 1845 (8 and 9 Vict. c. 109) which for the first time declared all contracts made by way of gaming or wagering void irrespective of their form or subject-matter. The provisions of this Act were adopted by our Act XXI of 1948 as hereinbefore mentioned. The Gaming Act of 1892 (55 and 56 Vict. c. 9) further tightened up the law.

As far back as 1850 the Supreme Court of America in Phalen v. Virginia [[1850] 49 U.S. 163; 12 L. Ed. 1030, 1033] observed :

> "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and the simple."

The observations were quoted, with approval, in Douglas v. Kentucky [[1897] 168 U.S. 488; 42 L. Ed. 553, 555]. After quoting the passage from Phalen v. Virginia [[1850] 49 U.S. 163; 12 L. Ed. 1030, 1033] the judgment proceeded :

> "Is the state forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results ? Can the Legislature of a State contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries ?"

It will be abundantly clear from the foregoing observations that the activities which have been condemned in this country from ancient times appear to have been equally discouraged and looked upon with disfavour in England, Scotland, the United States of America and in Australia in the cases referred to above. We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Art. 19(1)(g). We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Art. 301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word "trade", "business", or

"intercourse". We are, however, clearly of opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Arts. 19(1)(g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Art. 19(1)(g) or Art. 301 of our Constitution.

The Court of Appeal, we have already said, took the view that it was not open to the State, which had not thought fit to prohibit these prize competitions but had sought to make a profit out of them by levying a tax, to contend at the same time that it was illegal or was not a "trade" at all. But as pointed out in United States v. Kahrigar [345 U.S. 22; 97 L. Ed. 754], the fact of issuing a licence or imposing a tax means nothing except that the licensee shall be subject to no penalties under the law if he pays it. Lewis v. United States of America [348 U.S. 49; 99 L. Ed. 475] also recognises that the Federal Government may tax what it also forbids and that nobody has a constitutional right to gamble but that if he elects to do so, though it be unlawful, he must pay the tax. In this connection reference may be made to the observation of Rowlatt J. in Mann v. Nash [L.R. (1932) 1 K.B.D. 752 at p. 757]:

> "The revenue authorities, representing the State, are merely looking at an accomplished fact. It is not condoning it or taking part in it."

Further down he said :

> "It is merely taxing the individual with reference to certain facts. It is not a partner or a sharer in the illegality."

That crime is not a business is also recognised in F. A. Lindsay, A. E. Woodward and W. Hiscox v. The Commissioners of Inland Revenue [18 T.C. 43] (per Lord President Clyde and per Lord Sands) and in Southern (H. M. Inspector of Taxes) v. A. B. [L.R. (1933) 1 K.B. 713; 18 T.C. 59]. The fact that regulatory provisions have been enacted to control gambling by issuing licences and by imposing taxes does not in any way alter the nature of gambling which is inherently vicious and pernicious.

We also arrive at the same result by applying the doctrine of 'pith and substance'. As Lord Porter pointed out : "The phrase raised in a convenient form an appropriate question in cases where the real issue is one of subject matter and it may also serve a useful purpose in the process of deciding whether a particular enactment is a law with respect to trade, commerce or intercourse as such or whether it is a law with respect to some other subject which incidentally trenches upon trade, commerce and intercourse." Reference has already been made to the observations of Dixon J., as he then was, in King v. Martin [(1939) 62 C.L.R. 457]. Adapting his language, we may say that when Art. 19(1)(g) guarantees or Art. 301 declares the freedom of trade they describe human activities in a specific aspect. They single out attributes which the act or transaction may wear and make the freedom, which they confer, depend upon those attributes. The freedom secured by the two Articles, we think, implies that no unreasonable restraint or burden shall be placed upon an act falling under that description because it is trade or commerce or intercourse. We have analysed the provisions of the impugned Act and it is quite clear that the Act does not purport directly to interfere with trade, commerce or intercourse as such, for the criterion of its application is the specific gambling nature of the transaction which it restricts. The purpose of the Act is not to restrict anything which brings

the transactions under the description of trade, commerce or intercourse. In other words, the Act is in pith and substance an Act with respect to betting and gambling. To control and restrict betting and gambling is not to interfere with trade, commerce or intercourse as such but to keep the flow of trade, commerce and intercourse free and unpolluted and to save it from anti-social activities. In our opinion, therefore, the impugned Act deals with gambling which is not trade, commerce or business and, therefore, the validity of the Act has not to be decided by the yardstick of reasonableness and public interest laid down in Arts. 19(6) and 304. The appeal against the stringency and harshness, if any, of the law does not lie to a court of law.

In the view we have taken, it is not necessary for us to consider or express any opinion on this occasion as to the vexed question whether restriction, as contemplated in Arts. 19(6) and 304(b), may extend to total prohibition and this is so because we cannot persuade ourselves to hold that Art. 19(1)(g) or Art. 301 comprises all activities undertaken with a view to profit as "trade" within the meaning of those Articles. Nor is it necessary for us on this occasion to consider whether a company is a citizen within the meaning of Art. 19 and indeed the point has not been argued before us.

The last point urged by the petitioners is that assuming that the impugned Act deals only with gambling and that gambling is not "trade" or "business" or "commerce" and is, therefore, not entitled to the protection of our Constitution, the prize competitions run by them are in fact not of a gambling nature. The trial court accepted this contention while the Court of Appeal rejected it. We have examined the scheme and the rules and the official solutions and the explanations in support thereof and we have come to the conclusion that the competitions at present run by the petitioners under the name of R. M. D. C. Crosswords are of a gambling nature. Our view so closely accords with that of the Court of Appeal that we find it unnecessary to go into the details of the scheme. To start with, we find that the Board of Adjudicators pick up nine of the clues and select only those competitors whose answers correspond with the official solution of those nine clues. Those nine clues may be from the top, may be from the bottom or may be selected at random. It is said that they are like nine compulsory questions in a school examination but then in a school examination, the students are told which are the nine compulsory questions and they can take particular care with regard to those; but in this scheme there is no knowing which nine will be selected and those competitors whose answers do not accord with the official solution are debarred from being considered for the first prize. A competitor may have given correct answers to eight of the nine selected clues and may have given correct answers to the remaining eight so that he has sent in sixteen correct answers but he will, nevertheless, not be considered for the first prize because his answers to the nine selected questions did not agree with the official solutions of those nine clues. This is a chance element to start with. We have then seen that the competing words out of which one is to be selected are in some cases equally apt. We are not satisfied that the word selected by the Board is the more apt word in many cases. The reasons given by them appear to us to be laboured and artificial and even arbitrary in some cases. On the whole, we have come to the conclusion that the Court of Appeal was right in its conclusion that in point of fact the prize competitions run by the petitioners partake of a gambling nature and, therefore, fall within the definition and are to be governed by the regulatory and taxing provisions of the Act.

For the reasons stated above, we have come to the conclusion that the impugned law is a law with respect to betting and gambling under Entry 34 and the impugned taxing section is a law with respect to tax on betting and gambling under Entry 62 and that it was within the legislative competence of the State Legislature to have enacted it. There is sufficient territorial nexus to entitle the State Legislature to collect the tax from the petitioners who carry on the prize competitions through the medium of a newspaper printed and published outside the State of Bombay. The prize

competitions being of a gambling nature, they cannot be regarded as trade or commerce and as such the petitioners cannot claim any fundamental right under Art. 19(1)(g) in respect of such competitions, nor are they entitled to the protection of Art. 301. The result, therefore, is that this appeal must be allowed and the order of the lower court set aside and the petition dismissed and we do so with costs throughout.

Appeal allowed.

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