

H. Anraj

Vs

Government of Tamil Nadu

Dipak Dhar and Others

Vs

State of West Bengal and Another

Writ Petitions Nos. 435 and 436 of 1985 and Civil Appeal No. 4099 of 1984

(V. D. Tulzapurkar, Sabyasachi Mukharji JJ)

04.10.1985

JUDGMENT

TULZAPURKAR, J. -

1. These writ petitions and the civil appeal raise a common question of law, namely, whether sales tax can be levied by a State legislature on the sale of the lottery tickets in the concerned State ?
2. The facts giving rise to the aforesaid question lie in a narrow compass and in the writ petition the question arises out of the levy imposed for the first time on such sales of lottery tickets by an amendment made in the Tamil Nadu General Sales Tax Act, 1959 with effect from January 28, 1984 while in the civil appeal it arises out of a similar levy imposed for the first time by making suitable amendments in the Bengal Finance (Sales Tax) Act, 1941 with effect from May 1, 1984.
3. Indisputably the subject of "Lotteries" organised either by the Government of India or by the Government of a State falls within the Union List (Entry 40 of List I) but in the absence of any law having been enacted by the Parliament on the subject the running of lotteries could be done by the Government of various States only under Article 258(1) of the Constitution on entrustment of that function by the Union to the concerned State. Accordingly at the instance of the Tamil Nadu Government which proposed to organise its own State lottery the Central Government entrusted that function to the State Government by means of a Presidential Order dated October 27, 1971, the operative part whereof ran thus :

Now, therefore, the President is pleased to permit the Government of Tamil Nadu to conduct a State lottery, subject to the condition that the tickets of the lottery shall not be sold in any other State without the permission of the Government of that State.

The President is further pleased to entrust the Government of Tamil Nadu under clause (1) of Article 258 of the Constitution the executive power of the Union in respect of lotteries organised by that Government.

Pursuant to the aforesaid Presidential Order the Government of Tamil Nadu organised a State lottery by sponsoring a Raffle Scheme and framing appropriate rules in that behalf. The State Government

was also desirous of levying sales tax on the sale of the lottery tickets by placing the incidence thereof on every dealer selling such tickets within the State and for that purpose by a Notification GOP No. 77 dated January 28, 1984 issued under Section 59 of the Tamil Nadu General Sales Tax Act, 1959 the State Government inserted an Entry 163 in the First Schedule to the Act whereby lottery tickets were brought within the purview of the charge and tax at the rate of 20% was levied on the sale of such tickets "at the point of first sale in the State". This notification was later followed by a regular legislative amendment made in the Act as required by Section 59(2). Presumably this was done in the exercise of its own independent taxing power under Entry 54 of List II in the Seventh Schedule to the Constitution. It seems that under the Raffle Scheme so promulgated the first sale of lottery tickets issued thereunder was by the State Government of Tamil Nadu to various licensed agents, wholesalers, stockists etc. and the State Government became liable to pay sales tax as the first dealer. Therefore, the Finance (Raffle) Department of the State Government issued a Notification GOMs No. 219 on March 31, 1984 bringing into force certain arrangement whereunder while retaining the sale price of the ticket at its face value the tax was not passed on to the licenced dealer or to purchaser; in other words effectively exemption from payment of sales tax was granted to the purchaser. Shri H. Anraj the common petitioner in both the writ petitions, who has been carrying on business in the State of Tamil Nadu as a dealer in lottery tickets on business in the State of Tamil Nadu as a dealer in lottery tickets issued by the Royal Government of Bhutan, the State of Assam and various other lotteries, has challenged the validity of both the levy of sales tax on the sale of lottery tickets as also the exemption granted under Notification GOMs No. 219 dated March 31, 1984.

4. Presumably on the entrustment of the function of conducting a State lottery by the Union Government under a similar Presidential Order the Government of West Bengal organised its own lottery by sponsoring a Raffle Scheme and framing appropriate rules in that behalf and for the purpose of levying sales tax on the sale of the lottery tickets the State legislature promulgated the West Bengal Taxation Laws (Second Amendment) Act, 1984 whereunder by making appropriate amendments (by way of additions) to Sections 5(1)(aa), 5(1)(dd), 5(2)(a)(vb) and 5(2)(v)(iva) of the Bengal Finance (Sales Tax) Act, 1941 sales tax at the rate of 20% was levied on the taxable turnover of every dealer in regard to the sale of lottery tickets. By a Notification No. 1020 FT dated March 29, 1984 the levy imposed under the aforesaid amendments was brought into force with effect from May 1, 1984. By a writ petition filed in the Calcutta High Court the appellants (being three petitioners who carry on business in the State of West Bengal as agents and stockists of various lotteries organised by different States including the State of West Bengal) challenged the validity of the aforesaid amendments made in the Bengal Finance (Sales Tax) Act, 1941 whereunder sales tax has been levied on the sale of lottery tickets substantially on the ground that a lottery ticket when sold represented an actionable claim and not "goods" and such a transaction being merely a sale of a chance to win a prize in the draw was not exigible to sales tax and, therefore, the amendments made were beyond the legislative competence of the State legislature, as Entry 54 of List II in the Seventh Schedule authorises legislation levying sales tax only on the sale or purchase of "goods"; the matter ultimately went before a division bench of that court who by its judgment and order dated August 14, 1984 dismissed the writ petition upholding the constitutional validity of the amendments in question as also the levy imposed thereunder. In substance the High Court came to the conclusion that lottery tickets were not actionable claims but "goods" within the definition of that expression given in the Bengal Finance (Sales Tax) Act, 1941 and, therefore, the State legislature was competent under Entry 54 of List II to enact the concerned amendments levying sales tax on the sale of lottery tickets. Hence the appeal.

5. Counsel for the dealers have challenged the levy of sales tax on the sale of lottery tickets imposed

under both the enactments, the Tamil Nadu General Sales Tax Act, 1959 as amended and the Bengal Finance (Sales Tax) Act, 1941 as amended principally on the ground of lack of legislative competence on the part of the concerned State legislatures. Counsel pointed out that under the charging provision contained in both the Acts (Section 3 of the Tamil Nadu Act, 1959 and Section 4 of the Bengal Act, 1941) the taxable event is the sale of goods (here lottery tickets) and the levy is imposed upon the taxable turnover of every dealer in regard to the sales of lottery tickets and therefore, quite clearly, each of the State legislatures has purported to act in the exercise of its own taxing power under Entry 54 of List II. But according to counsel Entry 54 of List II enables legislation imposing a tax, inter alia, on "sale of goods"; that it is well settled that the expression "sale of goods" has to be construed in the sense which it has in the Indian Sale of Goods Act, 1930 (vide *Gannon Dunkerley case (State of Madras v. Gannon Dunkerley & Co., 1959 SCR 379, 416, AIR 1958 SC 560)*), that "goods" under Section 2(7) thereof comprises within its scope every kind of movable property but specifically excludes actionable claim, that the essence of lottery is a chance for a prize for a price, that a sale of such a chance is not a sale of goods and therefore the levy of sales tax on sale of lottery tickets would be beyond the ambit of Entry 54 of List II. Alternatively, counsel contended that a lottery ticket is an actionable claim as defined in Section 3 of Transfer of Property Act or a chose-in-action known to English law, the ticket itself being merely a slip of paper or memorandum evidencing the right of the holder thereof to claim or receive a prize if successful in the draw and therefore the impugned levy is outside Entry 54 of List II. So far as the Madras Act is concerned counsel for the writ petitioners raised a further contention that the State Government's Notification GOMs No. 219 dated March 31, 1984 was discriminatory and violative of Article 14 and Article 304(a) of the Constitution inasmuch as thereunder the burden of sales tax, surcharge and additional surcharge is prohibited to be passed on to the purchaser of Tamil Nadu Lottery Tickets while there is no such similar treatment given to the lottery tickets of other States which are being sold in the State of Tamil Nadu thereby putting the sale of the latter tickets at a serious disadvantage.

6. On the other hand the learned Attorney-General appearing for the State of Tamil Nadu and counsel for the State of West Bengal strongly refuted the validity of the grounds on which the levy of sales tax on the sale of lottery tickets was challenged by counsel for the dealers. For deciding the legislative competence of the impugned amendments levying sales tax on lottery tickets, apart from Entry 54 of List II ('taxes on the sale or purchase of goods') reliance was also placed on Entry 62 of List II ('Taxes on... betting and gambling') and it was urged that if the dealers' contention were correct that lottery is a chance and when a lottery ticket is sold it is a chance that is sold, then the tax in the present case would be a tax on betting and gambling and the same has to be levied in the case of lottery tickets at the time of the sale of the tickets because it is at that time that betting takes place and as such the impugned amendments would fall under Entry 62 of List II. Of course, the learned Attorney General and counsel for the State of West Bengal justified the impugned amendments under Entry 54 of List II by contending that a lottery ticket was "goods" within the definitions of that expression given in the two Acts as also in the Sale of Goods Act, 1930 and not purely an actionable claim as contended for by counsel for the dealers and hence the levy on its sale was perfectly competent under that entry, and in this behalf the contention in substance was that a sale of a lottery ticket confers on the purchaser two rights (a) a right to participate in the draw and (b) a right to claim a prize if successful in the draw and though the latter may be an actionable claim the former constitutes beneficial interest in the movable property (incorporeal in character) in possession of the holder of the ticket and hence 'goods' capable of being possessed and bought or sold. As regards the exemption granted by the Tamil Nadu Government under Notification GOMs No. 219 dated March 31, 1984 it was contended that the circumstance that the Tamil Nadu

Government decided not to pass on the sales tax to the purchaser cannot invalidate the same as falling under Article 14 or Article 304 inasmuch as it is open to a dealer not to pass on the burden to the purchaser and bear it himself and further it is also open to all other State Governments who run lotteries to elect not to pass on the sales tax to the purchaser of their lottery tickets.

7. As regards Entry 62 of List II on which the reliance was placed by learned Attorney General, counsel for the dealers have rejoined by saying that reliance on that entry for finding the legislative competence will be of no avail for two reasons. First, if the tax was to be levied on betting and gambling the charging event ought to have been the organising of the lottery and the levy should have been imposed on the two State Governments for having organised that activity by undertaking the conduct of the lotteries and not on any dealer selling lottery tickets as is the case here; and secondly, Entry 40 of List I is 'Lotteries organised by the Government of India or the Government of a State' while Entry 34 of List II is 'betting and gambling' and it is well settled that the latter does not include lotteries organised by the Government of India or the Government of the State which topic is specifically dealt with by the former (vide *H. Anraj v. State of Maharashtra* ((1984) 2 SCC 292)) and therefore, the expression 'betting and gambling' in Entry 62 of List II must be given the same meaning, that is, it excludes State lotteries and therefore under Entry 62 there cannot be any power to levy tax on State lotteries and such construction of the relevant entries is in consonance with the constitutional scheme as explained by this Court in *Kerala State Electricity Board v. Indian Aluminium Co.* ((1976) 1 SCR 552 : (1976) 1 SCC 466, AIR 1976 SC 1031). In other words legislative competence if at all would be under Entry 54 of List II and unless the sale of a lottery ticket involves a sale of goods the levy would be incompetent being outside that entry.

8. Elaborating the main contention of lack of legislative competence under Entry 54 of List II, counsel for the dealers have urged that since that entry enables legislation levying tax on 'sale of goods' it is necessary to appreciate the real concept of the expressions 'goods', 'sale', 'lottery' and 'lottery ticket'. Section 2(j) and 2(n) of the Tamil Nadu Act defines 'goods' and 'sale' thus :

2(j) 'Goods' means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes all materials, commodities, and articles (including those to be used in the fitting out improvement or repair of moveable property); and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale;

2(n) 'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable considerations; (other clauses give extended meanings which are not material).

Similarly the expressions 'goods' and 'sale' are defined in Section 2(d) and (g) respectively of the Bengal Act thus :

2(d) 'goods' includes all kinds of movable property other than actionable claims, stocks, shares or securities;

2(g) 'sale' means any transfer of property in goods for cash or deferred payment or other valuable consideration....

The term 'goods' is defined in Section 2(7) of the Sale of Goods Act, 1930 and so far as is material it means "every kind of movable property other than actionable claims and money;" and this definition read with Section 4 of that Act clearly shows that the concept of 'sale of goods' thereunder means "a transfer of property in the goods for a price".

9. Article 366(12) of the Constitution gives an inclusive definition of 'goods' which says -

'Goods' includes all materials, commodities and articles;

and Article 366(29-A) inserted by the Forty-sixth Constitutional Amendment Act, gives an extended meaning to the concept of 'sale or purchase of goods' while defining the expression "tax on the sale or purchase of goods" but we are not concerned with the extended meaning in this case and only clause (a) thereof is material which runs thus -

(29-A) 'tax on the sale or purchase of goods' includes -

(a) a tax on the transfer, otherwise than in pursuance of a contract, or property in any goods for cash, deferred payment or other valuable consideration;

10. On a proper reading of the aforesaid definitions counsel urged that two significant aspects clearly emerge therefrom; first, that sans the extended meaning accorded to the expression 'sale of goods' (with which I am not concerned in the instant case), the true concept of 'sale of goods' is that there must be a transfer of property in the goods for a price, that is to say the concept has the same meaning which it has under the Sale of Goods Act, 1930 and secondly, the expression 'goods' covers within its scope every kind of movable property but actionable claims are specifically excluded from its purview.

11. For the purpose of bringing out the real meaning and concept of 'lottery' and 'lottery ticket' counsel relied upon the dictionary meanings of those expressions as also on certain decided cases. In Webster's Dictionary 'lottery' is defined as "a distribution of prizes by lot or chance". In the Oxford New English Dictionary 'lottery' is defined as "an arrangement for the distribution of prizes by chance among persons purchasing tickets". In Archibold's Criminal Pleadings. 7th Edition (p. 1345) 'lottery' has been defined as "the distribution of prizes by lot or chance without the use of any skill". In Black's Law Dictionary (5th Ed., p. 853) it is defined thus :

A chance for a prize for a price. Essential elements of a lottery are consideration, prize and chance and any scheme or device by which a person for a consideration is permitted to receive a prize or nothing as may be determined predominantly by chance. (Based on State v. Wassick, W. Va. (191 SE 2d 283, 288))

12. In Edward H. Horner v. United States (37 Law Ed 237, 241) the Supreme Court of the United States quoted with approval the following definition of 'lottery' contained in the Century Dictionary :

A scheme for raising money by selling chances to share in a distribution of prizes; more specifically, a scheme for distribution of prizes by chance among persons purchasing tickets, the correspondingly numbered slips or lots, representing prizes or blanks, being drawn from a wheel on a day previously announced in connection with the scheme of the intended prizes. In law the term 'lottery' embraces all schemes of distribution of prizes by chance, such as policy-playing, gift exhibitions, prize

concerts, raffles at fairs, etc. and includes various forms of gambling. (Very passage has been annotated in Words and Phrases Permanent Edition, Vol. 25 at p. 446).

13. In *Corpus Juris Secundum*, Vol. 54 at page 845 the three essential elements of a lottery are stated thus :

There are three elements essential to the existence of a lottery, namely, chance, consideration and prize; if these three elements are present the scheme is a lottery, otherwise it is not... If an essential element is absent the scheme is not a lottery, regardless of the motive for the omission, and, conversely if all the elements are present, the scheme is a lottery, regardless of the fact that the purpose of its sponsor is to increase his business.

In Volume 38, *American Jurisprudence 2d* at page 113 the further statement of law in para 6 is :

In order to comprise a lottery, these three elements or ingredients (mentioned above) must be present; chance alone will not do so, nor will chance even when coupled with consideration. Nor is the combination of consideration and prize sufficient alone.

14. Reliance was also placed on three English decisions, namely, *Bartlett v. Parker* ((1912) 2 KB 497), *Hall v. McWilliam* (85 Law Times Reports 239) and *Kerslake v. Knight* (133 Law Times Reports 606) to show that its essence a lottery involves a sale of a chance to win a prize for consideration. It is unnecessary to discuss in detail the facts in each of the three decisions but it will suffice to say that in each one of these cases the occasion to discuss the essence of a lottery arose in the context of the penal provisions contained in Section 41 of the Lotteries Act, 1823 and the question that arose for decision was whether the particular scheme of distribution of prizes sponsored by the concerned accused in three cases (each being a different scheme) constituted a lottery or not and whether a conviction under the said Section 41 was or could be properly recorded against them and was answered in the affirmative.

15. Reference was also made to a Full Bench decision of Madras High Court in *Sesha Ayyar v. Krishna Ayyar* (AIR 1936 Mad 225 : 70 MLJ 36) where in the context of the question whether a Kuri Chit Fund was a lottery or not the Full Bench has emphasised the same three essential elements that go to constitute a lottery, namely, (a) a prize or some advantage in the nature of a prize, (b) distribution thereof by chance, and (c) consideration paid or promised for purchasing the chance.

16. Coming to the lottery ticket counsel pointed out that the dictionary meaning of the word 'ticket' is "a printed card or a piece of paper that gives a person a specific right, as to attend a theatre, ride on a train, claim of purchase, etc." (see Webster) and lottery ticket has been defined in Words and Phrases, Permanent Edition, Vol. 25-A Supplement at page 73 thus.

'Lottery ticket' is token of the right to participate in pool (*Finster v. Keller*, 96 Cal Rep 241, 249 : 18 CA 3d 836). Further counsel pointed out how the term 'ticket' in the context of lottery has been explained in the same volume 25-A at page 491, namely, - "The term 'ticket', when speaking of the sale of lottery tickets is equivalent to chances." *Saloman v. State* (27 Ala 26, 30).

17. Counsel also strongly relied upon Justice Cornish's observation in the full bench decision of Madras High Court in *Sesha Ayyar v. Krishna Ayyar* (AIR 1936 Mad 225 : 70 MLJ 36) to the effect. "Tickets of course are only the tokens of the chance purchased, and it is the purchase of this chance

which is the essence of a lottery." Relying upon the aforesaid material counsel contended that a lottery ticket will have to be regarded merely as a slip of paper or memorandum evidencing the right of a holder thereof to share in the pool or the distributable fund; it is merely a convenient mode for ascertaining the identity of the winner and the fact of payment and, therefore, such a ticket, though a physical article, cannot be regarded as goods.

18. Having thus brought out the concept of a lottery as also of a lottery ticket counsel for the dealers have vehemently contended that a sale of a lottery ticket is nothing more than a sale of a chance to win a prize and no transaction of sale of movable property takes place or is involved in the sale of a lottery ticket, the ticket itself being merely a token of the chance purchased and therefore the levy of a tax on the sale of such chance must fall outside Entry 54 of List II and therefore the impugned amendments made in both the Acts would lack legislative competence. In any event counsel urged that a lottery ticket constitutes an inchoate right to receive the prize money and therefore can at best be described as a contingent interest in money and it is well settled that the expression 'goods' does not include money.

19. Without prejudice to the aforesaid contention counsel for the dealers made an alternative submission. It was urged that assuming without admitting that lottery tickets are regarded as a kind of movable property or some kind of merchandise they would be so only in a limited sense but in pith and substance they are 'actionable claims' which have been expressly excluded from the definition of 'goods'. In this behalf reliance was placed by counsel on the definition of an 'actionable claim' given in Section 3 of the Transfer of Property Act, 1882 and the following passages appearing in Mulla's (6th Ed.) under the heading 'Actionable Claims' at pages 804, 805 :

In English law movable property was said to be either in possession and enjoyment and therefore a chose in possession; or out of possession, but realizable by action, and therefore, a chose in action.. it (the term chose in action) is also used to denote a document evidencing a right or title. (like a ticket here) (p. 804)

Actionable claims, therefore, include claims recognised by the courts as affording grounds for relief either -

(1) as to unsecured debts or

(2) as to beneficial interest in movable property not in possession, actual or constructive - whether present or future, conditional or contingent. (p. 805)

Reliance was also placed upon the decision in *United States v. Mueller* (178 (2d series) Federal Reports 593, 594) where the following passage occurs :

Conceding, without deciding, that lottery tickets are merchandise, they are such only in a limited sense. In a general sense they are more in the nature of choses in action being in some respects memoranda of conditional promises to pay. (Also annotated in *Words and Phrases*, Permanent Edition, Volume 25-A at p. 491).

20. Similarly, counsel relied upon an English decision in *Jones v. Carter* (8 QB 134 : 115 ER 825, 826) where Lord Denman, C.J., took the view that the assignment of a ticket in a Derby Sweepstake was an assignment of a chose in action (a decision annotated in *Halsbury's Laws of England*, 4th Ed., Volume 6 para 8(2) and in *Stroud's Judicial Dictionary*, fourth Ed., Volume 1 at page 460 under the heading 'chose in action'). It was submitted that a lottery ticket possesses the same character and

would, therefore, be a chose in action. Similarly, it was pointed out that in *King v. Connare* (61 CLR 596, 607), Lantham, C.J., also took the view that when a person buys a lottery ticket from the conductor of the lottery there is an assignment of chose in action.

21. In view of above counsel urged that a sale of a lottery ticket is no more than an assignment of an actionable claim and no transfer of any property in goods is involved and as such the impugned amendments suffer from lack of legislative competence.

22. At the outset I would like to point out that the entire material on which the reliance has been placed by counsel for the dealers to bring out the real meaning and concept of 'lottery' and 'lottery ticket' for the purpose of supporting their main contention. Though valuable as far as it goes is strictly irrelevant and of no assistance to decide the real issue arising in the case. It cannot be disputed that true meaning of lottery as given in all the dictionaries as also the three essential elements requisite for a lottery as enunciated in the American decision, the three English decisions and the full bench decision of the Madras High Court show that in essence a lottery means a chance for a prize for a price and that unless all the three essential elements are present the scheme or the transaction would not amount to a lottery. In fact the three English decisions dealt with the question as to whether the concerned accused were or could be properly convicted of a criminal offence and obviously the court could not answer that question in the affirmative unless in each of the concerned schemes all the three essential elements were present. In the Madras case the essentials of a lottery came to be considered in the context of the question whether a Kuri Chit Fund was a lottery or not. In the case before us the issue is not whether the raffle-schemes undertaken by the two State Governments are lotteries or not. If that were the issue the material relied upon would have been quite useful. Admittedly the raffle schemes are lotteries which involve gaming. The issue before us is whether a sale of a lottery ticket, which unquestionably involves the sale of a chance to win a prize, is something more and comprises transfer of property in goods and therefore a sale of goods or not so that a tax could be levied thereon under Entry 54 of List II and in order to decide this question the true concepts of 'goods', 'sale', 'movable property' and 'immovable property' would be most material.

23. Section 2(7) of the Sale of Goods Act defines 'goods' as meaning "every kind of movable property other than actionable claims and money". Clearly, the expression 'movable property' is used in contradistinction with 'immovable property'. Section 3 of the Transfer of Property Act gives a negative definition of immovable property saying that it does not include standing timber, growing crops, or grass and is, therefore, not of much assistance; but Section 3(26) of the General Clauses Act, 1897 defines 'immovable property' by stating that it "shall include land, benefit to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth", while 'movable property' is defined in Section 3(36) thus :

"Movable property" shall mean property of every description, except immovable property.

It is thus clear that when Section 2(7) of the Sale of Goods Act defines 'goods' as meaning 'every kind of movable property other than actionable claims and money', the expression 'movable property' occurring therein must mean property of every 'description except immovable property'. Now, it is obvious that lottery tickets can by no stretch of imagination be regarded as immovable property but would, therefore, be movable property and as such these will fall within the expression "goods". Of course, questions whether these tickets constitute "goods" property so called or are slips of paper or memoranda merely evidencing the right to claim a prize by chance, and whether these are actionable claims and hence excluded from the concept of goods, will be considered presently.

But it cannot be disputed that as opposed to immovable property these tickets would be movable property and would normally qualify to fall within the expression "goods".

24. Since 'goods' are defined to exclude actionable claims it will be useful at this stage to refer to the definition of 'actionable claim' as given in Section 3 of the Transfer of Property Act which runs thus :

"Actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

This definition as analysed in Mulla's Transfer of Property Act (at page 805 of the 6th Ed.) comprises two types of claims - (a) a claim to unsecured debts and (b) a claim to beneficial interest in movable property not in possession, actual or constructive - whether present or future, conditional or contingent. We would be concerned not with (a) but with (b) in this case, and reading (b) it is clear that if the beneficial interest in movable property is not in possession of the claimant it will be an actionable claim but if it is in his possession or enjoyment it will not be actionable claim but a chose in possession. Keeping the aforesaid aspect's in view we proceed to consider the questions whether lottery tickets are goods properly so called or whether these are actionable claims ?

25. Counsel for the dealers contended that a lottery ticket would stand in the same category as a steamship ticket or a railway ticket or a railway cloakroom ticket or a cinema ticket, all being purely contractual documents; in other words it was urged that delivery of a lottery ticket evidencing the terms and conditions of the offer of a prize at the draw, on its acceptance by the purchaser by payment of price results merely in bringing into existence a contract and does not result in the transfer of any rights from the promoter or the dealer to the purchaser, much less of rights to property. It is not possible to accept this contention; whether by reason of a sale of a lottery ticket merely a contractual document comes into existence or along with the delivery of such a ticket to the purchaser on payment of price by him some rights are transferred to the purchaser must depend upon the intention of the parties, the mode of issuing such ticket and the rules governing the Raffle Scheme. Even proceeding on the assumption that lottery tickets are contractual documents that fact cannot militate against the tickets being goods and certain rights thereunder being transferred to the purchaser. In Salmond's Jurisprudence, 12th Ed. at pages 338-339 under the heading 'The Classes of Agreements', the following passage occurs :

Agreements are divisible into three classes, for they either create rights, or transfer them, or extinguish them. Those which create rights are themselves divisible into two sub-classes, distinguishable as 'contracts' and 'grants'. A contract is an agreement which creates an obligation or right in personam between the parties to it. A grant is an agreement which creates a right of any other description; examples being grants of leases, easements, charges, patents, franchises, powers, licences, and so forth. An agreement which transfers a right may be termed generically an 'assignment'. One which extinguishes a right is a 'release', 'discharge', or 'surrender'.

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It often happens that an agreement is of a mixed nature, and so falls within two or more of these

classes at the same time. Thus the sale of specific chattel is both a contract and an assignment, for it transfers the ownership of the chattel and at the same time creates an obligation to pay the price.

The delivery of a lottery ticket issued under the rules governing the Raffle Schemes in the instant case to a purchaser thereof is obviously not a mere contract creating an obligation or right in personam between parties to it but as explained hereafter, would be in the nature of a grant.

26. Dealing with agreements which are in the nature of grants, it is well settled that rights and benefits arising thereunder, unless of a personal nature, partake of the character of property as opposed to realty and therefore, movable property, capable of being assigned or transferred. As opposed to personal rights, like life, liberty or reputation these would be proprietary rights and benefits and hence includible in property according to Salmond's Jurisprudence (see para 108 at page 412 of 12th Ed. under the heading 'Proprietary rights - Dominion and status'). Counsel for the dealers, however, urged that this Court has taken the view that benefits arising under a contract are not proprietary rights and therefore, do not constitute property and in this behalf reliance was placed on two decisions, namely, *Swami Motor Transport (P) Ltd. v. Sankareswamigal Mutt* (1963 Supp 1 SCR 282, 306 and 307 : AIR 1963 SC 864) and *Anwar Khan Mehboob & Co. v. State of M.P.* In the former case the Court was concerned with the question whether the option to purchase the site conferred upon a tenant having his super-structure on the land under Section 9 of the Madras City Tenants' Protection Act, 1921 as amended in 1955 and again in 1960 amounted to interest or right in property and the court was of the view that even if such an option were conferred under a contract it would not be a right in property and therefore, the fact that such a right stemmed from a statute could not obviously expand its content or make it anyhow a non-proprietary right; the Court held that a statutory right to apply for the purchase of the land was not a right of property. In the latter case the Court took the view that a right to go to a forest area and collect tendu leaves under a contract given to the petitioner conferred no right to property before the leaves were plucked and therefore the Adhinyam in question had invaded no property rights. In my view both the decisions dealt with rights under a statute or contract which created merely obligations or rights in personam and not with agreement in nature of a grant. In the case of the latter type of agreements the rights or benefits arising thereunder would be property, more so when a party thereto has become entitled to the same on performing his part of the contract and in fact such rights or benefits would also be assignable. Counsel for the dealers fairly conceded the position that where under a contract, a party on the performance of his part of the contract is entitled to some emoluments or benefits then such emoluments or benefits under the contract would constitute property.

27. It cannot be disputed that in every raffle scheme based on the sale of lottery tickets, similar to the schemes sponsored by each of the two States in this case, every participant is required to purchase a lottery ticket by paying a price therefor (the face value of the ticket) and such purchase entitles him not merely to receive or claim a prize in the draw, if successful but before that also to participate in such draw. In other words, a sale of a lottery ticket confers on the purchaser thereof two rights (a) a right to participate in the draw and (b) a right to claim a prize contingent upon his being successful in the draw. Both would be beneficial interests in movable property, the former 'in praesenti', the latter 'in futuro' depending on a contingency. Lottery tickets, not as physical articles, but as slips of paper or memoranda evidence not one but both these beneficial interest in movable property which are obviously capable of being transferred, assigned or sold and on their transfer, assignment or sale both these beneficial interests are made over to the purchaser for a price. Counsel for the dealers sought to contend that the concept of a lottery cannot be sub-divided in two parts, namely, a right to participate and a right to receive the prize but the two together constitute one single right. It is not possible to accept this contention for the simple reason that the two

entitlements which arise on the purchase of a lottery ticket are of a different character, inasmuch as the right to participate arises in praesenti, that it to say it is a choate or perfected right in the purchaser on the strength of which he can enforce the holding of the draw, while the other is inchoate right which is to materialise in future as and when the draw takes place depending upon his being successful in such draw. Moreover, on the date of the purchase of the ticket, the entitlement to participate in the draw can be said to have been delivered unto the possession of the purchaser who would be enjoying it from the time he has purchased the ticket and as such it would be a chose in possession while the other would be an actionable claim or a chose in action as has been held in *Jones v. Carter* (8 QB 134 : 115 ER 825, 826) and *King v. Connare* (61 CLR 596, 607) on which counsel for the dealers relied. It is thus clear that a transfer of the right to participate in the draw which takes place on the sale of a lottery ticket would be a transfer of beneficial interest in movable property to the purchaser and therefore, amounts to transfer of goods and to that extent it is no transfer of an actionable claim; to the extent that it involves a transfer of the right to claim a prize depending on a chance it will be an assignment of an actionable claim.

28. That when a purchaser a lottery ticket he pays consideration (price) not merely for the right to claim in future a prize in the draw but also for the right in praesenti to participate in the draw will be clear from certain passages based on decided cases annotated in *Words and Phrases*, Permanent Edition, Volume 25-A, which we would like to extract :

'Lottery', in accordance with public usage, is scheme or plan for distribution of prizes by chance among those paying or agreeing to pay consideration for right of participation. (*City of Wink v. Griffith Amusement Co.*, 100 SW 2d 695, 698, 699, 700 and 701 : 129 Tex 40) (at p. 460)

A 'lottery' or scheme in the nature of a lottery is a plan in which a prize is set up and awarded by chance, for the right to participate in which a consideration is paid. (*Grimes v. State*, 178 So 69, 71 and 72 : 28 Ala App 4) (at p. 467)

A lottery is a scheme for the distribution of property by chance or lot among persons who have paid or agreed to pay a valuable consideration for the privilege of participating in such scheme. (*New Orleans v. Collins*, 27 So 532, 536 : 52 La Ann 973) (at p. 468)

Three things must concur to establish a thing as a 'lottery' : A prize or prizes; the award or distribution of the prize or prizes by chance; and the payment either directly or indirectly by the participants of a consideration for the right or privilege of participating. (*Robb & Rowley United v. State*, Tex Civ App 127 SW 2d 221, 222) (at p. 470)

The aforesaid passages which are based on decided cases clearly bring out the position that not one but two distinct rights are transferred to the purchaser of a lottery ticket and it is not possible to accept the contention that the two together constitute a single right.

29. Counsel for the dealers sought to raise a further contention that the issue of a lottery ticket, like the issue of shares by a joint stock company, creates for the first time in the buyer, the right to participate in the draw, that is to say, the right to have his number included amongst the participating numbers and therefore, there is no transfer involved in the issue of a lottery ticket; in other words just as a company before it indulges in capital issue does not hold any of its shares but only after they are issued they come to exist only in the hands of shareholders on their subscribing to them and on allotment to them, so in the case of a lottery the promoter sponsoring it does not

have the right to participate nor the right to claim a prize in a draw and that these rights come into existence for the first time in the participant when he purchases the ticket and therefore no transfer of any of the said rights is involved in the issue of a lottery ticket. And in this behalf reliance was placed on the following passage occurring at page 553 of volume I, 7th Ed. of Kanga & Palkhivala's Law and Practice of Income Tax under the heading "Amalgamation of Companies" :

In a case where company A amalgamates with and merges into company B, and the shareholders of company A are allotted shares in company B in their own right and not as nominees of company A, a question arises as to whether those shareholders are liable to tax under the head "capital gains". No such tax would be payable unless the amalgamation involves (a) a transfer, or (b) a sale, or (c) an exchange, or (d) a relinquishment of the asset or (e) the extinguishment of any rights therein (Section 2(47)). It is clear that such amalgamation does not involve any transfer or sale of the shares..... There is no transfer of any assets by the shareholders of company A to company B; the transfer of assets by company A cannot be regarded as a transfer by its shareholders. Nor is there any transfer by company B when it allots its share capital to the shareholders of the company A. The allotment of shares by a company cannot be regarded as a transfer of property by that company. As Lord Greene MR observed in *Re V.G.M. Holdings, Ltd.* ((1942) 1 All ER 224, 226 (CA)). "As share is a chose in action. A chose in action implies the existence of some person entitled to the rights, which are rights in action as distinct from rights in possession, and, until the share is issued, no such person exists. Putting it in a nutshell, the difference between the issue of a share to a subscriber and the purchase of share from an existing shareholder is the difference between the creation and the transfer of a chose in action."

The contention so put forward is in my view without any substance. In the first place the capital issue by a joint stock company is governed by the provisions of the Companies Act and Memorandum and Articles of Association of the company (whereunder no company can subscribe to or purchase its own share since it amounts to reduction of capital) whereas the issue of lottery tickets would be governed by a Raffle Scheme and the Rules framed therefor by the promoter (who in the instant case happens to be a State Government) containing provisions entirely different from those governing issue of share capital and as such the analogy of capital issue by a joint stock company is wholly inappropriate. Secondly, the learned authors were dealing with the case of amalgamation of two companies in the context of 'capital gains tax', while the learned Law Lord, as the report of the case shows, was concerned with construing the meaning of the word "purchase" occurring in Section 45 of the Companies Act, 1929 and held that acquisition of shares by subscription or allotment was not a purchase within the meaning of that section; in other words both the cases are in different context altogether. Moreover, as discussed earlier the agreement that comes into existence as a result of the sale of a lottery ticket by a promoter to a buyer is in the nature of a grant conferring the two rights (the right to participate and the right to claim a prize) as distinct from the right to receive or claim a prize in such draw, needs to be highlighted which has a significant bearing on the question whether the lottery tickets would be goods or not. It cannot be disputed that this right to participate in the draw under a lottery ticket remains a valuable right till the draw takes place and it is for this reason that licenced agents or wholesalers or dealers of such tickets are enabled to effect sales thereof till the draw actually takes place and as such till then the lottery tickets constitute their stock-in-trade and therefore a merchandise. In other words, lottery tickets, not as physical articles but as slips of paper or memoranda evidencing the right to participate in the draw must in a sense be regarded as the dealer's merchandise and therefore, goods, capable of

being bought or sold in the market. They can also change from hand to hand as goods. Even in *United States v. Mueller* (178 (2d series) Federal Reports 593, 594) on which counsel for dealers relied the court while emphasising the aspect that lottery tickets are more in the nature of choses in action (because of the right to claim a prize by chance) has observed that these are merchandise though in a limited sense. The aforesaid aspect of the matter really clinches in my view the position that for the purpose of imposing the levy of sales tax lottery tickets comprising the entitlement to a right to participate in a draw will have to be regarded as 'goods' properly so-called.

30. It is true that this entitlement to a right to participate in the draw is an entitlement to beneficial interest which is of incorporeal or intangible nature but that cannot prevent it from being regarded as goods. In *CST v. M.P. Electricity Board, Jabalpur* ((1969) 2 SCR 939 : (1969) 1 SCC 200 : AIR 1970 SC 732 : 25 STC 188) the question that arose for determination was whether electricity or electric energy supplied and distributed by the M.P. Electricity Board to various consumers was 'goods' within the meaning of C.P. & Berar Sales Tax Act, 1947 and the Madhya Pradesh General Sales Tax Act, 1959 and this Court held that the definition of 'goods' "was very wide and included all kinds of movable property" and the term 'movable property' when considered with reference to 'goods' as defined for the purposes of sales tax could not be taken in a narrow sense and that electric energy was covered by the definition of 'goods' in the two Acts. At page 945 of the Report this Court observed thus :

What has essentially to be seen is whether electric energy is 'goods' within the meaning of the relevant provisions of the two Acts. The definition in terms is very wide according to which 'goods' means all kinds of movable property..... The term 'movable property' when considered with reference to 'goods' as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction consumption and use which, if done dishonestly, would attract punishment under Section 39 of the Indian Electricity Act, 1910. It can be transmitted, transferred, delivered, stored, possessed, etc. in the same way as any other movable property.... If there can be sale and purchase of electric energy like any other movable object we see no difficulty in holding that electric energy was intended to be covered by the definition of 'goods' in the two Acts. If that had not been the case there was no necessity of specifically exempting sale of electric energy from the payment of sales tax by making a provision for it in the Schedules to the two Acts.

31. Similarly in *A.V. Meiyappan v. Commissioner of Commercial Taxes, Madras* (AIR 1969 Mad 284 : 20 STC 115 : (1969) 1 Mad LJ 480) the owner or producer of a film, instead of exhibiting the film himself, by entering into an agreement conferred upon another party the right to have his film exhibited for a certain period as a distributor together with ancillary right of making or causing to be made positive prints for the purposes of exhibition and the question arose whether the transaction was one of lease or sale of that right and on construction of the agreement in question and having regard to all the facts and circumstances the court came to the conclusion that it was a lease and not a sale and therefore not exigible to sales tax, though the right of exhibiting the film which was the subject matter of the agreement was regarded as falling within the definition of 'goods' under section 2(j) of the Madras General Sales Tax Act, 1959. After referring to the concept of copyright both under the English as well as Indian law the court observed thus :

Copyright is referred to (in Salmond's jurisprudence, 11th Ed. p. 462) as an immaterial form of property recognised by law, being the product of human skill and

labour or of a man's brains. In all the English text books and which it is unnecessary to refer at length, copyright has been regarded as incorporeal movable property and that view has been adopted in our country as well. It would be sufficient to refer to Savitri Devi v. Dwarka Prasad (AIR 1939 All 305 : 1939 ALJ 71 : 182 IC 84).

32. If incorporeal right like copyright or an intangible thing like electric energy can be regarded as goods exigible to sales tax there is no reason why the entitlement to a right to participate in a draw which is beneficial interest in movable property of incorporeal or intangible character should not be regarded as 'goods' for the purpose of levying sales tax. As stated above lottery tickets which comprise such entitlement do constitute a stock-in-trade of every dealer and therefore his merchandise which can be bought and sold in the market. Lottery tickets comprising such entitlement, therefore, would fall within the definition of 'goods' given in the Tamil Nadu Act and the Bengal Act.

33. In the light of the aforesaid discussion my conclusions are that lottery tickets to the extent that they comprise the entitlement to participate in the draw the "goods" properly so called, squarely falling within the definition of that expression as given in the Tamil Nadu Act, 1959 and the Bengal Act, 1941, that to that extent they are not actionable claims and that in every sale thereof a transfer of property in the goods is involved. In view of these conclusions the impugned amendments made in the two concerned Acts for levying tax on sale of lottery tickets will have to be upheld as falling within the legislative competence of the concerned State legislature under Entry 54 of List II in the Seventh Schedule and therefore, we think it unnecessary to go into the validity of the alternative submission made by the learned Attorney General that legislative competence for enacting the impugned amendments would also be there under Entry 62 of List II in the Seventh Schedule of the Constitution.

34. Having thus disposed of the main contention raised on behalf of the dealers, we shall now proceed to deal with the challenge to the exemption Notification GOMs No. 219 dated March 31, 1984 issued by the State Government of Tamil Nadu which is alleged to be violative of Articles 14, 19(1)(g) and 301 read with 304(a) of the Constitution. Such challenge has been raised only by the petitioners in writ petition Nos. 435 and 436 of 1985. Under the impugned amendment made in the Tamil Nadu Act by insertion of Entry 163 in the First Schedule to the Act lottery tickets became taxable at the point of first sale in that State and it appears that under the Raffle Scheme promulgated by the State Government the first sale of lottery tickets issued thereunder was by the State Government to various licensed agents, wholesalers, stockists, etc. and the State Government became liable to pay sales tax as the first dealer. Such levy had the effect of increasing the face value of the ticket to the extent of sales tax surcharge or additional surcharge payable on the sales. This position was reviewed by the Government with a view to reduce the burden of tax on Tamil Nadu Raffles, which was being passed on to the buyers in addition to the face value. With that object in view the Finance (Raffle) Department of the State Government issued the aforesaid notification bringing into force certain arrangement whereby while retaining the sale price of the ticket at its face value the tax was not to be passed on to the licensed dealer or to the purchaser. The notification runs thus :

FINANCE (RAFFLE) DEPARTMENT

#G.O. Ms. No. 219 Dated : 31.3.1984 Panguni 18, Ruthrodhkari, Thiruvalluver Andu  
2015##

Read G O P No. 77 Dt. 28.1.1984

In the G.O. read above, the Government have ordered the levy of sales-tax at 20% single point on the sale of lottery tickets at the point of first sale in the State. Consequent on this levy of tax, sale price of tickets has increased over and above their face value to the extent of sales tax surcharge and additional surcharge payable on the sales. The position was reviewed by the Government with a view to reducing the burden of tax on Tamil Nadu Raffles which is now being passed on to the buyers in addition to the face value. The Government have decided that the Tamil Nadu Raffle tickets shall continue to be sold at their face value even after the levy of tax and that sale price (face value) shall include sales tax, surcharge and additional surcharge as applicable.

2. The Government accordingly direct that all the Tamil Nadu Raffle tickets (whether ordinary or bumper draws) shall be sold at their respective face values only which will include sales tax, surcharge and additional surcharge as applicable and that no agent or seller of the Raffle tickets shall collect the tax etc., over the face value or increase the face value on any account.
3. The above orders shall take effect from April 1, 1984.
4. The procedure for accounting will issue separately in consultation with the Commissioner of Raffles and Commissioner of Commercial Taxes.
5. The Commissioner of Raffles is requested to give wide publicity on these orders immediately.

(By order of the Governor)

C. Ramachandran

Commissioner and Secretary to Govt.

35. According to the petitioners the arrangement under the notification is that the Raffle Department of the Government of Tamil Nadu pays the tax to the Commercial Taxes Department of the Government of Tamil Nadu and the tax is not passed on to the purchaser; in other words effectively exemption from payment of sales tax is granted to the purchaser. Thus in substance lottery tickets issued by the Government of Tamil Nadu do not suffer any tax while on the other hand the lottery tickets issued by other governments and sold within the State of Tamil Nadu are subject to tax. The net result is that sale of lottery tickets of other governments within the State are at a great disadvantage as compared to the sale of Tamil Nadu Government lottery tickets inasmuch as a Tamil Nadu Government lottery ticket of the face value of Re 1 will be available to the purchaser at Re 1 but a lottery ticket of any other government of the face value of Re 1 will have to be purchased by the purchaser at Rs 1.20. Since such a result is directly brought about by the impugned notification the writ petitioners have challenged its constitutional validity mainly under Article 301 read with Article 304(a) of the Constitution.

36. The argument in support of the challenge to the impugned notification under Article 301 read with Article 304(a), briefly stated, runs thus. According to the counsel if lottery tickets are regarded as goods - and we have now held that they are goods - the sale of goods imported into the State of Tamil Nadu will be subjected to the sales tax whereas the sale of Tamil Nadu Government lottery tickets will not be subject to tax and thus there is a clear discrimination against the imported goods

and therefore, the amendment made in the Tamil Nadu Act read with the impugned exemption notification which permits such discrimination would be violative of Article 301 read with Article 304(a) of the Constitution. Counsel pointed out that Article 301 guarantees freedom of trade, commerce and intercourse throughout the territory of India, subject to the other provisions of this Part (Part XIII) and this is followed by Article 304(a) which runs thus :

304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law -

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced;

Counsel also relied upon three or four decisions of this Court where the aforesaid provisions of the Constitution in the context of tax legislation came up for consideration before this Court and urged that in view of the settled position in law that emerges from those decisions the instant exemption notification will have to be held a violative of Article 301 read with Article 304(a) of the Constitution. Reference was made to *Atiabari Tea Co. Ltd. v. State of Assam* ((1961) 1 SCR 809 : AIR 1961 SC 232), *Firm A.T.B. Mehtab Majid and Co. v. State of Madras* (1963 Supp 2 SCR 435 : AIR 1963 SC 928 : 1963 STC 355), *A. Hajee Abdul Shakoor and Co. v. State of Madras* ((1964) 8 SCR 217 : AIR 1964 SC 1729 : (1964) 15 STC 719), *State of Madras v. N.K. Nataraja Mudaliar* ((1968) 3 SCR 829 : AIR 1969 SC 147 : (1968) 22 STC 376) and *V. Guruvaiah Naidu and Sons v. State of T.N.* ((1976) 38 STC 565 : (1977) 1 SCC 234 : 1977 SCC ax) 172) and counsel pointed out that as a result of these decisions the legal position has been well settled that freedom of trade, commerce and intercourse guaranteed by Article 301 includes freedom from tax laws if such tax laws, not being of compensatory or regulatory nature, directly and immediately impede or hamper the free flow of trade, commerce and intercourse throughout the territory of India and that if such law accords discriminatory treatment to goods imported from other States as compared to similar goods manufactured or produced in the State the same would be clearly violative of Article 304(a) and since in the instant case such situation obtains under the impugned notification the same will have to be struck down as being violative of Article 304(a).

37. I find considerable force in the aforesaid contention of counsel for the writ petitioners. It is unnecessary to deal with all the decisions cited by counsel but it will suffice if reference is made only to the decision in *A.T.B. Mehtab Majid and Co. case* (1963 Supp 2 SCR 435 : AIR 1963 SC 928 : 1963 STC 355). In this case the petitioner firm was a dealer in hides and skins; it used to sell hides and skins tanned outside the State of Madras as well as those tanned inside the State. Under Rule 16 of the Madras General Sales Tax Rules tanned hides and skins imported from outside and sold inside the State were subjected to higher rates of tax than the tax imposed on hides and skins tanned and sold within the State and the petitioner firm challenged the sales tax assessment made in relation to the turnover of sales of tanned hides and skins which had been obtained from outside the State of Madras on the ground that there was discriminatory taxation which offended Article 304(a) of the Constitution. The respondents contended (a) that sales tax did not come within the purview of Article 304(a) as it was not a tax on the import of goods at the point of entry, (b) that the impugned rule was not a law made by the State legislature, (c) that the impugned rule by itself did not impose the tax but fixed the single point at which the tax was imposed by Sections 3 and 5 of the Act, and (d) that the impugned rule was not made with an eye on the place of origins of the goods. Negating all the contentions of the respondents this Court held that it was well settled that taxing

laws can be restrictions on trade, commerce and intercourse, if they hampered free flow of trade and if they are not what can be termed to be compensatory tax or regulatory measure; that sales tax of the kind under consideration could not be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities; that the sales tax which had the effect of discriminating between goods of one State and goods of another may affect the free flow of trade and it will then offend against Article 301 but will be valid only if it comes within the terms of Article 304(a). The Court finally held the impugned Rule 16(2) invalid. The instant case is on all fours of this decision.

38. The only answer given to the aforesaid challenge by the State Government in its counter affidavit sworn by Mr M. Kandaswamy, Deputy Secretary to the Government is that in the case of Tamil Nadu Government lottery tickets the State Government are the first dealers as well as the tax collecting authority while in the case of imported tickets the tax element is not to be borne by the State Government since they are not the first sellers of those tickets and that if this distinction is kept in view there cannot be violation of Article 301 read with Article 304(a) of the Constitution; further, it is also stated that in the case of sales of Tamil Nadu Government lottery tickets the State Government are the first sellers and as such they have to bear the tax on the sale of such tickets and it is well settled that it is open to such first seller either to pass on the tax and collect it from the buyer or to bear the liability himself without passing on the same to the buyer. In my view neither of these aspects has any real bearing on the issue raised by counsel on behalf of the writ petitioners. These aspects cannot obliterate the glaring fact that because of the notification imported goods are at a disadvantage as compared to indigenous goods, both being of identical type. The real question is whether the direct and immediate result of the impugned notification is to impose an unfavourable and discriminatory tax burden on the imported goods (here lottery tickets of other States) when they are sold within the State of Tamil Nadu as against indigenous goods (Tamil Nadu Government lottery tickets) when these are sold within the State from the point of view of the purchaser and this question has to be considered from the normal business or commercial point of view and indisputably if the question is so considered the impugned notification will have to be regarded as directly and immediately hampering free flow of trade, commerce and intercourse. Discriminatory treatment in the matter of levying the sales tax on imported lottery tickets which are similar to the ones issued by the State Government so as to hamper free flow of trade, commerce and intercourse is writ large on the face of the impugned notification and in my view the same is clearly violative of Article 301 read with Article 304(a) of the Constitution.

39. In the result I uphold the validity of the impugned amendments made in the two enactments, namely, Tamil Nadu General Sales Tax Act, 1959 and West Bengal Finance (Sales Tax) Act, 1941 but I strike down the impugned Notification GOMs No. 219 dated March 31, 1984 issued by the State Government of Tamil Nadu. The writ petitions are partly allowed while the civil appeal is dismissed. In the circumstances I direct the parties to bear their respective costs.

SABYASACHI MUKHARJI, J. (concurring) ♦

I have had the advantage of reading in draft the judgment delivered by my learned brother. I would like to add my opinion on one aspect of the matter. Both under the relevant provisions of the relevant Tamil Nadu Act and the West Bengal Act, in order to attract the levy of sales tax, there must be sale of goods i.e. transfer of property. In other words, both these Acts insist on transfer of property in goods. Article 366(12) of the Constitution gives an inclusive definition of 'goods' indicating thereby "'goods' includes all materials, commodities and articles". Therefore, there must be a transfer of property in the goods for a price; the concept has the same meaning which it has

under the Sale of Goods Act, 1930.

41. It was urged before us on behalf of the dealers that by the issue of lottery tickets, the right to participate in the draw is created for the first time in the buyers. In other words, it was urged that by the sale of lottery ticket, the right to participate is created for the first time; if it is considered to be a 'grant' and as such a sale of goods, it was contended that such right was not existing before the sale of the lottery ticket. This contention has caused me anxiety from the jurisprudential point of view.

42. I agree with respect that 'grant' is an agreement of some sort which creates rights in the grantee and an agreement which transfers rights may be termed as assignment. But the question, is, before the grant, was such a right, namely the right to participate in the draw, existing in the grantor ? The point made is that there is no transfer of property involved in the issue of a lottery ticket and it is only after the issue of the lottery ticket that the grantee gets a right to participate. In other words, it was sought to be urged that in a lottery, the promoter sponsoring it does not have any right to participate nor to claim a prize in a draw and these come into existence for the first time by the purchase of lottery ticket when he purchases the ticket and therefore it cannot be said that any transfer of right is involved, but only creation of new right by the grantor in favour of the grantee.

43. I respectfully agree with my learned brother that the passage relied on on behalf of the counsel for the dealers at page 553 of Volume I, 7th Ed. of Kanga & Palkhivala's Law and Practice of Income Tax is not relevant and the analogy of capital issue by joint stock company is not appropriate.

44. Under the rules, the promoter is not able to participate in the draw or claim a prize in such a draw. Therefore the right that is transferred to the purchaser of lottery ticket is not the same right which was existing in the grantor, in this case the promoter. By the sale by the promoter and purchase by the grantee of the ticket, there is no transfer of the same property namely the property which existed in the grantor namely disability from participating in the draw which is granted to the purchaser or the grantee of the lottery ticket. The transfer of right from the promoter-grantor to the buyer-grantee is involved in the sale of a lottery ticket but is it the transfer of the same right which the promoter or grantor had or a larger or greater right created by the factum of transfer in favour of the grantee ? This is a point of some complexity and there is no easy solution.

45. I have, however, persuaded myself to agree with the order proposed by my learned brother because the promoter of lottery in the cases involved before us is the State and the grant is in derogation of the rights of the State. The State, in my opinion, can create such right for the first time, and such transfer of the right by the State as a promoter would amount to a transfer of property and being in consideration of a price can be sale of goods.

46. I should, however, not be understood to accept the position that if private lotteries are permissible and legal, a point which need not be decided in these cases, in such cases sale of goods was involved or not.

47. I, however, agree with my learned brother that the right to participate in the draw under a lottery ticket remains a valuable right till the draw takes place and it is for this reason that licensed agents or wholesalers or dealers of such tickets are enabled to effect sales thereof till the draw actually takes place and therefore lottery tickets, not as physical articles but as slips of paper or memoranda evidencing the right to participate in the draw can be regarded as dealer's merchandise and therefore goods which are capable of being bought or sold in the market. With these observations, I

respectfully agree with the conclusion reached by my learned brother and concur with the order proposed by him.

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