

Vikas Sales Corporation and Another

Vs

Commissioner of Commercial Taxes and Another

Civil Appeal Nos. 7771 - 75 of 1996 with C.A. Nos. 8352-62, 7776-80 and 8418-8448

(CJI A. M. Ahmadi, B. P. Jeevan Reddy, S. C. Sen JJ)

01.05.1996

JUDGEMENT

B. P. JEEVAN REDDY, J.:-

1. Leave granted in Special Leave Petitions. This batch of appeals and writ petitions raise the question - whether the transfer of an Import Licence called R. E. P. Licence/Exim Scrip by the holder thereof to another person constitutes a sale of goods within the meaning of and for the purposes of the Sales Tax enactments of Tamil Nadu, Karnataka and Kerala. If it does, it is exigible to sales tax. Otherwise not. The Karnataka and Madras High Courts have taken the view that R.E.P. Licences/ Exim Scrips constitute goods and, therefore, on their transfer, sales tax is leviable. Their judgment appears to be influenced mainly by the decision of this Court in H. Anraj v. Govt. of Tamil Nadu, 1985 Suppl (3) SCR 342 : (AIR 1986 SC 63).

2. With a view to conserve precious foreign exchange and to channelise the nation's economy on desired lines, the Central Legislature enacted the Imports and Exports (Control) Act in 1947. Section 3 empowers the Central Government to make provisions by order published in the official gazette for prohibiting, restricting or otherwise controlling the import into and export of the goods from the country. The expression "licence" is defined in clause (i) of S.2 to mean, a licence granted, including a customs clearance permit issued, under any control order. Pursuant to S.3 and S.4(a) of the said Act, the Central Government issued the Import (Control) Order, 1955. Clause 3(i) of the Order provides that "save as otherwise provided in this Order, no person shall import any goods of the description specified in Schedule I except under and in accordance with a licence or a customs clearance permit granted by the Central Government or by any Officer specified in Schedule II". The Order contains elaborate provisions governing the grant and cancellation of licences and conditions subject to which the licences have to be operated.

3. The Central Government has been issuing, from time to time, what is called the Import and Export Policy, published in the form of a broucher. The Import Policy in vogue during the year concerned herein provided for issuance of what is called "replenishment licences" (for short "R.E.P. Licences"). The objective behind the licences was to provide to the registered exporters the facility of importing the essential inputs required for the manufacture of the products exported. The essential idea was to encourage exports and for that purpose import licences called R.E.P. Licences were issued equal to the prescribed percentage of the value of exports. These Licences were made freely transferable. It was provided that the transfer of such licences did not require any endorsement or permission from the licensing authority. It was clarified that such would be

"governed by the ordinary law". It only required a letter from the transferor recording and evidencing the transfer. On that basis, the transferee became the due and lawful holder of the licence and could either import the goods permitted thereunder or sell it to another in turn.

4. With effect from July 3, 1991, the name of the licence was changed to Exim Scrip (Export-Import Licence). The provisions governing the Exim Scrip were broadly the same as those governing the R.E.P. Licence with certain minor variations, which are not relevant for our purposes.

5. Several registered exporters who obtained R.E.P. Licences/Exim Scrips sold them to others for profit. In fact, these licences/Exim Scrips were being traded freely in the market and on stock exchanges. The sales tax authorities of certain States proceeded to subject such sales to sales tax under their respective enactments. The assessee immediately protested contending that these licences/Exim Scrips do not constitute "goods" within the meaning of the relevant sales tax enactments and, therefore, not exigible to tax. The matter came up for consideration in the first instance before a learned single Judge of the Karnataka High Court in *Bharat Fritz Werner Ltd. v. Commr. of Commercial Taxes* (1992) 86 STC 170. It was a writ petition challenging the validity of a circular issued by the Commissioner of Commercial Taxes, Karnataka, stating that whenever an Import Licence is transferred, it attracts tax under S.5(1) of the Karnataka Sales Tax Act, 1957 as unclassified goods at the rate of seven percent and directing the assessing authorities and other concerned authorities to levy tax accordingly. The learned Judge considered the definition of "goods" in S.2(m) of the Karnataka Act and held following *Anraj* (AIR 1986 SC 63) that having regard to the nature and character of the said licences and their free transferability, they constitute goods, the sale whereof is subject to sales tax. The learned Judge rejected the argument that the said licences are in the nature of actionable claims. He held : "the import licence not merely enables a person the right of indulging in a business of importing goods but it also excludes competition. Therefore, it cannot be said that it is only a beneficial interest in respect of a movable property not in possession of the person but is itself a valuable right which, according to the petitioners themselves, is freely transferable. The import licence therefore, must be treated as merchandise for the purpose of the Act can clearly falls within the definition of 'goods'. The learned Judge further held that the right under this licence is, in fact, more concrete and substantial than the right under a lottery ticket considered in *Anraj* (AIR 1986 SC 63). On appeal, a Division Bench of the Karnataka High Court affirmed the judgment of the learned single Judge. The Division Bench too relied upon the ratio of *Anraj* and dismissed the appeal in the following words :

"In the instant case, the transfer of R.E.P. Licences confer upon the transferee the immediate right to clear goods covered by the licences at the Customs barrier. This is not an inchoate or incomplete right. It cannot be held to materialise in future because its exercise is dependent upon the transferee buying goods covered by the licence and bringing them to Indian shores. Nor can R.E.P. licences be held to be actionable claims because the Customs authorities might not clear the goods and the transferee would have to commence an action against them in a Court of Law. In our view, the transfer of an R.E.P. licence confers upon the transferee a right which is choate and perfected and exercisable immediately he presents to the Customs barrier goods of the nature covered thereby.

It must, therefore, follow that R.E.P. licences are goods within the meaning of the said Act and the premium or price received by the transferor thereof is liable to sales tax thereunder".

6-7. A Division Bench of the Madras High Court has also taken the same view in *P. S. Apparels v. Deputy Commercial Tax Officer, T. Nagar* disposed of on April 4, 1994. Under the said judgment, a large number of writ petitions were disposed of.

8. Number of appeals have been preferred by the assesseees against the decisions of Karnataka and Madras High Courts, while a number of other assesseees have approached directly by way of petitions under Art. 32 of the Constitution of India, raising identical questions.

9-10. The main contention of the learned counsel for appellants/petitioners S/Shri K. K. Venugopal, Joseph Vellapally, Vaidyanathan and K. V. Mohan, is that these licences/scripts are not goods; they are not property; they represent merely a permission to import goods, which permission can be revoked at any time by the licensing authority; they are really in the nature of shares and securities which have been expressly excluded from the definition of "goods" in the relevant enactments. The expression "goods" has been understood by this Court in *State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd.*, 1959 SCR 379 : (AIR 1958 SC 560) in the sense it is defined in the Sale of Goods Act and the said definition cannot and does not comprehend the licences of the nature concerned herein. The meanings assigned to the expression "licence" and "goods" in various law dictionaries have been brought to our notice, besides several decisions, Indian and English by the learned counsel. On the basis of the said material, it is argued that property is a bundle of rights but every stand in that bundle does not by itself constitute property. On the other hand, Sri A. K. Ganguly and Sri Chandrasekharan, learned Additional Solicitor General, supported the reasoning and conclusion arrived at by Karnataka and Madras High Courts and commended it for our acceptance.

11. Entry 54 in List II of the Seventh Schedule to the Constitution of India empowers the State Legislatures to make laws with respect to "taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92-A of List-I". Entry 92-A of List-I speaks of "taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce". The Karnataka, Tamil Nadu and Kerala Sales Tax Acts are referable to Entry 54, while Central Sales Tax Act, 1956 is referable to Entry 92-A. These entries empower the State Legislatures and the Parliament respectively to levy sales tax on sale or purchase of goods with the differences that if it is an intra - State sale, it is the State Legislature which is competent to levy the tax, whereas in the case of inter-State sale, it is the Parliament alone that can levy tax. Entry 54 in List-II, which is the one we are immediately concerned with in these matters, is a legislative head, a head of legislation. Being a legislative head, it must be construed liberally and not narrowly. There appears no reason why Entry 54 should not be given its full and due meaning and content. By giving full effect to Entry 54 in List-II, the field and content of Entry 92-A in List-I is in no way affected or curtailed. So far as the meaning of the expression "goods" is concerned, these two entries cannot be called competing entries. There is no overlapping between them. The meaning given to the said expression in Entry 54 in List-II can equally be attributed to the said expression in Entry 92-A in List-I. This is a consideration which must certainly weigh with the Court in approaching the question at issue herein.

12. Clause (12) in Art. 366 of the Constitution defines the expression "goods" in the following words : 'goods' includes all materials, commodities and articles". Clause (29A) in Article 366, as amended by the forty sixth Amendment Act, defines the expression "tax on the sale or purchase of goods" in the following words:

"(29-A). "Tax on the sale or purchase of goods" includes -

- (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
- (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a work contract;
- (c) a tax on the delivery of goods on hire purchase or any system of payment by instalments;
- (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
- (e) a tax on the supply of goods by any unincorporated association or body of person to a member thereof for cash, deferred payment or other valuable consideration;
- (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration; and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made".

The definition in clause (29-A) was inserted by the forty sixth Amendment Act with a view to give an expansive meaning to the words "tax on the sale or purchase of goods". Clauses (c) and (d) in this definition are relevant to the present controversy. Clause (d) provides that even where a right to use any goods is transferable for cash, deferred payment or other valuable consideration, it will be a sale or purchase of goods for the purpose of the Constitution.

13. Clause (7) in S.2 of the Sale of Goods Act, 1930 defines the expression "goods" thus: "goods' means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale" (Emphasis added). Since the said definition defines the "goods" to mean, "every kind of movable property other than actionable claims and money", it would be appropriate to notice the definition of "property" in cl. (11). It reads: " 'property' means the general property in goods, and not merely a special property". It is noteworthy that both these definitions seek to spread the net as wide as possible. While the definition of goods includes every kind of movable property within its ambit, the definition of property says that it includes not merely special property, but general property in goods as well.

The General Clauses Act, 1897 defines "movable property" to mean "property of every description except immovable property". The expression "immovable property" is defined to "include land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth". The definitions in Karnataka, Tamil Nadu and Kerala General Clauses Acts are identically worded. In the absence of definition of the expression in the Sales Tax enactments, the definitions in the respective General Clauses Acts become applicable. None of these Acts, it may be mentioned, defines the expression "property".

14. The Central Sales Tax Act, 1956 defines the expression "goods" in Cl.(d) of S.2 in the following words :

'Goods' includes all materials, articles, commodities and all other kinds of movable property, but does not include newspapers, actionable claims, stock, shares and securities".

What is relevant to note is that this definition is not only inclusive in nature, but takes in all kinds of movable property. It excludes from its ambit certain items, which but for such exclusion, may well have fallen within the ambit of the said definition.

15. The Tamil Nadu Sales Tax Act, 1959 defines the expression 'goods" in cl.(j) of S.2 in the following terms:

" '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 the goods (as goods or in some other form) involved in the execution of a works contract or those goods to be used in the fitting out, improvement or repair of movable property and all growing crops, grass or things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale".

This definition too includes all kinds of movable property within the definition of goods while excluding certain specified items, viz., newspapers, actionable claims, stocks, shares and securities. The Act does not define the expression "movable property" which means that the definition in the General Clauses Act has to be adopted for the purposes of the Tamil Nadu General Sales Tax Act.

16. The definition of "goods" in the Karnataka Sales Tax Act, 1957 is no different. It reads :

" 'goods' means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities), and includes live stock, all materials, commodities and articles including goods, as goods or in some other form involved in the execution of a work contract or those goods to be used in the fitting out, improvement or repair of movable property and all growing crops, grass or things attached or forming part of, the land which are agreed to be severed before sale or under the contract of sale".

This Act too does not define the expression "movable property".

17. The definition of "goods" in the Kerala General Sales Tax Act, may now be set out :

" 'goods' means all kinds of movable property (other than newspapers, actionable claims, electricity, stocks and shares and securities), and includes live stock, all materials, commodities and articles (including those to be used in the construction, fitting out, improvement or repair of immovable property or used in the fitting out improvement or repair of movable 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".

18. Inasmuch as all the aforesaid definitions of the expression "goods" say that it includes all kinds of movable property, it becomes necessary to notice the meaning of the expression "movable property". Inasmuch as the Sales Tax enactments do not define the said expression, we have to adopt the definition in the respective State General Clauses Act. But these definitions in the General Clauses Act too are not very helpful. All that they say is that movable property means property of every kind except immovable property. The counsel have accordingly brought to our notice the several meanings of property and movable property in various legal dictionaries.

19. In Black's Law Dictionary (6th Edition, 1990), the expression "property" has been given the following meanings:-

"Property : That which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. *Fulton Light, heat and Power Co. v. State*, 65 Misc. Rep. 263, 121 N.Y.S. 536. The term is said to extend to every species of valuable right and interest. More specifically, ownership, the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it; to use it, and to exclude every one else from interfering with it. That dominion or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects. The exclusive right of possessing, enjoying, and disposing of a thing. The highest right of man can have to anything; being used to refer to that right which one has to lands or tenements, goods or chattels, which no way depends on another man's courtesy.

The word is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditaments, and includes every invasion of one's property rights by actionable wrong. *Labberton v. General Cas. Co. of America*, 53 Wash, 2d 180, 332 p. 2d. 250, 252, 254.

Property embraces everything which is or may be the subject of ownership, whether a legal ownership, or whether beneficial, or a private ownership. *Davis v. Davis*. Tex. Civ. App., 495 S. W. 2d 607, 611. Term includes not only ownership and possession but also the right of use and enjoyment of lawful purposes. *Hoffmann v. Kinealy*, Mo., 389 S.W. 2d 745, 752.

Property, within constitutional protection, denotes group of rights inhering in citizen's relation to physical thing, as right to possess, use and dispose of it. *Cereghino v. State By and Through State Highway Commission*, 230 Or., 439 370 P. 2d 694, 697.

Goodwill is property, *Howell v. Bowden*, Tex. Civ. App., 368 W. 2d 842, 484; as is an insurance policy and rights incident thereto, including a right to the proceeds, *Harris v. Harris*, 83 N. M. 441, 493 P.2d 407, 408".

The Dictionary further says "property is either: real or immovable; or personal or

movable". It then proceeds to give the meaning of the expression "absolute property", "common property", "intangible property", "movable property", "personal property", "private property" and "public property" among others. The above definition shows the wide meaning attached to the expression. It is said to extend to every species of valuable right and interest. It denotes every thing which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal. It includes "everything that has an extendable value". It extends to every species of valuable right and interest.

Effect is the definition in the Dictionary of Commercial Law by A. H. Hudson (published by Butterworths, 1983). It reads:

"Property. In commercial law this may carry its ordinary meaning of the subject-matter of ownership, e.g. in bankruptcy referring to the property of the debtor divisible amongst creditors. But else where as in sale of goods it may be used as a synonym for ownership and lesser rights in goods. The Sale of Goods Act, 1979, S.2(1) makes transfer of property central to sale. Section 61(1) provides that 'property' means the general property in goods, and not merely a special property. 'General Property' is tantamount to ownership; bailees who have possession and not ownership and others with limited interest are said to have a 'special property' as their interest".

20. Jowitt's Dictionary of English Law (Sweet & Maxwell Limited, 1977) Volume-I also sets out the meaning of the expression "property" as well as the meaning of the expression "general property" and "special property". We may set them out:

"Property (Norn. Fr. proprete; Lat. proprietas; proprius, one's own), the highest right a man can have to anything, being that right which one has to lands or tenements, goods or chattels which does not depend on another's courtesy.

In its largest sense property signifies things and rights considered as having a money value, especially with reference to transfer or succession, and to their capacity of being injured. Property includes not only ownership, estates, and interest in corporeal things, but also rights such as trade marks, copyrights, patents, and rights in personam capable of transfer or transmission, such as debts.

Property is of two kinds, real property (q.v.) and personal property (q.v.).

Property in reality is acquired by entry, conveyance, or devise; and in personality, by many ways, but most usually by gift, bequest, or sale. Under the Law of Property Act, 1925, S.205, "property" includes anything in action and any interest in real or personal property. There must be a definite interest; a mere expectancy as distinguished from a conditional interest is not a subject of property.

'Property' also signifies a beneficial right in or to a thing. Sometimes the term is used as equivalent to ownership; as where we speak of the right of property as opposed to the right of possession (q.v.), or where we speak of the property in the goods of a deceased person being vested in his executor. The term was chiefly used in this sense with reference to chattels. (Finch. Law 176).

Property in this sense is divided into general and special or qualified.

General property is that which every absolute owner has (Co. Litt. 1456), See OWNERSHIP.

Special property has two meanings. First, it may mean that the subject-matter is incapable of being in the absolute ownership of any person. Thus a man may have a property in deer in a park, hares or rabbits in a warren, fish in a pond, etc.; but it is only a special or qualified property, for if at any time they regain their natural liberty his property instantly ceases, unless they have animus revertendi (2 B1. Comm. 391). See ANIMALS FERAE NATURAE....."

This definition also shows that the expression signifies "things and rights considered as having a money value". Even incorporeal rights like trade marks, copyrights, patents and rights in personam capable of transfer or transmission, such as debts, are also included in its ambit. The meaning given to "general property" and "special property" are self-explanatory and need no emphasis at our hands. It is worth recalling that movable property means "property of every description except immovable property" - the definition in all the General Clauses Acts.

21. The above material uniformly emphasises the expansive manner in which the expression "property" is understood. Learned counsel for the petitioners brought to our notice the meanings of the term "property" set out in Chapter 13. "The Law of Property", in Salmond's Jurisprudence (12th Edition, 1966). In this chapter, several meanings attributed to "property" are discussed in extenso, to all of which it may not be necessary to refer. Suffice to say that property is defined to include material things and immaterial things (Jura in re propria) and leases, servitudes and securities etc. (Jura in re aliena). The material things are said to comprise land and chattels while immaterial things include patents, copyrights and trade marks, which along with leases, servitudes and securities are described as incorporeal property. The expression "movable property" is stated to include (Page 421) corporeal as well as incorporeal property. Debts, contracts and other choses-in-action are said to be chattels, no less than furniture or stock-in-trade. Similarly, patents, copyrights and other rights in rem which are not rights over land are also included within the meaning of movable property. We are unable to see anything in the said Chapter 13, which militates against the meaning ascribed to the said expression in the judicial dictionaries referred to above. Indeed, they are consistent with each other.

22. Learned counsel for the petitioners have brought to our notice the several meanings of the expression "licence" in various law dictionaries. But, as those very dictionaries make it clear, the expression has several meanings - and one has to choose the appropriate one depending upon the context. We do not think it necessary to refer to the material cited by the learned counsel for the reason that the character, nature and content of the licences in question should be ascertained with reference to the law governing them and not with reference to the general meaning of the expression "licence". We have already referred to the provisions of the "Export and Import Policy" governing these licences. We may now refer to a few more paragraphs from the "Import and Export Policy" 1990-93, relevant to the R.E.P. Licences/Exim Scrips.

23. Para 184(1), which deals with "Extent of Import Replenishment", says, "the extent of replenishment permissible against export products (other than Gem and Jewellery) enumerated in Column 2 of Appendix 17 Part I of this book shall be that set out in Column 3".

Para 185 (1), which deals with "Items permissible for Import", says, "REP Licences issued against export of products listed in Column 2 of Appendix 17 Part I and as per para 184(4) of this book, will be valid for import of those relevant items of raw materials, components, consumables and packing materials, as are listed in Appendices 3 and 5 Part-A and related to the product exported".

Para 192 deals with "Flexibility in the utilisation of REP Licences". It says that the said licencees "are also valid for import of any other items of raw materials components, tools, consumables and packing materials listed in Appendices 3 and 5 Part A" besides some other goods.

Para 199 deals with "Transferability of REP licences". It reads:

"199(1). The REP licence will be issued in the name of the registered exporter only and will not be subject to "Actual User Conditions". A licence holder may transfer the licence to another person. The licence holder or such transferee may import the goods permitted therein.

(2) The transfer of a REP licence will not require any endorsement or permission from the licensing authority i.e., it will be governed by the ordinary law. Accordingly, clearance of the goods covered by a REP licence issued under this policy will be allowed by the Customs authorities on production by the transferee of only the documents of transfer of the licence concerned in his name. Whenever a REP licence is transferred the transferor should give a formal letter to the transferee, giving full particulars regarding number, date and address of the transferee, and complete description of the items of import for which the licence is transferred".

As mentioned hereinbefore, the relevant features of Exim Scrip are identical.

24. The above provisions do establish that R.E.P. licences have their own value. They are bought and sold as such. The original licensee or the purchaser is not bound to import the goods permissible thereunder. He can simply sell it to another and that another to yet another person. In other words, these licences/Exim Scrips have an inherent value of their own and are traded as such. They are treated and dealt with in the commercial world as merchandise, as goods. A REP Licence/Exim Scrip is neither a chose-in-action nor an actionable claim. It is also not in the nature of a title deed. It has a value of its own. It is by itself a property - and it is for this reason that it is freely bought and sold in the market. For all purposes and intents, it is goods. Unrelated to the goods which can be imported on its basis, it commands a value and is traded as such. This is because, it enables its holder to import goods which he cannot do otherwise. (With effect from March 1, 1992, of course the very policy and system under which these licences/scrips were being issued, has been discontinued).

25. Since Karnataka and Madras High Courts have placed strong reliance upon the decision of this Court in Anraj (AIR 1986 SC 63), it would be appropriate to refer to the relevant facts and the ratio of the said decision. The question in that case was whether lottery tickets are "goods" within the meaning of and as defined in the Tamil Nadu General Sales tax Act and Bengal Finance (Sales Tax) Act, 1941. The contention of the State was that they were goods and, therefore, attract the sales tax on their sale. According to assessee, the lottery tickets were in the nature of actionable claims but not goods. They questioned the legislative competence of the State Legislatures to levy sales tax on

their sale. They contended that the expression "sale of goods" has to be construed in the sense in which it is used in the Sale of Goods Act, as has been held by this Court in *Gannon Dunkerley* (AIR 1958 SC 560). They submitted that the definition of 'goods' in Sale of Goods Act excludes from its purview actionable claims and that the essence of the lottery being merely a chance for a prize for a price, it does not constitute goods, but a mere actionable claim. It was argued that the lottery ticket is a mere slip of paper or a memorandum evidencing the right of the holder thereof to claim or receive a prize if successful in the draw.

25-A. The arguments of the assessee were rejected by this Court. The Court referred to the definition of "goods" and "sale" in both the aforesaid enactments, the definition of "goods" in Article 366(12) and the definition of "tax on the sale or purchase of goods" in Article 366 (29A). It referred to the meaning of the expression "lottery ticket" in law dictionaries and decided cases, it referred to the definition of "movable property" in the General Clauses Act, 1897 and the definition of the expression "actionable claims" in Section 3 of the Transfer of Property Act and observed (Tulzapurkar, J. speaking for the Bench comprising himself and Sabyasachi Mukharji J.) (AIR 1986 SC 63 Paras 32 and 33).

"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 is merchandise which can be bought and sold in the market. Lottery tickets comprising such entitlements, therefore, would fall within the definition of 'goods' given in the Tamil Nadu Act and the Bengal Act.

In the light of the aforesaid discussion my conclusion are that lottery tickets to the extent that they comprise the entitlement to participate in the draw are '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".

With respect to the nature and content of the lottery tickets, the learned Judge observed that it confers upon the holder thereof "the right to participate (in the draw) and the right to claim a prize if successful..... 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".

We are of the opinion that the ratio of the said decision fully supports the contention of the States herein. As rightly pointed out by the Karnataka High Court, the content of R.E.P. Licence/Exim Scrip is far more substantial and real than that of a lottery ticket. If lottery tickets are goods, there is no reason why these licences/scrips are not goods.

We see no substance in the argument based upon the decision in *Gannon Dunkerley*

(AIR 1958 SC 560). On the basis of this decision, it is contended that the expression "goods" and "sale of goods" must be understood in the sense they are used in the Sale of Goods Act. We need not quarrel with this proposition. We have not only referred hereinbefore the definition of "goods" and "property" in the Sale of Goods Act but have also pointed out that in material particulars it is similar to the definition of "goods" in Tamil Nadu, Karnataka and Kerala Sales Tax Acts. All of them uniformly say "goods" mean "every kind of movable property" (Sale of Goods Act) and "all kinds of movable property" (Tamil Nadu, Karnataka and Kerala Acts). As a matter of facts, this submission was made but not pursued by any of the counsel for the petitioners.

26. We are also of the opinion that these licences/scrips cannot be treated as actionable claims "Actionable claims" is defined in Section 3 of the Transfer of Property act in the following words:

'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".

When these licences/scrips are being bought and sold freely in the market as goods and when they have a value of their own unrelated to the goods which can be imported thereunder, it is idle to contend that they are in the nature of actionable claims. Indeed, in Anraj (AIR 1986 SC 63), the main contention of the petitioners was that a lottery ticket was in the nature of an actionable claim. The said argument was rejected after an elaborate discussion of law on the subject. We agree with the said decision and on that basis hold that the R.E.P. Licences/Exim Scrips are not in the nature of actionable claims.

Learned counsel for the petitioners submitted that the licence is something less than property, because the licencing authority can always cancel it, in which event, it becomes a mere scrap of paper. That feature, in our opinion has no relevance on the question at issue. Cancellation can be effected by the appropriate authority in accordance with the procedure prescribed by law and on proof of permissible grounds. We are unable to see how the said factor detracts from the inherent value of these licences. For that matter, many a grant is subject to such a condition. That circumstances is in no way affects the content of the grant. The further contention that the licence/scrip merely gives a right to import certain goods, that in case the licence is lost one can always obtain a copy from the authority and, therefore, the licence has no value of its own is equally unacceptable. We have already pointed out how the commercial world treats these licences and trades in them. They represent merchandise for all practical purposes.

27. Learned counsel for petitioners have brought to our notice certain decisions, to which a brief reference would be in order:

The decision on which strong reliance is placed by Sri K. K. Venugopal is in State of Orissa v. Titaghur Paper Mills Company Limited, 1985 (Suppl) SCC 280 : (AIR

1985 SC 1293). It was a case arising under the Orissa Sales tax Act. Under Section 3-B of the Orissa Act, the State Government was empowered to declare from time to time by notification any goods or class of goods to be liable to tax on turnover of purchases. Notifications were issued under this provision from time to time declaring that standing trees and bamboos agreed to be served shall be liable to tax on turnover of purchases at the rate prescribed. The contention of the assessee was that the said levy was not a tax on sale or purchase of goods within the meaning of Entry 54 in List II and, therefore, beyond the legislative competence of the State Legislature. Construing the relevant notifications and contracts. (called Bamboo contracts and Timber contracts) this Court held that the Bamboo contracts were in the nature of a grant of interest in immovable property and, therefore, beyond the purview of the Act. So far as Timber contracts are concerned, the Court held that inasmuch as the property in the trees, which were the subject matter of the contracts, passed to the forest contractor only in the felled trees, i.e., in timber, after all the conditions of the contract had been complied with and after such timber was examined and checked and removed from contract area, they too were not governed by the Notification concerned therein. On the basis of this decision, it was contended by Sri Venugopal that taxable event, if at all, will arise only at the time of transfer of the actual goods imported under and by virtue of the said licences/scrips, but not at the time of transfer of documents. We are unable to agree. We are unable to see how the above holding helps the petitioners herein, more particularly, in view of our finding that these licences/scrips have value of their own are freely transferable and are openly traded in the market and on stock exchanges.

28. Sri Vaidyanathan relied upon a decision of the Patna High Court in *State of Bihar v. Rameshwar Jute Mills*, AIR 1953 Patna 236, where the sale of loom hours was held not to be a sale of goods. It was held by the Court that the expression "goods" in Section 2(d) of the Bihar Sales Tax Act cannot be given a wider connotation which is given to that term in the Sale of Goods act or for that matter the wider connotation given to "movable property" in the General Clauses Act. It was held that having regard to the definition in that act, the expression "goods" refers only to tangible goods or tangible movable property and not to any kind of intangible right like loom hours, actionable claims, stocks, shares or securities. We are afraid, we cannot agree with the said reasoning which appears to be contrary to the one affirmed by this Court in *Anraj* (AIR 1986 SC 63).

29. Reliance was then placed upon the dissenting opinion of Mudholkar, J. in *Joint Chief Controller of Imports and Exports v. Aminchand Mutha*, (1966) 1 SCR 262 : (AIR 1966 SC 478) to contend that transfer of a right to quota is not sale of goods. The observations relied upon are to the effect that the Import Export policy issued by the Government of India "would not confer a legal right upon an exporter for the division of the quota rights of a dissolved firm". Firstly, the majority opinion (Gajendragadkar, CJ, Wanchoo, Shah and Sikri, JJ.) is to the contrary. Secondly, quota rights considered therein were not freely transferable like the licences/scrips concerned herein. The last mentioned comment holds good for the other decision relied upon *S.Chandra Sekharan v. Government of Tamil Nadu*, (1974) 2 SCC 196 : (AIR 1974 SC 1543). This decision deals with the transferability of a licence/authorisation in respect of a ration shop.

30. Sri K. K. Venugopal placed strong reliance upon the decision of the Court of Appeal in *Frank Warr and Co. v. London Country Council*, (1904) 1 KB 713. In particular, the learned counsel relied upon the observations of Romer L. J. at pages 720 to 722. It was a case where a contract was entered into between lessees of a theatre and the plaintiffs. Under this contract, the plaintiffs were

given the exclusive right for a particular period to supply refreshments in the theatre. For that purpose, the plaintiffs were entitled to use the refreshment rooms, bars and wine cellars in the theatre and were also given the exclusive right to advertise and to let spaces for advertisement in certain parts of the theatre. It was held by the Court of Appeal that the said contract did not convey to the plaintiffs an interest in the land which could form the subject-matter of compensation under the Lands Clauses Consolidation Act, 1845. In that connection, Romer L. J. held that the contract created only a licence in favour of the plaintiffs, but did not create any estate or interest in land in their favour. It was also held that the right given to the plaintiffs to use refreshment rooms and bars etc. was to enable the plaintiffs to supply refreshments at appropriate times and did not involve absolute parting of possession of those parts of the theatre by the lessees to the plaintiffs. Referring to the earlier decision in *Thomas v. Sorrell* (1674) Vaugh 351, the learned Judge held, "a dispensation or licence properly passeth no interest, nor alters or transfer property in anything, but only makes an action lawful which without it had been unlawful". It is evident, the decision dealt with the question whether the interest created in the plaintiffs under the aforesaid contract was a lease or a licence. It was held that it was only the latter. With respect, we are unable to see how the said observations are of any assistance to the appellants/petitioners herein.

31. Sri Gangulu, learned counsel for the State of Tamil Nadu, relied upon the dissenting opinion of S.R. Das, J. in *Chiranjitlal Chowdary v. Union of India*, 1950 SCR 869 (at pages 920 to 922) : (AIR 1951 SC 41 at pp 61-62) where the learned Judge dealt with the meaning of the expression "property" in Article 19(1)(f) and Article 31 of the Constitution. Having regard to the context in which the said question had arisen, we do not think it necessary to refer to the observation relied upon since the material referred to by us on the meaning of the expression "movable property" and the decision in *Anraj* (AIR 1986 SC 63) is more to the point.

32. In the written submissions filed by Sri. K. V. Mohan, a new contention, not urged at the bar, is raised, viz. that R.E.P. Licence/Exim Scrips are incentives granted by the Union of India as concessions from customs duty and that this is a matter which comes within the exclusive competence of the Union Legislature under Entry 41 in List 1 of the Seventh Schedule to the Constitution of India and that, therefore, the State Legislature has no power to levy sales tax upon their sale/purchase. We are unable to see any substance in this submission either. Applying the rule of pith and substance, it must be held that the enactments in question are referable to Entry 54 in List II and not to Entry 41 in List I. By no stretch of imagination can they be related to Entry 41 in List I. The State Legislatures are not seeking to make a law with respect to customs duties. They are seeking only to levy tax upon the sale of goods. The test to be applied in this behalf has been authoritatively stated by the Constitution Bench of this Court in *A. S. Krishna v. State of Madras*, 1957 SCR 399 : (AIR 1957 SC 297).

33. Another contention raised in the written submission of Sri. K. V. Mohan is that even if the said licences/scrips are treated as goods, the tax must be levied at the first point of sale, viz., upon the authority issuing the licence. We cannot agree. The grant of licence by the licencing authority to the registered exporter is not a sale. The sale is when the registered exporter on the purchaser sells it to another person for consideration.

34. The last submission urged by Sri Vaidyanathan is that these licences/scrips constitute securities within the meaning of Clause (h) of Section 2 of the Securities Contracts (Regulation) Act, 1956, and therefore, stand excluded from the definition of "goods" contained in Tamil Nadu, Kerala and Karnataka Sales Tax Acts as well as Central Sales Tax Act. The contention is misconceived. It is true that the definition of "goods" in the said Sales Tax enactments does exclude securities, but the

question is whether these licences/scrips are securities. They are not. Before the definition of the expression "securities" in Clause (h) of Section 2 of the Securities Contracts (Regulation) Act was amended by Act 15 of 1992, the definition reads thus :

(h) 'securities' include -

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ii) Government securities;

(iii) rights or interest in securities;

By the said amendment Act, sub-clause (iia) was added in the said definition, which reads:

"(iia) such other instruments as may be declared by the Central Government to be securities;"

Firstly, it is not brought to our notice that any declaration has been made by the Central Government to the effect that these licences/scrips are securities. Secondly, any such declaration can only be for the period subsequent to the coming into force of the said Amendment Act, i.e., subsequent to January 30, 1992. All the cases before us pertain to the period earlier to the said date. In this view of the matter, it is not necessary to pursue this argument further. For the above reasons, all the appeals and writ petitions fail and are dismissed herewith. No costs. Order accordingly.