

M/s. B.R. Enterprises

Vs

State of U.P.

Civil Appeal No. 2747 of 1999

(K. Venkataswami, A. P. Misra JJ)

07.05.1999

JUDGMENT

A.P. Misra, J.

1. Special leave granted in all the special leave petitions.

2. We are witnessing in this case exhibition of Federalism in true spirit. Contrary to the usual pouring in of citizen's writ petitions for vending their grievances against the States, here we are drawn to decide issues *inter se* between two distinct sets of States, one challenging and the other upholding certain provisions of The Lotteries (Regulation) Ordinance, 1997 (Ordinance No. 20 of 1997) (hereinafter referred to as the "Ordinance No. 20") and now The Lotteries (Regulation) Act, 1998 (hereinafter referred to as the "1998 Act"). The Union Government, of course, has joined this issue with one such set of States for upholding its Act. The issue here is confined to the State lotteries under Entry 40, List I of the Seventh Schedule of the Constitution of India. As a consequence of the order passed by the State of U.P. banning State lotteries of other States by virtue of power entrusted under Section 5 of the impugned Ordinance/Act, various affected States, challenged the provisions in different High Courts. In some of them interim orders were passed and in others, the High Courts finally disposed of the petitions. The Gujarat High Court upheld the validity, while the Guwahati High Court struck down some of its provisions as *ultra vires*. Against all the aforesaid orders and judgments, the aforesaid appeals have been filed. One writ petition under Article 32 has also been filed raising the same issue. Some of the aforesaid petitions are transfer petitions seeking transfer of petitions pending in the various High Courts raising similar issues. We permitted learned counsel for the petitioners in these transfer petitions to argue the common points which, in fact, is the bone of contentions of all the parties. As in all these petitions, common issues are raised, we are disposing of all, after hearing learned counsel for the parties, by this composite judgment. Apart from the common issues, we are not disposing of nor propose to dispose of any of the individual residuary points, if any, remain after our this adjudication.

3. In order to adjudicate issues in this case, one of the fundamental questions raised is, what is the character of State lotteries ? If lotteries are gambling in nature, does it lose its character as such when it takes on the cloak of State lotteries ? Whether such cloak dissolves its character as *res extra Commmercium* ? In any case, even if it is legalised, would it qualify to be or can it be held to be a trade within the meaning of Chapter XIII of the Constitution of India ? If it is a trade, are the provisions of the impugned Act violative of the Articles of Chapter XIII ? Challenge to some of the provisions are based on the ground of it being discriminatory and arbitrary, hence violative of Article 14 of the Constitution. Finally, entrustment of power to the States under Section 5 is attacked as it being unbridled without any guideline thus liable to be struck down.

4. Before taking up for consideration the various points raised, it is necessary to dwell certain bare facts to reveal the resulting cause of filing of various petitions in the various High Courts before finally reaching this Court for adjudication. The whole gambit of sale of lottery tickets in India, both private and State lotteries, from the very inception is drawing with concern attention of various authorities and Government including courts, as to how to control the evil effects of lotteries on its people at large, more so, when in complete banning, it effects in times of need, the very useful source of State revenue. Basically, lotteries are gambling and its business is *res extra commercium*; but to shed off this, the State in interest of State revenue has been finding avenues to legitimate it through some legitimatization under the law to eliminate the impediments in collecting the State revenue and dilute, if possible, the exploitation of the people. The details of which we shall be referring hereinafter. The immediate reference to which we are concerned is Ordinance No. 20 of 1997 which was issued on 1st October, 1997, which came into force on 2nd October, 1997 which restricted the lottery business organised by the States and enabled the State Governments to prohibit sale of tickets of lotteries of other States. Under the said Ordinance, the State of U.P. issued notification dated 7th October, 1997 banning sale of lottery tickets of the State of Nagaland in the State of U.P. This notification and the aforesaid Ordinance was challenged by the State of Nagaland in the Gauhati High Court in Civil Rule No. 4986 of 1997. The High Court stayed this notification. This Ordinance was also subject matter of challenge in the High Court of Gujarat where in Special Civil Appeal No. 7903 of 1997 (The Gujarat Lottery Sellers Association v. The State of Gujarat and another), the High Court upheld this Ordinance and the notification of Gujarat Government which banned the State lotteries within the State of Gujarat. Against this, Civil Appeal arising out of SLP (C) No. 22423 of 1997 has been filed which we are considering and disposing of by means of this judgment. The State of U.P. filed Civil Appeal arising out of SLP (C) Nos. 21304-21307 of 1997 as against the aforesaid interim order passed by the Guwahati High Court staying the Ordinance in which this Court directed the State of U.P. to move the Gauhati High Court. This order was passed as an interim measure. In a Writ Petition No. 2200 of 1997 filed before the Allahabad High Court (Lucknow Bench) by M/s Ganga Agencies (Manipur State Lotteries), the High Court ordered that so long the interim order of the Gauhati High Court is operative the sale of lottery tickets shall be permitted to be sold in U.P.

5. This Court finally disposed of SLP (C) Nos. 21304-21307 of 1997 (Civil Appeal No. 8858-8861 of 1997) by observing that Gauhati High Court is free to dispose of the petition pending before it in accordance with law, since hearing had already completed. As the Ordinance No. 20 was lapsing, Ordinance No. 31/97 (second Ordinance) was promulgated. Under it, the notification dated 29th October, 1997 of the State of U.P. was also stayed by the Guwahati High Court. Against this order, also SLP (C) No. 4710-4712 of 1998 (State of U.P. v. State of Mizoram and others) was filed in this Court. Finally, the Guwahati High Court declared the Ordinance No. 20 to be unconstitutional on the ground that Ordinance was not legislation by the Parliament within Article 298 of the Constitution of India, hence it could not restrict executive powers of the State to carry on lottery business. It also held Section 5 to be *ultra vires* the Central Legislative powers on the ground of excessive delegation and also violative of Articles 301 and 303 of the Constitution. It further held that Section 4(a), (f) and (g) imposes unreasonable restrictions, therefore, unconstitutional. Against this, the State of U.P. filed Civil Appeals arising out of SLP (C) Nos. 5224-28 of 1998 and the Union of India filed Civil Appeals arising out of SLP (C) Nos. 5081-5085 of 1998, which is also the subject matter of consideration through this judgment.

6. In order to maintain the continuity, the Central Government issued the Lotteries (Regulation) Ordinance, 1998 (No. 6 of 1998) (third Ordinance) on 23rd April, 1998. This last Ordinance was also challenged along with Notification dated 29th October, 1997 of State of U.P. in Civil Rule 2315

of 1998 (M/s. Jyoti Agencies and another v. Union of India and others) before the Gauhati High Court which was also stayed by means of interim order dated 22nd May, 1998. Civil Appeal arising out of SLP (C) No. 15978 of 1998 has been filed against this order by the State of U.P. The Ordinance No. 5 of 1998 (third Ordinance) has finally rolled into the Lotteries (Regulation) Act, 1998 (No. 17 of 1998) (hereinafter referred to as '1998 Act'). This Act along with Notifications dated 29th October, 1997, 17th March, 1998 and 20th April, 1998 of the State of U.P. were challenged in Civil Rule No. 3296 of 1998 (State of Nagaland v. Union of India and others) before the Guwahati High Court. The Guwahati High Court by order dated 10th July, 1998 stayed the provisions of Section 4(a), (g), (h), (j), Sections 5 and 6 of the 1998 Act and also the aforesaid notifications issued by the State of U.P. Even SLP against this order has been filed before this Court being SLP (C) No. 17566 of 1998.

7. The Gujarat Lottery Sellers' Association has challenged the constitutional validity of the Ordinance No. 20 promulgated on 1st October, 1997 and also challenged the Notification dated 30th September, 1997, issued by Government of Gujarat, banning the instant lotteries within the State w.e.f. 1st November, 1997. One of the grounds raised by the petitioner before the Gujarat High Court was that the State notification dated 30th September, 1997 was issued even before the Ordinance which came into force on 2nd October, 1997, hence without authority of law. The Gujarat High Court by its judgment and order dated 24th October, 1997 dismissed the petition holding that instant lottery is gambling and can be restrained by the State Government. The High Court held the Ordinance No. 20 to be valid. Aggrieved by this, the aforesaid Civil Appeal arising out of SLP (C) No. 22423 of 1997 was filed. Similar matter also came in the Delhi High Court, when it, by means of interim order dated 3rd December, 1997 in Civil Writ Petition No. 5105 of 1997 disagreed with the view of the Guwahati High Court and agreeing with the view of the Gujarat High Court, declined to stay the impugned Ordinance. Hence, the State Ordinance remained in operation within the National Capital Territory of Delhi. The Guwahati High Court on 30th March, 1998 in Miscellaneous Case No. 310 of 1998 in C.R. No. 31 of 1998 (State of Nagaland v. U.O.I. and others) stayed the order of the Government of Delhi directing implementation of the aforesaid order passed by the Delhi High Court. Thereafter, on 30th April, 1998 the Delhi High Court observed that the Delhi Government may move the appropriate forum against this order of the Guwahati High Court. This led to filing of Transfer Petition by the National Capital Territory of Delhi in this Court being Transfer Petition No. 670 of 1998.

8. A Writ Petition (C) No. 226 of 1998 is also filed in this Court by the Government Lottery Agencies and Sellers Association (Regd.) and another challenging the aforesaid Ordinances 20 and 31 of 1997 including the notification issued by Government of National Capital Territory of Delhi pursuant to the power conferred under Section 5. During the pendency, the Parliament enacted the Lottery (Regulation) Act 17 of 1998 repealing/substituting the earlier Lottery (Regulation) Ordinance of 1997. Thereafter, various State Governments including the States of Arunachal Pradesh and Nagaland as well as other distributors filed writ petition challenging the legality and validity of Section 4(a), (f), (g), (i), Section 5 and Section 7 of the said 1998 Act being *ultra vires*. On 17th July, 1998 the High Court of Guwahati observed that the provisions, under challenge, of this Act as well as provisions of the Ordinances being *pari materia* and since provisions of the Ordinances have already been struck down by that Court, hence, granted stay of the aforesaid provisions including the notification of the Government of National Capital Territory of Delhi and other States. In the aforesaid writ petition filed by the Government Lottery Agencies and Sellers Association (Regd.) and others, an amendment was sought to challenge the aforesaid 1998 Act as it substituted the earlier Ordinance. Except for Section 5 of the Ordinance, in which some modification was brought through this Act, to which we shall be referring to later, other provisions

remained the same.

9. Civil Appeal arising out of SLP (C) No. 10356 of 1997 (B.R. Enterprises v. State of U.P. and another) is against the order of the Allahabad High Court dismissing the writ petition filed by an agency of State lottery Manipur holding such dispute between the State of Manipur and State of U.P. could only be decided by the Supreme Court. It held, so far Manipur lotteries, unless it was declared to be State lottery, the petitioner has no *locus standi*, hence writ petition was dismissed. Another Civil Appeal arising out of SLP (C) No. 10357 of 1998 is filed by the State of U.P. against an order passed by the Allahabad High Court confirming the interim stay order. Civil Appeal arising out of SLP (C) No. 15978 of 1998 is filed by the State of U.P. against an interim order of Guwahati High Court staying the Ordinance No. 6/98. Civil Appeals arising out of SLP (C) Nos. 16021, 16617, 17566 and 17782 of 1998 are all filed against the interlocutory orders passed by the Guwahati High Court staying Section 4(a), (g), (h), Sections 5 and 7 of the Central Act No. 17/98. The first and third of these SLPs are filed by the State of U.P. and the second by Government of N.C.T. of Delhi. Remaining petitions are transfer petitions seeking transfer of the cases from Madras High Court, Karnataka High Court, Andhra Pradesh High Court and Delhi High Court to this Court. These also challenge either the Ordinance or the Lotteries (Regulation) Act, 1998 (Act No. 17/98) (hereinafter referred to as 'Lotteries Act'). They all raise the same issues, as aforesaid. For proper appreciation of the submissions of learned counsels for the parties, we herewith quote Sections 4, 5 and 7 of the Act, which are the subject matter of challenge :

"4. A State Government may organise, conduct or promote a lottery, subject to the following conditions, namely :-

- (a) prizes shall not be offered on any pre-announced number or on the basis of a single digit;
- (b) the State Government shall print the lottery tickets bearing the imprint and logo of the State in such manner that the authenticity of the lottery ticket is ensured;
- (c) the State Government shall sell the tickets either itself or through distributors or selling agents;
- (d) the proceeds of the sale of lottery tickets shall be credited into the public account of the State;
- (e) the State Government itself shall conduct the draws of all the lotteries;
- (f) the prize money unclaimed within such time as may be prescribed by the State Government or not otherwise distributed, shall become the property of that Government;
- (g) the place of draw shall be located within the State concerned;
- (h) no lottery shall have more than one draw in a week;
- (i) the draws of all kinds of lotteries shall be conducted between such period of the day as may be prescribed the State Government;
- (j) the number of bumper draws of a lottery shall not be more than six a calendar year;

(k) such other conditions as may be prescribed by the Central Government.

5. A State Government may, within the State, prohibit the sale of tickets of a lottery organised, conducted or promoted by every other State.

7(1) Where a lottery is organised, conducted or promoted after the date on which this Act receives the assent of the President, in contravention of the provisions of this Act, by any Department of the State Government, the Head of the Department shall be punishable with rigorous imprisonment for a term which may extend to two years or with fine or with both :

Provided that nothing contained in this section shall render such Head of the Department liable to any punishment if he proves that the contravention was committed without his knowledge or that he exercised all due diligence to prevent the commission of such contravention.

(2) Notwithstanding anything contained in sub-section (1) where a contravention under this Act has been committed by a Department of Government and it is proved that the contravention has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any officer, other than the Head of the Department, such officer shall also be deemed to be guilty of that contravention and shall be liable to be proceeded against and punished accordingly.

(3) If any person acts as an agent or promoter or trader in any lottery organised, conducted or promoted in contravention of the provisions of this Act or sells, distributes or purchases the ticket of such lottery, he shall be punishable with rigorous imprisonment for a term which may extend to two years or with fine or with both."

10. There are some changes in the various sub-clauses of Section 4 and Section 7, and also in Section 5 from what was contained in the Ordinance.

11. Before we proceed to consider the issues, we herewith refer to the short submissions poured by learned counsel for the parties. The first we refer to such set of submissions who challenge either the Ordinance or the Act. Learned senior counsel, Shri K.K. Venugopal, appearing on behalf of the State of Sikkim, submits that when there is sale of lottery tickets by the State it loses its pernicious nature, hence it is no more *res extra commercium*. Attacking Section 5 of the Act, he submits that it violates Article 303 of the Constitution as this authorizes the State Government to give preference to one State over the other. It can ban the lotteries of other States though it can run its own lotteries. Clause 2 of Article 303, which is only an exception to Article 303(1), would not be attracted as it is restricted to a situation arising from scarcity of goods in any part of the territory of India. Repelling submission on behalf of the Union of India that Section 5 safeguards the interest of such State Governments which as a matter of policy do not desire to have such lotteries in their own State to stop sale of lotteries of other Governments within its jurisdiction. Submission is that it may though reduce the extent of discrimination to a great extent but would not completely neutralise the violation of Article 303(1) of the Constitution. In the counter affidavit of the Union, it is not sought to establish any public interest in banning such State lotteries specially when such lotteries contribute towards State revenue. This, in fact, ameliorates poverty and funding welfare projects, especially so far the State of Sikkim is concerned which is an industrially backward State and has

very little source of revenue. It is violative of Article 302 of the Constitution. A reference was made to the case of *Nataraja Mudaliar v. State of Madras, 1968(3) SCR 829* (at p. 852-853), a decision by the Constitution Bench, that burden under Article 302 to establish public interest is on the State. He further submits that stand for the Union that even a lottery organized by the Union of India or a State is *res extra commercium* does not stand for the following reasons :

(a) "The concept of *res extra commercium* applies when a right is claimed against a State so that the Court looks into the nature of the right and holds that if such claim relates to a trade in noxious goods or a trade which is essentially vicious, it cannot be elevated to the status of a trade or business. This can have no application whatsoever when the State itself is running that business or trade.

(b) The purpose for which the venture is undertaken is of significance for deciding whether the venture is a trade or is *res extra commercium*. A citizen runs a lottery for his private pecuniary benefit while the State runs for public good for raising revenues for funding welfare projects. The State's endeavour in raising revenues for the benefit of its citizens would involve public interest which would be absent in the case of a citizen undertaking the same business or trade. What is not trade or business in the hands of the citizen would, therefore, for this reason be a trade or business in the hands of the State.

(c) When the State undertakes any such venture, as State, it would ensure that sufficient safeguards are imposed on the carrying on of the trade by itself so that larger public interest is sub-served while reducing its deleterious effect to the extent necessary to safeguard public interest. Qualitatively, therefore, there is a difference between the same venture or enterprise being undertaken by the individual or the citizen, solely with profit motive, as against the State which has no profit motive but has the interest of its citizens at heart by raising revenue for the welfare of its citizens.

(d) Entry 34 of List II "betting and gambling" conferred authority on the State legislatures to ban gambling, based on the morality aspect and based on the vice of gambling, for protecting its citizens against such a vice. By Entry 40 of List I the Constitution has carved out lotteries of a particular nature even though they constitute gambling, namely, lotteries organised by the States, so as to prevent a State legislature from using the morality or the vice aspect of gambling to interfere with the right of the State to raise revenues for the benefit of its own citizens. As a result, Entry 40 of List I recognizes the right of the Union and of the States to run lotteries without the morality or the vice aspect affect such lotteries, subject, of course, to regulation by laws made by Parliament. In other words, the Entry 40 of List I itself is proof of the fact that a lottery run by the Union of India or by the States is not affected by the aspect of morality or vice which is present only in Entry 34 of List II and is, therefore, not *res extra commercium*.

(e) This would also follow from Article 298 of the Constitution which extends the executive power of the Union and each State to carrying on any trade or business, without limitation, except to the extent of the provisos therein which are not relevant for the present purpose. In other words, the entirety of the executive power of the State is exhausted by Article 162 of the Constitution and Article 298 and there is no

third category of executive power covering the carrying on of a venture or enterprise which is *res extra commercium*. If so the concept of trade in Article 298 has to be the same as the trade in Part XIII of the Constitution.

(f) The judgment of this Court in Fateh Chand's case (1977(2) SCC 670) brings out the difference between money lending in the traditional sense, by money lenders who exploit the borrowers, and money lending by institutions including Banks. It is this difference which would equally apply to lotteries carried on by individuals and lotteries carried on by the State.

(g) This issue is no more *res integra* by reason of the decision in the Khoday case (1995(1) SCC 574) being the judgment of a Constitution Bench of this Hon'ble Court, where the judgment of the RMDC case has also been considered and wherein in paras 9, 24, 35, 30, 41, 55, 60, 62 and 63 this Hon'ble Court has held that the carrying on of trade in liquor would be a legitimate business and not illegal when carried on by the State.

(h) Even on the interpretation by the Union of India of Section 5 of a selective ban which could be imposed only by those States which have themselves given up the right to carry on the lottery business, there would be a violation of Article 303 of the Constitution of India as the State of Sikkim and other States, which are covered by Entry 40 of List I, can carry on the lottery business only in some States and not in others, thus impeding the free flow of goods for a reason which is not traceable to clause (2) of Article 303 of the Constitution. The only exception to Article 303(1) of the Constitution is a situation arising out of scarcity of goods. The concept of reasonable classification present in Article 14 would have no relevance to a preference or discrimination under Article 303 of the Constitution.

(i) Lotteries run by the State as a means of raising revenues have always been recognised as early as 1935 as seen in Entry 48 of List I of the 7th Schedule of the Government of India Act, 1935 covered under "State Lotteries" while Entry 36 of List II of the 7th Schedule of the 1935 Act covered "Betting and gambling". Consequent upon the Government of India Act, 1935 the Adoption (Adaptation ?) of Laws Order, 1937 has included in Section 294-A of the Indian Penal Code, 1860 an exception to the offense of keeping a lottery office by excluding from the scope thereof "any lottery not being a State lottery". It is submitted that a State lottery always stood on a different footing from a lottery run by an individual for private profit, which alone would be the lottery covered by the RMDC judgment (See : 1957 SCR 874)"

12. Next, challenging the validity of Section 5, he submits that the power conferred on the State for banning the lotteries of every other State is bereft of any guidelines and, therefore, a piece of excessive delegation. It is an uncanalised power conferred on a State at its whim and fancy. There is nothing in the objects, preamble, or any other provisions of the Act from which guideline could be collected specially that it is only a State which does not run its own lottery, can impose such a ban on every other State. For this, he relied on the case of *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and another v. Union of India and others*, 1960(2) SCR 671 at P. 696 and 697). Further, Section 5 is capable of being exercised arbitrarily, *State of West Bengal v. Anwar Ali Sarkar*, 1952 SCR 284 (at 314).

13. Shri F.S. Nariman, learned senior counsel for the State of Nagaland, submits that carrying on State organised lottery is permitted by the Constitution by placing it within the exclusive competence of Parliament (Item 40 of List I of the Seventh Schedule). A distinction is drawn between State organised lotteries and State authorised lotteries in *State of Haryana v. Suman Enterprises, 1994(4) SCC 217* (5 Judges). A reference was also made to Article 298, the executive power of the State which extend to carry on any trade or business, even beyond its territory. It is only because of Article 298 and the premise implicit therein that the business of organising State lotteries by the State was comprehended within its extended executive power.

14. He further submits that State lotteries are legitimized and run with authority of law hence it is no more pernicious. This can be traced back to the year 1844 when the India Act 5 of 1844 was first enacted. The historical account of this is referred in *Sesha Ayyar v. Krishna Ayyar, AIR 1936 Madras 225 (Full Bench)*. This referred to the English Lotteries Act, 1823 and its preamble, the underline (underlying ?) public policy which declared the lotteries to be common public nuisances, because they promoted gambling and speculation to draw great sums from servants, children and unwary persons to the great impoverishment and utter ruin of many families. Reference of 1844 Act was also made which is quoted hereunder :

"Whereas great mischief has been found to result from the existence of lotteries : (1) it is hereby enacted, that in the Territories subject to the Government of the East India Company, all lotteries not authorised by Government, shall, from and after 31st day of March 1844, be deemed, and are hereby declared common and public nuisances and against law; (2) and it is hereby enacted, that from and after the day aforesaid, no person shall in the said Territories, publicly or privately, keep an office or place for the purpose of drawing any lottery not authorised by Government, or shall have any such lottery drawn, or shall knowingly suffer any such lottery to be drawn in his or her house; and any person so offending shall for every such offence, upon conviction, before a justice of the Peace, or Magistrate, be punished by fine not exceeding Rs. 5,000/-"

15. He referred to this judgment to make distinction between the State lotteries and other lotteries. He also referred to the amendment brought in the Indian Penal Code through Act 27 of 1870 (Section 10) by introducing Section 294A. This excludes the State lotteries from its penal purview, in contrast to the other lotteries. Similar distinction is to be found under the Government of India Act, 1935, when the Government lotteries were placed under Entry 48 of List I while betting and gambling (other forms of lotteries) was placed under Entry 36 of List II. Referring back to the *State of Bombay v. R.M.D. Chamarbagwala, 1957 SCR 874* (RMDC case) case, it was submitted that it was a case of a private lotteries and not State organised lotteries. It was on these facts it held that it was opposed to public policy (private lotteries were in fact opposed to public policy) could not be characterised as trade or business or trade, commerce or intercourse. Repelling further submission of Union with reference to the Australian case cited in RMDC case (supra), he submits that even these cases made a distinction between private lotteries and lotteries conducted under the authority of the Government. Hence, the fact that the private lotteries are pernicious and had to be suppressed and were suppressed in India right from the year 1844, does not mean that lotteries organised by the State could be similarly stigmatised as pernicious. The ratio of RMDC case (supra) has to be read with another decision of the Constitution Bench of five Judges in *Fateh Chand case (supra)*. This decision holds that there are 'aspects of business or trade' which in one sense may be noxious when conducted by a given class of persons and in another would be permissible. He also referred to a case of *H. Anraj and others v. State of Maharashtra, 1984(2) SCC 292*, (hereinafter referred to as

"Anraj case-I"), also referred by other counsel. In paras 5 and 9, this Court held that the right to conduct lotteries by States in India was a part of the right to carry on business granted under Article 298 of the Constitution, hence it could hardly be said that it would be outside the purview of trade, commerce or intercourse under Articles 301 to 303. He also referred to *H. Anraj and others v. State of Maharashtra, 1986(1) SCC 414*, (hereinafter referred to as "Anraj case-II"), in which notification issued by the Tamil Nadu under the Sales Tax Act was struck down on the ground that it violated Article 304(a). This case further holds that lottery tickets in respect of lotteries organised by a State were "goods". It is significant that a note of caveat of Sabyasachi Mukherjee, J. in Anraj case-II, (Para 46) is recorded :

"It 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".

16. Next, he challenged Section 5 to be violative of Articles 301, 302 and 303 of the Constitution. Article 302 is an exception to Article 301 under which a Parliament is permitted to impose such restriction on freedom of trade, commerce or intercourse between one State and another as may be required in the *public interest*. He placed reliance on the case of *Parag Ice & Oil Mills and another v. Union of India, 1978(3) SCC 459* at page 473 (7 Judges) in which it was held that the restrictions contemplated by Article 302 must bear a reasonable nexus with the need to serve public interest. He contested the stand of the Union as referred in para 5 of the letter dated 27th November, 1998, reference of which is quoted hereunder :

"Consequently, the Central Government decided to enact an appropriate legislation to regulate the conduct of lotteries so as to protect the poor and gullible persons....."

17. He submits the discrimination, on the one hand Union through statutes controls the State lotteries (Section 4) but in contra distinction as revealed by Union's letter dated 2nd March, 1955, free trade and commerce without control of the Bhutan lottery were permitted for a period of ten years under the Treaty. This Treaty falls under Entry 14 of List I is an exclusive Union subject. Thus, no law of a State can legitimately impinge upon the implementation of a Treaty entered into by the Union Government with any foreign State. Further, repelling the affidavit of Union of India in para 7 with reference to Section 5 of the Act that :

"Section 5 may be invoked by the State Government for prohibiting sale of lottery tickets of other States even if they fulfill all the conditions laid down in section 4. However, the ban shall be applicable to the lotteries of all the States uniformly. Hence, the State Government cannot discriminate in any way."

18. This submission is contrary to the plain language of Section 5 under which the State Government may continue to sell its own lotteries still prohibit the sale of lotteries organised by other States. No public interest is shown nor any reasonable nexus disclosed between the restriction and the need to serve public interest, hence, it violates Article 302. Thus, he concludes that Section 5 is invalid enabling discriminatory preference by one State over the other. Thus, he submits that the sale of Bhutan lotteries unrestricted in the State of India, while prohibiting State organised lottery would amount to discrimination and violative of Article 14 and Article 303 of the Constitution. He also attacked sub-Section (g) of Section 4. The place of draw should only be in the State concerned, cannot be said to be in "public interest". He specifically referred to the condition as prevailing in Nagaland, there being grave problem of law and order, hence the discrimination set up in Section

4(g) so far in relation to the State of Nagaland cannot be said to be in public interest. In the last, it is submitted that condition imposed under Section 4(g) is not to be construed as mandatory.

19. Learned senior counsel, Shri Shanti Bhushan, on behalf of the State of Nagaland, also supported the aforesaid submissions. He made three main submissions. *Point No. 1.* The whole Act in its entirety is a discriminatory piece of legislation contravening Article 14 of the Constitution. Though the impugned Act imposes restrictions on the lotteries organised by the State but does not impose any restrictions on the lotteries organised by a foreign government (Bhutan lotteries). Section 4 reveals itself with its opening words that the restrictions contained thereunder are to a State organised lotteries, instead of restricting the lotteries organised by the Government of Bhutan, the Union has promoted its lotteries. He referred to the Treaty dated 28th February, 1995 to remain in force for a period of 10 years. He referred to the circular dated 20th January 1998 by Government of India which refers that Section 5 applies to the State lotteries and not to the lotteries of Bhutan. He submits that the reason to justify the placing of restriction on lotteries organised by the State Government should equally be applicable to the lottery organised by a foreign Government. It cannot be said that sale of lottery tickets by the State causes mischief or harm to the people of India but would not cause mischief or harm in case it is organised by a foreign Government. No defence could be made in meeting the challenge of discrimination under Article 14 that there is difference between the Government of Indian State and the Government of foreign State, since this has no rationale or nexus with the object sought to be achieved. This clearly demonstrates hostile discrimination about which the State Government can complain to this Court. He repelled the submission for the Union that State could prohibit restrictions on Bhutan lotteries under Entry 34, List II. He submits that such acceptance of such proposition would totally upset the constitutional scheme of allocation of subjects between the Parliament and the State. He made reference to Entry 14 which refers to Treaty, Entry 41 to trade and commerce with foreign countries and Entry 97 to the residuary power of the Union under List I. His *point No. 2.* is the challenge of Section 5 viz - (1) the legislature has delegated its essential legislative powers without laying down any policy; (2) it authorises the State Government to prohibit the sale of lottery tickets organised by every other State, thus, *per se* discriminates between its own lotteries and lotteries of other States; and (3) it also contravenes the provision of Article 301 read with Article 303 of the Constitution when it gives preference to one State over the other. His submission is, it is impossible to discern from any provision of the impugned Act as to what is the policy in regard to the prohibition of the sale of tickets of a lottery in a particular State. This policy has to be laid down by the Parliament. In the absence of any policy, there has been total abdication of legislative power by the Parliament and it is a naked delegation of a legislative power to the State Governments. In support of this discrimination, he referred to the State of Tamil Nadu where the State has prohibited the sale of lottery tickets of all other States but continues to sell its own lotteries. If the State Government prohibits the sale of lottery tickets of other States and promotes sale of its own lottery, it violates Article 301 read with Article 303. With reference to Article 298, the submission is that the State gets right to organise the business of lottery only because State lottery is trade or business. If State lotteries are not, no State Government would have right to organise and conduct its own lotteries. The last *point No. 3* is challenge to sub-clauses (a), (g), (h) and (j) of Section 4 as they are unreasonable and arbitrary. The special reference was made with emphasis on clause (g). This clause requires that place of draw shall be located within the State concerned. With reference to State of Nagaland, it was submitted that in view of the situation prevailing there, it is not safe to draw lotteries within the State of Nagaland itself.

20. Mr. R.F. Nariman, appearing for the respondent in Civil Appeal arising out of SLP (C) No. 16021 of 1998, with reference to Article 301, submits that trade, commerce and intercourse is free

throughout the territory of India. Article 302 is an exception but only in public interest. Article 303 puts an embargo both on the Parliament and the legislation (legislatures ?) of the States not to make any law giving preference to one State over another with respect to any Entry relating to trade and commerce in the Seventh Schedule. Thus, Section 5 of the impugned Act which enables the State to prohibit the lotteries of others amount to restrict free trade and commerce hence violative both of Articles 301 and 303 of the Constitution. It also discriminates *inter se* between one State and the other wherein the State which prohibits lotteries in its territory may have liberty to do trade and business of the sale of lottery tickets throughout the territory of India while others will have territorial limitation to sell lotteries hence violative of Article 303 of the Constitution of India. In support, he relied on the case of *Atiabari Tea Co. Ltd. v. The State of Assam and others, 1961(1) SCR 809*, and also the case of *Automobile Transport (Rajasthan) Ltd. v. The State of Rajasthan and others, 1962(1) SCR 491*, where the restrictive interpretation given to Article 303, namely, to be limited to the Entries relating to trade and commerce in any of the List in Seventh Schedule, namely, Entries 41 and 42 of List I, Entry 26 of List II and Entry 33 of List III was rejected. In these cases even the impediment of the movement of vehicle or taxation on vehicle on the given facts was held to be a barrier in a free trade within the meaning of Article 301 of the Constitution. Hence, the submission was, Section 5 entrusting the State to prohibit the sale of lottery tickets organised by every other State, would fall within the mischief of the principle laid down in the aforesaid decisions, hence it impede free trade within the territory of India thus violative of Articles 301 and 303 of the Constitution.

21. Learned senior counsel, Shri S.S. Ray, appearing for the State of Nagaland, submits that organising lotteries by the Government of India by any State Government is a legitimate business activities. He drew this inference in view of Article 40, List I of the Seventh Schedule and Article 298 of the Constitution. He relied and referred to the case of Anraj case-I (supra), that the Government of every State had the unrestricted right to organise lotteries of its own (in the absence of legislation by the Parliament on the subject). The executive power of a State by virtue of Article 298 extends to lotteries organised by itself but not to lotteries organised by the other States. Next, he referred to Anraj case-II (supra) that the legislative competence of the States to levy a tax on the sale of lottery tickets is under Entry 54, List II and not under Entry 34, List II. There cannot be discriminatory taxes imposed by a State between lottery tickets organised by other States and sold within the taxing State, and Lottery tickets organised and sold by the taxing State itself. Such discrimination would be violative of Articles 301 and 304(a) of the Constitution. He also referred to the case of *M/s Suman Enterprises and others (supra)* in which a distinction between lotteries organised by the State and lotteries authorised by the States has been made out. Lotteries organised by the State would fall under Entry 40, List I and will not fall under the regulatory power of other States under Entry 34, List II. It lays down certain conditions which would be essential for the lotteries organised by the State. He also made reference to *Khoday Distilleries Ltd. others v. State of Karnataka and others, 1995(1) SCC 574*. The question raised therein was, whether the State could create monopoly for the manufacture, trade or business in liquor ? In this case the argument was that the State cannot carry on trade in liquor in view of Article 47 of the Constitution. Submission in this case was, if a citizen has no fundamental right to do an act including any trade, then Article 19(6) cannot confer such right on the State. What a citizen cannot do under Article 19(1), the State cannot do under Article 19(6). Further, the State power to carry on trade in liquor *de hors* Article 19(6) and Article 298 of the Constitution cannot be extended to trade in liquor. This is so because Union of India has no executive power to trade in a commodity which under Article 47 is enjoined to prohibit. This submission was rejected and it was held :

".... that the State's power to regulate and to restrict the business in potable liquor

impliedly includes the power to carry on such trade to the exclusion of others. Prohibition is not the only way to restrict and regulate the consumption of intoxicating liquor. The abuse of drinking intoxicants can be prevented also by limiting and controlling its production, supply and consumption. The State can do so also by creating in itself the monopoly of the production and supply of the liquor. When the State does so, it does not carry on business in illegal products..... regulated in the interests of the health, morals and welfare of the people.....

When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business. The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business."

22. In *Ch. Khazan Singh and others v. State of U.P. and others*, 1974(1) SCC 295, it was held that Article 298 envisages carrying on of trade and business by a State without any territorial limitations and the restriction, if any, on the executive power of the State is contained in clause (b) of the proviso to Article 298. Learned counsel, Mr. Ray, submitted even if it could be said that lotteries are social evil, the same can be regulated or restricted, keeping with public policy or public interest. It cannot be placed as a crime which is universally condemned or punished. Even in the past the proceeds of lotteries have been utilized for welfare, developmental or growth activities by the State, especially when the economic and social evolution of the State is at a nascent stage. He referred that proceedings (proceeds ?) of State lotteries have been contributed substantially in building of major European and American cities, even Art Galleries in U.K. Hence, it cannot be submitted that State lotteries are wholly against public morality or public conscience. He referred to 38, *Am. Jur. 2nd, p. 152, 57* :

"57. *Generally* -But experience demonstrated the evil tendency and effect of such schemes and the need for public control and regulations. At the present day, both State and private lotteries are forbidden, or at least regulated in some manner, by Constitution or statute, or both, in many, if not all, States. Congress has closed the mails against them. Most of the governments of the continent of Europe have at different periods raised money for public purposes by means of lotteries, and a small sum was raised in America during the Revolution by a lottery authorised by the continental Congress."

23. He also referred to Halsbury's Laws of England, (4th Ed.) Vol. 4, paras 142, 143 and 144 :

"142. *Offences in connection with unlawful lotteries.* - All lotteries in Great Britain which do not constitute gaming are, with the exception of those subsequently mentioned, unlawful.

143. *Statutory defences.* - It is a defence to the person charged with any offence in connection with a lottery to prove that it was one declared by statute not to be an unlawful lottery, and that, at the date of the alleged offence, he believed and had

reasonable ground for believing that none of the statutory conditions required to be observed in connection with the promotion and conduct of the lottery had been broken. It is also a defence to prove that the lottery in question was not promoted wholly or partly outside Great Britain and constituted gaming as well as a lottery.

144. *Art unions.* - There are certain exceptions to the general rule that lotteries are illegal. An art union is permitted to hold lotteries, under certain conditions, and is made a lawful association, and the members, subscribers and contributors are exempted from penalties as are all persons acting under their authority or on their behalf."

24. He also referred to the Betting, Gambling and Lotteries Act, 1963 at page 539 of the Halsbury's Statutes of England 3rd Ed., Vol. 14 in particular Section 41 at page 583 that subject to the provisions of this Act, all lotteries are unlawful. He also referred to Section 45 which exempts certain small lotteries conducted for charitable, sporting or other purposes.

25. Next, while dealing with challenge to Section 5, he submits that in Suman Enterprises case (supra) lotteries were divided into five different categories and on the facts of the present case, there would be sixth category, namely, lottery organised by a foreign State. The position which emerges is that Government of India and the Bhutan Lotteries can be organised and conducted anywhere in India without any conditions while State lotteries can only be organised in other States only if those States do not prohibit them by virtue of Section 5. Even if a State prohibits the lotteries of other States it can organise its own lotteries in its State. He referred to Section 8 of the U.P. Unauthorized Lottery (Prevention) Act, 1995 which gives the U.P. State Government power to grant permission to private persons to conduct lotteries in certain cases and under certain conditions. Challenging the power given under Section 5 to a State Government to prohibit lotteries of every other State, he submits that there is no rational basis or policy behind such empowerment. There is no nexus, reasonable or otherwise between the object of the prohibition and the actual prohibition. Hence, it is unreasonable, arbitrary and discriminatory. He also reiterates the submissions by other counsel that Section 5 confers an unauthorised delegation of an essential legislative function without any guidelines. Negating the submission by the Union and the State of U.P. that the State which as a policy prohibits sale of its own lottery tickets, could only prohibit the sale of lotteries of every other State, refers to the stand taken by the State of Tamil Nadu which though supports Union for upholding the provision but differ on interpretation that power under it is not conditional but absolute. It is open to a State to bring the prohibition of sale of lotteries in phased manner, hence while running its own lotteries could prohibit lotteries of other States. This reveals the sphere of discrimination which is absolute and remains as unguided delegation. Thus, this Section is violative of Article 14. Apart from this, it is also not in public interest. Further, sale of such lottery tickets are trade and business falling under Part XIII of the Constitution and is violative of Articles 301 and 303 of the Constitution.

26. He drew our attention that on one hand granting right to Bhutan to organise and sale its lotteries everywhere in India while prohibiting Indian States exercising such right is violative against public policy. On the contrary, a public policy demands that no Indian States can be denied or prohibited entry into any Indian market where a foreign State is allowed. Hence, Union Government instead of spelling out public interest for any public policy its act constitutes contrary to public interest, public good, public welfare, subvert societal goals and contrary to the social milieu of the country today. He refers to some decisions of the Courts in England, USA and India on the meaning and scope of "public policy". In *Central Inland Water Transport Corporation and another v. Brojo Nath Ganguly*

and another, AIR 1986 SC 1571; 17 Am. Jur. 2nd P. 533, 534, it held that there must be no injury or harm to the public interest, public good, and public welfare; in *Rattan Chand Hira Chand v. Askar Nawaz Jung (dead) by Lrs. and others*, 1991(3) SCC 67, it held that Public policy must not subvert societal goals or endanger the public good. What constituted an injury to public interests or welfare would depend upon the times and climes. The social milieu in which the contract is sought to be enforced would decide the factum, the nature, and the degree of the injury, Courts must move in to fill the lacuna if the legislature fails to keep pace with the changing needs and values; Courts must promote the goals of society; must be tethered to the ethos of society and furnish the felt necessities of the time, Rattan Chand Hira Chand case (supra); Doctrine of public policy extends not only to harmful acts, but has to be applied to harmful tendencies, *Fender v. St. John-Mildmay*, 1938 AC 1, *Gherulal Parakh v. Mahadeodas*, 1959 Suppl.(2) SCR 406. It is community's common sense and common conscience. Black's Law Dictionary (6th Ed.) p. 1231; Public policy is the public law equivalent to private law equitable principles such as that which states that no person can benefit from his own wrong. Thus, the courts will presume that Parliament did not intend to imperil the welfare of the State or its inhabitants, De Smith - Judicial Review of Administrative Action (5th Ed.) p. 328, *R. Vs. Registrar General, Ex parte Smith*, 1991(2) All ER 88.

27. Next, learned senior counsel, Shri Rajeev Dhawan, appearing for the respondents in Civil Appeal arising out of SLP (C) No. 15196 of 1998 and Transfer Petition (Civil) Nos. 806-807 of 1998, reiterated the submissions made by the preceding senior counsel. He submits that there could be no dispute that the lottery tickets are 'goods' hence *res commercium*. The lotteries can be conducted by the State, subject to the four conditions as laid down in the case of Suman Enterprises (supra). Till Parliament makes the law it can do so under Article 298 of the Constitution of India. The lotteries are commercial activity, therefore *commercium* which attract sales tax and the States are not competent to regulate its own State lotteries in their States. This power vests exclusively with the union. The exclusionary principle, like *res extra commercium* have the effect of eliminating the invocation of a fundamental right at the threshold which has to be used rarely and always with circumspection and must be narrowly construed as a principle of public policy. The principle of constitutional unworthiness is that certain kind of rights are so morally repugnant that they are not entitled to constitutional protection at all. The effect of the principle of constitutional unworthiness has a devastating effect. It narrows the scope of fundamental right. It takes out certain claims from the protection of the Constitution at the threshold and since it is rejected at the threshold, such right is not even tested for reasonableness. He referred to the case of *Krishna Kumar Narula v. The State of Jammu and Kashmir and others*, 1967(3) SCR 50 at 54 in which this Court refused to accept the broad argument. The reliance is placed on the following passage :

"..... that dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morals.... Such an approach leads to incoherence in thought and expression. Standards of morality can offer guidance to impose restrictions, but cannot limit the scope of the right."

28. This Court held that right to trade in liquor was business. However, a contrary view was taken by this Court in the case of *Khoday Distilleries* (supra) in which it was held that the right to trade in liquor was not constitutionally protected. After taking note of the *Krishna Kumar's* case (supra), the Court did make three exceptions, namely, (a) trade in alcohol is not *per se* prohibited for medicinal and industrial goods; (b) even though trade in potable alcohol was *res extra commercium*, the State itself may sell potable alcohol, set up a monopoly business for that purpose and maximise its revenue by any mode of sale; and (c) the State may on a non-discriminatory bases permit sale of alcohol by private parties. Next, he submits that the *RMDC* case (supra) is limited in its scope

confined to private lotteries. He referred to the case of *Gherulal Parekh v. Mahadeodas Malya, 1959 Suppl.(2) SCR 406*, that in it, a narrow interpretation was given to the said RMDC case (supra). Hence, in the case of State lotteries, the principle decided therein would not be applicable. The State lotteries are a distinct constitutional class. He referred to the ancient text, to substantiate the legitimacy of the State lotteries and consequently exercise of its power by showing that even in the ancient time the lotteries under the Government were sanctioned by the Kings which yielded revenue which is an important part of the ancient Indian jurisprudence. Thus, he submits that since the State lotteries and activities connected thereto are a permissible trade and not *res extra commercium*, Part XIII of the Constitution is attracted. With reference to Article 303 he submits that neither the Union nor the State can discriminate between one State and the others. This constitutional prohibition is absolute with only one exception under Article 303(2), namely, scarcity of goods. Meeting the interpretation of the Union with reference to Section 5 that it permits the total ban which is non-discriminatory, he submits that it is not the form but the substance which has to be considered. The effect of total ban could mean, it would affect some States more than others; it would affect the North Eastern States to make their lotteries unviable; and in any case this affects the free trade and public interest. Article 301 confers freedom of trade and it could only be curtailed for public interest under Article 302 which the Union of India has not shown, pleaded and proved. With reference to Bhutan lotteries, he submits that validity and scope of Bhutan lotteries is not in issue. The State has no power under the Act or the Constitution to regulate Bhutan lotteries. Finally, with reference to the challenge of some of the provisions of the Act, it is submitted that the Act has to be read as a whole, hence Sections 3, 4, 5 and 6 are to be read together and Section 5 is not to be read independently. In the configuration from Sections 3 to 6, Section 5 is placed between Sections 4 and 6. Thus, this Section vests the power to the State to prohibit non-conforming lotteries (lotteries which do not conform to the requirement of Section 4). This Section is only a declaration of a prohibition and not a prohibitory effect. This section suffers from excessive delegation, lack of guidelines etc., as submitted by other counsel.

29. Shri P.K. Gowami, learned senior counsel, appearing for the State of Arunachal Pradesh, adopted the arguments raised by other learned senior counsel. He also made references to sub-section (1) of Section 4 which prohibits the 'single digit' lottery which is said to be arbitrary as there is no rational nexus for this restriction. The submission is that the continuance of the single digit lottery does not have an adverse affect on the purchasers.

30. Learned senior counsel, Shri G.L. Sanghi, also appearing for the State of Nagaland in Civil Appeals arising out of SLP (C) Nos. 5081-5085 of 1998, submitted that with reference to Bhutan lotteries, the effect of treaty is that the Bhutan lotteries can be sold throughout India without fulfilling any obligations under the Lotteries Act without complying with the conditions under Section 4 of the Act, on the other hand, State organised lotteries have to comply with the conditions and cannot be sold through its territory by virtue of exclusion, if any, by the order of the State. The Lotteries Act in question which is intended to control and prevent the earnings through lotteries results in conferring complete monopoly in favour of a foreign lottery, thus the evil sought to be arrested is let loose in most irrational, objectionable and arbitrary manner, hence violative of Articles 14 and 302 of the Constitution. He submits that the Parliament should not have under Section 5 given a *carte blanche* to the executive of all the States to decide, whether any restrictions be imposed on lotteries organised by other States. This delegation of power is arbitrary, unbridled and also in breach of Articles 302 and 303 of the Constitution. He referred to the case of *Hamdard Dawakhana* (supra) and in *Arminster Singh v. State of Punjab, 1979 SCR 845* at 855-856. He also made reference to the invalidity of the sub-section (g) of Section 4 of the Act. This refers to the place of draw to be located within the State concerned.

31. Mr. Rakesh Dwivedi, learned senior counsel appearing for the State of Manipur in Civil Appeals arising out of SLP Nos. 5224-28 of 1998, submits by posing a question, namely, whether it is permissible to the Parliament under Article 298 to delegate power to the State Government vide Section 5 of the impugned Act to impose ban on the State organised lottery of other States ? Secondly, as has been submitted by other counsel, whether State organised lottery can be said to be *res extra commercium* ? He referred to the Government of India Act, 1935 and also to the draft Constitution before the Constituent Assembly and also the debate which led to bring in Article 298 in the present form. His submission is that the draft Article 266 which is now Article 289 provided for trade and business of States being subject matter of Union taxation. To this, Provinces protested which led to the insertion of Article 298 as a compromise to enable the States to carry on trade and business throughout the country, even with respect to subject matter in List I for earning more revenue. This expanded power was made subject to legislation by the Parliament. He referred to the case of *S.R. Bommai and others v. Union of India and others, 1994(3) SCC 1* at page 216, to contend that federalism is a basic feature of our Constitution and thus Article 298 should be understood in the light of federalism. Proviso (b) to Article 298 is not merely a repetition of the Article 248 read with List I entries of Seventh Schedule. This was with a purpose to enhance the revenue earning power of the States. Thus, he submits that the Parliament cannot make a law empowering the State Government of one State to perform the functions with respect to another State or with respect to an acquired foreign territory (with reference to Bhutan lotteries). One State Government cannot be delegated the power to increase or diminish the area of the activity of another State. He also referred to Articles 292 and 293(1), namely, borrowing by the Government of India and borrowing by States respectively. Articles 269(3) and 286(3) refer to the taxes levied and collected by the Union but assigned to the States and restrictions as to imposition of tax on the sale or purchase of goods respectively and finally Article 289(3) which refers to the exemption of property and income of a State from Union taxation just to show the demarcation under the Constitution and the distribution of revenue between Union and the States. Thus, he submits that the power to totally prohibit the carrying on of any trade or business by the State executives is only with the Parliament and it must be done by legislation. The carrying on of business or the non-carrying on are both comprehended under Article 298. This cannot be delegated to any State executive. His submission is that Article 298 has also to be interpreted in the light of the basic feature of federalism under which all the States are co-equal. One State cannot be subordinated to another State with respect to the matters which are in the Central List. Repelling the argument on behalf of the State of Uttar Pradesh by Shri R.N. Trivedi, learned Additional Solicitor General, that Article 258 empowers the Parliament to delegate powers and duties upon the State or its officers or authorities of the State, he submits that under Article 258(1) the President can only entrust power to the State Government with the consent of the State Government. This starts with the words, "notwithstanding anything in this Constitution". But Article 258(2) does not begin with the non-obstante clause thus, if Article 298 inhibits delegation of powers to the State Government, then Article 258(2) cannot be used by the Parliament for delegating the power to the State Government.

32. Next, Shri A.K. Ganguli, learned senior counsel on behalf of the State of Tamil Nadu in Transfer Petition Nos. 806-807 of 1998, supported the interpretation of Section 5 of the Act by Union of India for upholding its validity but differed partly its interpretation that the State Government can only exercise power to ban State lotteries of other States, if it does not have its own lottery tickets for sale. Submission is that on plain reading of Section 5, once power is delegated to the State it can still be exercised even while having its own lottery. He submits that lotteries are a form of gambling hence such transaction does not belong to the commercial business of the country. He supported the submission made on behalf of the Union that such activities cannot be said to

come within the purview of free trade, commerce and intercourse.

33. To repeal and withstand the storm of submissions by one set of parties, as aforesaid, the submission on behalf of the Union of India by Mr. C.S. Vaidainathan, learned Addl. Solicitor General of India, and on behalf of the State of Uttar Pradesh by Mr. R.N. Trivedi, learned Addl. Solicitor General of India, is that the lotteries, whether organised by the State or otherwise partake the vice of betting and gambling and is thus *res extra commercium*. Lotteries are inherently pernicious. Dealing in any such lotteries does not have the protection of Article 14, 19(1)(g) or 301. Submission was that all sorts of betting and gambling which includes State lotteries are outside the pale of protection of Article 19(1)(g) as well as of Part XIII of the Constitution; as betting and gambling is neither "trade" nor "commerce" and when the Parliament enacts the law under Entry 40 of List I as the impugned Act, no State can invoke the provisions of Article 301, 302 or 303 of the Constitution since the source of the power under Entry 40, List I is really betting and gambling, *J. Bharati v. State of Maharashtra, 1985(1) SCR 201* at 203. Lotteries organised by the Government of India or by a Government of State, in fact, is taken out of Entry 34 of List II and placed under Entry 40 of List I must likewise be held to be neither trade nor commerce. The sheet anchor in support of this submission is the decision by the Constitution Bench of the RMDC case (supra). Running of lotteries unless authorised by the State is an offence under Section 294A, IPC. The executive power of the State under Article 162 read with Article 246(3) and Entry 34 of List II extends to prohibiting Bhutan lotteries. The submission is that crime could not be a business which could receive the protection of Article 19(1)(g). Section 5 should be so read and interpreted as to entitle only such State which does not permit its own lottery to be sold before it could prohibit lotteries of every other State and, if this is interpreted so, neither there would be any violation of Article 14 nor Article 301. Further, Article 298 does not confer any plenary right on any State to carry on any trade or business. Although, Article 298 does not provide specifically but in substance it is subject to the other provisions of the Constitution. Thus, a State cannot without obtaining licence under the provisions of the Industries Development Regulation Act start an Industry mentioned in the Schedule of the Industries Development Regulation Act. Similarly, a State cannot insist as a matter of right to sell liquor in another State where there is complete prohibition. Thus, the extended executive power of the State to carry on any trade or business for any purpose should only be such trade or purpose, which, under the scheme of the Constitution, is permissible and not prohibited. Article 298 is subject to the parliamentary legislation, thus, is subject to provisions of Articles 245 and 246. The provisions of Article 298 should be read to be subject to the provisions of Articles 53 and 258 of the Constitution. A State can carry on a trade, subject to the executive power of the Union under Article 53 and any entrustment made under Article 258. The submission was that Article 298 is subject to the aforesaid limitations and it does not refer to trade or business which are not so recognised under Article 19(1)(g). Thus, lotteries organised by the State would not be lawful in the absence of legislation by the Parliament or entrustment by the Union under Article 298. Thus, Article 301 would not be applicable in the present case. Even if applicable, the Parliament can impose restrictions in public interest. However, this Article cannot be extended for dealing in lotteries as it is neither trade nor commerce. In the present case, the public interest is writ large and is implied in view of the nature of the activity, namely, trade in pernicious matter. He referred to paras 6 and 8 of the counter affidavit filed by the Union, the Statement of Object and Reasons, and the Debates. Reference was made to the Anraj case-II (supra). Relevant portion of the paragraph 27 is quoted hereunder :

"..... transfer of the right to participate in the draw which takes place on the sale of a lottery ticket would be transfer of beneficial interest in movable property to the purchase and therefore amounts to transfer of goods and to that extent, it is not

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."

34. Based on that it was submitted that there are two rights which flow from sale of lottery tickets, right to participate and right to claim a prize, the right to participate would be sale of goods, covered by Entry 54 of List II but if both the rights were subject to sales tax, namely, the right to participate and claim a prize, it would be covered by Entry 62 of List II. The inference is, therefore, the sale of lottery tickets is sale of goods *per se* is not justified as it is only the right to participate which fell for consideration in Anraj case-II (supra).

35. Next submission is that the provisions of Section 5 should be read down, as submitted earlier, as it would be incongruous that a State, which, as a policy and in public interest, does not permit sale of its own lotteries has to permit sale of lotteries of other States. Thus, it is only when a State, as a policy, decides not to sale its own lottery in public interest would be entitled to prohibit sale of lotteries of other States. Next, that Section 5 does not suffer from any vice of excessive delegation of essential legislative policy as public interest and public policy is implicit in exercise of power by the State. Guidelines can be found from the subject matter of the Act itself. It can also be deduced from the objects and reasons of the Act. The circumstances leading to legislation can also be taken into account. So far as Bhutan lotteries are concerned they are not covered by the present Act. This lottery not being the lottery organised by the State, would not fall under Entry 40, List I, but under Entry 34 of List II. That is not a conscious legislation referable to Entry 10 of List I or Entry 14 of List I. The treaty itself is subject to laws in force in the territory of India. It would also be subject to legislation by the State so long as there is no legislation made by the Parliament with reference to Entries 10 or 14 of List I. At present, in the State of Uttar Pradesh there is a legislation prohibiting the sale of lotteries which would also apply to Bhutan lotteries as they are not State organised lotteries. Defending the attack, it is submitted, Section 12(3) does not amount to effacement or abdication of the powers by the Parliament. Conferment of rule making power on the State does not amount to exercise of legislative powers by the State but it acts as a delegate of the Parliament. Reliance is placed on the cases of *Jayantilal Amrit Lal Shodhan v. F.N. Rana and others, 1964(5) SCR 294*, and *Tripura v. Sudhir Ranjan, 1997(3) SCC 665*. Augmentation of revenues by a State by sale of lottery tickets, cannot override the interest of another State which does not permit sale of any lottery tickets.

36. Within the parameter of the aforesaid submissions, now we proceed to decide issues of great importance, namely, the nature and character of lotteries, whether they by their very nature even if legitimised could be classified as commercium hence trade and business at the common parlance ? or it is distinct class by itself, legalised for a limited purpose, for achieving specialised objectives to be used for a temporary period. What is the reason for gambling to be legitimized, if in a given situation it has to be for a wider and purposeful objectives which leads to imposing conditions to reduce its evil consequences as suggested by this Court through Suman Enterprises (supra), adopted through Section 4 of the impugned Act, does it lose its original character of being pernicious. Even if it could be said to have diluted it, could it still be classified as commercium and equated with every other form of trade and commerce ? Its effect on its citizens has been cause of concern which had drawn attention of the kings and his subject since ancient time, the Government and the courts of various countries including ours. On the one hand, sometimes justifying for the benevolent and good cause like charitable purpose and public benefit, but later reiterating even from this stand on account of its pernicious effect on the public at large on account of its condemnation to such a magnitude that it resulted into complete banning of such lotteries. Justification, as in the present case, is for the augmentation of public revenue which swells through voluntary contributions

contrary to the exaction through compulsion as in the cases of taxes. This scenario was in the past and is going on not only in this country but other countries of the world also.

37. In this background, now we proceed to consider first, what is the nature and character of the lotteries ? What changes, if any, is brought in when lottery becomes State lottery ? So far as lotteries are concerned, it can neither be denied nor has been denied that lotteries are a form of gambling. The question next is, whether a lottery, which is not a State lottery, if it is gambling, does it lose its character as such when it becomes a State lottery ? The lotteries as such are pernicious in nature cannot be denied. However, the submission is, when it cloaks itself with the linen of State authority and is presented as State organised lottery, it loses its pernicious character and what could be said before he puts on the cloak to be *res extra commercium* becomes commercium. Hence, for this we have to understand what is trade and business, and what is lottery ? Unless their true nature and character is understood, submissions could not be properly appreciated. We are also conscious, the resultant conclusion of it would not be proper if based on views of one or two individual judges but has to be based on what was and is understood at the common law. For this, we have to turn our pages to the ancient history to gather wholesome view as to what was understood then and what is understood now, which is revealed through the ancient texts and various decisions of our courts and courts of other countries.

38. In this context, we may first refer to the Constitution Bench decision of this Court in the RMDC case (supra), which is a leading case, which has truly dwelled on this subject at some length. It holds that gambling activities are in its very nature and essence *extra commercium*. They were considered to be a sinful and pernicious vice by the ancient seers and law givers of India. It also records that it has been deprecated even by the laws of England, Scotland, United States of America and Australia. In support, it prunes what seers and law givers of India in the ancient time looked upon gambling. A reference was made of hymn XXXIV of the Rigveda which proclaims the demerits of gambling and quoted verses 7, 10 and 13. It referred to Mahabharata which deprecates gambling by depicting the woeful conditions of the Pandavas who had gambled away their kingdom. Manu in verse 221 advises the king to exclude from his realm gambling and betting, since these two vices cause the destruction of the kingdom of (sic). Verse 226 describes a gambler as secret thieves who constantly (sic) the good subjects by their forbidden practices. Verse 227 referred to the gambling as a vice causing great enmity and advises wise men not to practice it even for amusement. As is the present case, even in the ancient time, in spite of condemnation of gambling, Yajnavalkya permitted it under State control. Vrihaspati on this subject records that gambling had been totally prohibited by Manu because it destroys truth, honesty and wealth while some other law givers permitted it when conducted under the control of the State so as to allow the king a share of every stake. However, the Supreme Court of America as far back as in 1850 considered his issue as recorded in *Phalen v. Virginia case, 1850(49) US 163, 12 L Ed. 1030, 1033*, for useful appreciating its adjudication is quoted hereunder :-

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

39. The observations were quoted, with approval of Douglas V. Kentucky. After quoting the passage from Phalen case (supra) judgment proceeded :

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

40. In the said decisions, a reference was made to the decision of Australian High Court in *The King v. Connare, 1939(51) CLR 596*, Evatt, J. did not think that lottery tickets can be regarded as goods or commodities entitled for protection of Section 21 of the Commonwealth of Australian Constitution Act. He held at page 628 :

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

41. In the same decision, McTiernan J. held :

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

42. McTiernan J. reiterated his view in another case in *King v. Connare, 1938(61) CLR 596* :

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

43. In the same decision the view of Taylor J. is also quoted hereunder :

"No simple legislative expedient purporting to transmute trade and commerce into something else will remove it from the ambit of S. 92. But whilst asserting the width of the field in which S. 92 may operate it is necessary to observe that not every transaction which employs the forms of trade and commerce will, as trade and commerce, invoke its protection."

44. With reference to the history of lotteries in England, the learned Judge quoted :

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

45. It is significant that American Congress faced with the difficulty to include gambling activity within the commerce clause of Article 1, Section 8 sub-section (3) of the Constitution of the United States in the interests of controlling its activity including ban or penalising a person, interpreted the commerce clause to include gambling activity. The relevant portion as recorded in RMDC case is quoted hereunder :

"Congress having made law regulating gambling activities which extended across the State borders, the question arose whether the making of the law was within the legislative competence of the Congress, that is to say whether it could be brought within the commerce clause. The question depended for its answer on the further question whether the gambling activities could be said to be commerce amongst the States. If it could, then it was open to Congress to make the law in exercise of its legislative powers under the commerce clause. More often than not gambling activities extend from State to State and in view of the commerce clause, no State Legislature can make a law for regulating inter-State activities in the nature of trade. If betting and gambling does not fall within the ambit of the commerce clause, then neither the Congress nor the State Legislature can in any way control the same. In such circumstances, the Supreme Court of America thought it right to give a wide meaning to the word 'commerce' so as to include gambling within the commerce clause and thereby enable the Congress to regulate and control the same. Thus in *Champion V. Ames* (1903 (188) US 321; 471 L. Ed. 492) the carriage of lottery tickets from one State to another by an express company was held to be inter-State commerce and the court upheld the law made by Congress which made such carriage an offence."

46. We have summarised the relevant portions of the various decisions given by the Australian, American and England Courts to show how they have received the lotteries in their countries, its nature, impact on public at large, their concern about its regulation and control. There can be no doubt, on the perusal of the said decisions that these courts considered lottery as gambling and even where such lotteries were permitted under the regulating power of the State but were not given the status of 'trade and commerce' as understood at common parlance. It is significant, within the fertile and exclusive zone of interpretation, when situation arose, to interpret the word 'commerce' which normally would not have included 'gambling' within it, in the wider public interest as to bring jurisdiction to the legislature to control or restrict 'betting and gambling' interpreted this also to come within commerce clause. This wider definition to the commerce clause was given by the American Court with an objective to control such lotteries rather giving absolute freedom to trade in it. Thus, the law in *Champion case* (supra) penalising even carriage of lottery tickets from one State to another was upheld. In cases *United States v. Kahriger*, (1953(345) U.S. 22; 97 L.Ed. 754) and *Lewis v. United States*, (1955(348) U.S. 419; 99 L. Ed. 475), the Supreme Court of United States held that there is no constitutional right to gambling.

47. We have referred to some of the quotations in ancient Dharmasastra as referred in RMDC case, we are shortly giving few more of the views in Dharmasastra on this point in issue. Kautilya in III-20 referred to in Chapter 26 of the *Dyutasamahvaya*, allowed gambling in a central place under States supervision as it led to the detection of thieves. According to the view of some others it was also allowed to be carried in the presence of master of the gambling hall and provided it yielded revenue to the king. If they indulge in gambling openly but gives to the king share in the stakes then such a person does not incur in punishment. *Rigveda* Chapter X Verse 34 records :

"Gambling is one of the most ancient vices."

48. Brahmapurna condemns it in the strong language. It says that the gambler's wife is always in distress and the gambler on seeing the condition of his wife is also worried. Some of the historical background of the lottery is recorded in Encyclopaedia Britannica 1980 Ed. at page 327-328 which is quoted hereunder :

"Lottery a scheme for the distribution of prizes to be determined by chance, was reputedly an invention of the Romans. Lottery in the modern sense originated in Italy during the middle ages spreading to France, Germany and Austria where rulers used them to raise revenue.First English lottery was drawn in 1569.However, lotteries encouraged mass gambling and fraudulent drawing and after they had been attackedparliament provided for their discontinuance in 1823. Thereafter large scale lotteries contrived to inhibit prosecution by giving large sums to charities.A century later following agitation for legalised lotteries, the Betting and Lotteries act, 1934, adopted the recommendation of royal commission and continued the prohibition on all lotteries."

In United States it records :-

"American colonial lotteries on the English pattern were used to raise money for public improvements and to insist in the financing of colleges including Columbia, Harvard, Dartmouth and Williams. In 1762 the Pennsylvania Provincial assembly denounced lotteries, declaring they were responsible for vice and idleness and were injurious to trade.In 1833 legislation enacted in Massachusetts, New York and Pennsylvania outlawed lotteries and early in 1834 similar action was taken by Ohio, Vermont, Maine, New Jersey, New Hampshire and Illinois. Provisions prohibiting legislatures from authorising lotteries in the future were inserted in many State constitutions.Congress responded by enacting legislation making it a federal crime to deposit lottery matter in the United States mails. In the Louisiana election of 1892, the lottery was the sole issue in the governor's contest. The anti-lottery candidate won and the lottery was outlawed."

49. In the Lotteries, Revenues and Social Costs : A historical examination of State-Sponsored gambling, it records in Boston College Law Review Vol. 34:11 at page 12 :-

"Two hundred years ago, government-sanctioned lotteries were common throughout America. Lacking a strong central government and burdened with a weak tax base, early Americans viewed lotteries as legitimate vehicles for raising revenue. Lottery proceeds were used to build cities, establish universities, and even to help finance the Revolutionary War. They were gradually abandoned throughout the 1800s as governments developed better forms of taxation. Lottery fraud became a concern and social problems stemming from excessive gambling developed. In 1893, the Librarian of Congress wrote of `a general public conviction that lotteries are to be regarded, in direct proportion to their extension, as among the most dangerous and prolific sources of human misery. Soon thereafter, federal legislation brought an end to the last remaining legal American lottery."

At page 22 if further records :

"From 1709 until 1826, the English Government conducted annual lotteries to raise revenue. These were so popular that they soon became a matter of concern. English lotteries were attacked for 'weakening the habits of industry,' diminishing 'permanent sources of the public revenue,' encouraging other forms of gambling, and being 'injurious, in the highest degree, to the morals of the people. Finally, in 1823, at about the same time that lotteries were beginning to be phased out in America, England abolished lotteries in that country."

At page 32 it further records :

"Until the early 1800s, there was little opposition to State conducted lotteries, State regulation, including bonding of operators and supervision of receipts, quieted opponents. Churches usually benefited from lotteries, so they were not quick to condemn. As the country's dependency on lotteries increased, however, so did the opportunity for abuse. Serious lottery opposition began to mount in the early to mid-1800s as part of general social reform that included movements for temperance, peace, women's rights, educational reform, prison reform and abolition of slavery. As one authority has noted :

In 1842, Democrats swept to power because of their opposition to lotteries. The lotteries in turn were portrayed merely as an adjunct to a corrupt monopolistic banking system dominated by the wealthy Whig power elite."

At page 70 it further records :

"Because legalized gambling leads to increased illegal gambling State-sponsored lotteries inevitably increase crime. Legalized gambling's impact on criminal behaviour, however, is not limited to an increase in illegal gambling. Perhaps the most serious concern is that legal gambling creates problem gamblers, and problem gamblers often turn to more serious criminal activity to support their habits."

50. From the references from Dharashastra, opinions of distinguished authors, references in the Encyclopaedia of Britannica and Boston Law Review and others, we find that each concludes, as we have observed, lottery remains in the realm of gambling. Even where it is State sponsored still it was looked down as an evil. Right from ancient time till the day all expressed concern to eliminate this, even where it was legalised for raising revenue either by the king or in the modern times by the State. Even this legitimisation was for the sole purpose of raising revenue, was also for a limited period, since this received condemnation even for this limited purpose. All this gives clear picture of the nature and character of lottery as perceived through the conscience of the people, as revealed through ancient scriptures, also by various courts of the countries. It is in this background now we proceed to examine, if lotteries are goods, could a contract for sale of such goods be conferred the status of trade and commerce as used in Chapter XIII of our Constitution.

51. Thus, now we proceed to examine what are lottery tickets ? What are the ingredients of a contract of sale of lottery tickets ? Whether its ingredients constitute it to be trade and to be such trade as to receive protection under our Constitution ? In other words, could such trade qualify to be a fundamental right or a right conferred by a Statute ? If it is a right out of creature of a Statute

could it not be regulated, curtailed or banned by the same Statute ? Whether a right spoken of "free trade" under Article 301 speaks about fundamental right or does it include trade of the nature we are concerned ? Whether mere legislation of a transaction by itself becomes 'commercium' of the nature as to qualify to be a trade as understood under Article 301.

52. In the Anraj case-I (supra), sale of lottery tickets was held to be 'goods', hence liable for sales tax. It holds :

"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. 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 capable of being transferred, assigned or sold and on their transfer, assignment or sale both these beneficial interest are made over to the purchaser for a price. 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 as such till then the lottery tickets constituted their stock-in-trade and therefore a merchandise and goods, capable of being bought or sold in the market."

53. In this case, neither there was any issue nor any contest, whether the sale of such lottery tickets would be a 'trade and commerce' or not within the meaning of Chapter XIII of our Constitution. This decision proceeded as if it is trade and commerce, hence after applying various decisions of this Court, right from Atiabari Tea Co. Ltd. (supra) to the later decisions on the touchstone of principle laid down therein on a question whether these 'lottery tickets' of others when subjected to sales tax while not imposing sales tax on the lottery tickets sold by the State of Tamil Nadu, are violative of Article 301 read with Article 304(a) of the Constitution being discriminative or not was held to be so. Hence, this case does not go beyond holding lottery tickets as 'goods' for the purpose of adjudicating the issue before us. It does not test nor there is any issue, whether sale of such 'goods', viz., lottery tickets would or would not be a 'trade or commerce' within the meaning of Chapter XIII of the Constitution.

54. So, now we proceed to examine what is 'lottery', what would be the ingredients in the 'sale of lottery tickets' and then to equate with other forms of contract pertaining to trade and commerce. Whether there is any striking difference between the two ? The "lottery" is defined as :

In Words and Phrases (Permanent Edn.) Vol. 25A at 439 :

"A 'lottery' is a species of gambling."

At Page 444 :

"The lottery statutes were enacted to suppress the widespread evil of gambling in lotteries and to allay and curb the gambling spirit of the public and thus prevent waste of money needed for more substantial purposes, the term 'lottery' as popularly and generally used referring to a gambling scheme in which chances are sold or disposed of for value and the sums thus paid are hazarded in the hope of winning a much larger sum, a scheme for the distribution of prizes by chance."

At page 445 :

"The term 'lottery' in law is of wide signification. In *Horner V. United States*, 13 S.Ct. 409, 147 U.S. 449, 37 L.Ed. 237, Mr. Justice Blatchford discussed various definitions of lottery, and among others approved that found in Worcester's Dictionary, in which it is defined to be "game of hazard in which small sums are ventured with the chance of obtaining a large value, either in money or other articles."

At page 491 :

"The term "tickets" when speaking of the sale of lottery tickets, is equivalent to "chances".

At the same page :

"In a general sense, "lottery tickets" are more in the nature of chooses in action than merchandise, being in some respects memoranda of conditional premises to pay."

State v. Mabrey, 60 N.W. 2d 889, 893 :

"Generally, to constitute 'lottery' there must be a prize awarded by chance for a consideration with no infusion of skill."

Common Wealth v. Luad, 15A.2d 839, 840, 841, 843, 845 :

"An artifice, no matter how new, is within the condemnation of the law against lotteries if it, in effect, embodies the principle of a 'lottery' and operate as such."

In *Law Lexicon*, P. Ramanatha Aiyar, 1997 Edn., at 1151 :

"Scheme for the disposal or distribution of property by chance. The term "lottery" has not technical meaning in the law distinct from its popular signification. A lottery is a scheme for the distribution of prizes by chance."

In *Words and Phrases*, Butterworths, 3rd Edn. at p. 70 :

"A lottery has been described as a scheme for distributing prizes by lot or chance."

At P. 71 :

".....It must not be entirely forgotten in the construction of these Acts of Parliament [see now the Lotteries and Amusements Act, 1976] that the evil which the lottery law has sought to prevent was the evil which existed where poor people with only a few pence to feed their children would go and put these few pence into a lottery and lose them, and this sociologically was a bad thing..."

In *Stroud's Judicial Dictionary*, 5th Edn., vol. 3 at p. 1507 :

"In Webster's Dictionary a lottery is defined to be 'A distribution of prizes by lot or chance' - and a similar definition is given in Johnson. Such definitions are, in our

opinion, correct."

In Black's Law Dictionary, 6th Edn., at p. 947 :

"A chance for a prize for a price. A scheme for the distribution of a prize or prizes by lot or chance, the number and value of which is determined by the operator of lottery."

55. So, we find three ingredients in the sale of lottery tickets, namely, (i) prize (ii) chance and (iii) consideration. So, when one purchases a lottery ticket, he purchases for a prize, which is by chance and the consideration is the price of the ticket. The holder of such ticket knows, the consideration which he has paid, may be for receiving nothing. However, there are few who may be lucky to receive the prize which is just by chance. The question is, could such transaction be termed as trade or commerce ? Part XIII of our Constitution deals with trade, commerce and intercourse within the territory of India. It does not define "trade and commerce". Thus, we have to take the word 'trade' as it is understood in common parlance. *Municipality of Chopda v. Motilal Manakchand, AIR 1958 Bom. 487, 489 : ILR 1945 Kar. 409.*

"The connotation of 'trade' is not only limited to an occupation which primarily concerns itself with sale and purchase of goods. Pursuit of a skilled employment with a view to earn profit, such employment not being in the nature of a learned profession or agriculture must be regarded as engaging in 'trade' within the meaning of Article 276 of the Constitution. A skilled occupation which involves the application of manufacturing processes to a commodity submitted to the person carrying on the occupation must be regarded as trade."

'Trade' is defined in Black's Law Dictionary, 6th Edn. at page 1492 :

"Trade. The act or the business of buying and selling for money; traffic' barter. May. Sloan, 101 U.S. 231, 25 L.Ed. 797. Purchase and sale of goods and services between businesses, states or nations. Trade is not a technical word and is ordinarily used in three senses : (1) in that of exchanging goods or commodities by barter or by buying and selling for money; (2) in that of a business occupation generally; (3) in that of a mechanical employment, in contradistinction to the learned profession, agriculture, or the liberal arts. *People V. Polar Vent of America, Inc.* 10 Misc. 2d 378, 174 N.Y.S. 2d 789, 793. An occupation or regular means of livelihood and is business one practices or the work in which one engages regularly. One's calling; occupation, gainful employment; means of livelihood. *People V. Carr*, 163 Cal App. 2d 568, 329 P2d 746, 752. Transaction involving purchase and sale of stocks, bonds, or other securities."

56. Since it is relevant for the purpose of interpretation of Chapter XIII of the Constitution as it uses both the words Trade and commerce' to refer to the word 'commerce'. The Black's Law Dictionary, 6th Edn., at p. 269 the word 'commerce' is defined :

"The exchange of goods, productions, or property of any kind; the buying, selling and exchange of articles."

57. On the other hand, 'trade' is an exchange of any article either by barter or for money or for service rendered. In other words, it is exchange between two parties, one who tenders the

consideration and the other who returns for this consideration, goods, money service or such other thing. Party paying consideration in any trade is aware for what he is paying the consideration. He receives for the consideration an ascertained thing or service. It is neither hypothetical nor it is a contract for any unascertained thing. In any case, there is no element or ingredient of chance under any `trade'. This element of chance makes the lottery a gambling. On the other hand, an absence of chance inherently attached to any contract coupled with some skill makes it to be a `trade'. So, trade is always associated with some skill while in lottery there is absence of said predominantly and essentially with the ingredient of chance. Thus, in nutshell in `lottery' there is no skill and element of chance, in `trade' it is for exchange of something for consideration where there is absence of chance and inherently with element of skill.

58. While deciding the validity of Section 21 of a New South Wales Statute called the Lotteries and Art Unions Act, 1901-1929, qua, Section 92 of the Commonwealth of Australia Constitution Act, as aforesaid, the learned Evatt J. with reference to sale of lottery tickets held :

"If they are goods or commodities they belong to a very special category, so special that in the interests of its citizens the State may legitimately exile them from the realm of trade, commerce or business."

McTiernan, J. as aforesaid, on the same subject further recorded :

"...It is gambling to buy a ticket or share in a lottery. Such a transaction does not belong to the commercial business of the country...."

Taylor, J. held :

"...But whilst asserting the width of the field in which S. 92 may operate it is necessary to observe that not every transaction which employs the forms of trade and commerce will, as trade and commerce, invoke its protection..."

59. Learned counsel for the States challenging the validity of the Act submits, since there is marked difference between our Constitution and the Australian Constitution and Constitution of the United States of America, hence we should not apply the principles of the decision of those Courts. It was pointed out, there is nothing in the American Constitution corresponding to Article 19(1)(g) or Article 301 as in our Constitution. Similarly, in the Australian Constitution there is no provision as we have in our Articles 19(6) or Articles 302, 304, in contrast Section 92 of the Australian Constitution is free without any such limitations. This submission was taken note by our Court in the case of RMDC (supra). The reference of these judgments of these foreign Courts were only to take the stock of the view as to with what vision they judged and what they meant and understood while dealing with the sale of lottery tickets. Nevertheless this apart, if reasoning of these decisions are to be tested, qua, our constitutional provisions, they should, of course, be tested with circumspection. As said, we have referred to these decisions, not for interpreting the provisions of our Constitution but only to know the nature and character of lotteries as understood in those countries to which we find there is no difference than what is understood in our country. It is in this background, this court in RMDC (supra), after recording the activities of lotteries which is condemned in this country from the ancient times and also taking note of views of the courts of other countries, found that they equally condemned, discouraged and looked it down with disfavour, viz., in England, Scotland, the United States of America and in Australia. Our Court records :

"...that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man... could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Art. 19(1)(g). We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Art. 301."

It further recorded :

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

60. So this decision concludes that our constitutional makers could never have intended, with reference to the transaction of lottery tickets, to raise it to the status of trade, commerce or intercourse. The purpose of Articles 19(1)(g) and 301 could not possibly have been to guarantee freedom of gambling. To dissolve principle laid down in RMDC case (supra), on behalf of such States challenging the validity of the Act, it is submitted that the RMDC case was concerned with the lotteries covered by Entry 34, List II and not the lotteries organised by the State which is covered by Entry 40, List I, hence it would have no application. In addition, they referred to the case of Gherulal Parekh (supra), to submit that what is recorded in RMDC case (supra) was narrowly interpreted in this case. The question in Gherulal case was, whether an agreement of partnership with the object of entering into wagering transactions was illegal within the meaning of Section 23 of the Indian Contract Act ? It was held that although a wagering contract was void and unenforceable under Section 30 of the Contract Act, it was not forbidden by law and an agreement collateral to such a contract was not unlawful within the meaning of Section 23 of the Contract Act. What is narrowed down, if at all, was with reference to morality aspect based on ancient scriptures. It holds after referring the RMDC case :

"The moral prohibitions in Hindu Law texts against gambling were not legally enforced but were allowed to fall into desuetude and it was not possible to hold that there was any definite head or principle of public policy evolved by courts or laid down by precedents directly applicable to wagering contracts."

61. This decision had not diluted the law laid down with respect to the finding that gambling would not fall within the meaning of word 'trade' under Article 301 of the Constitution or to have diluted that such transaction would not get protection under Article 19(1)(g). What is said is that moral prohibitions in Hindu Law text against gambling were not legally enforced. It is true, within the moral format, in a strict sense, if it was to be legally enforced there could not have been any legalised gambling. But it cannot be doubted and it is recognised by all the countries that gambling by its very nature promises to make poor man a rich man, to quench the thirst of a man in dire economic distress or to a man with bursting desire to become wealthy overnight draws them into the

magnetic field of lotteries with crippling effect. More often than not, such hopes with very remote chance encourage the spirit of reckless prosperity in him, ruining him and his family. This encouraging hope with the magnitude of prize money never dwindles. Losses and failures in lotteries instead of discouragement increases the craze with intoxicating hope, not only to erase the losses but to fill his imaginative coffer. When this chance mixes with this utopian hope, he is repeatedly drawn back into the circle of lottery like drug addicts. Inevitably, the happiness of his family is lost. He goes into a chronic state of indebtedness. In this context, it is said that how the Constitution makers could ever have conceived to give protection to gambling under Article 19(1)(g) or Article 301 of our Constitution.

62. Before considering the submission, the difference between the lottery organised by the State and other lotteries, on which basis the applicability of the principle of RMDC case (supra) is sought to be distinguished, we would like to refer to another realm of State activity, the transaction of which is in the nature of trade, viz., the manufacture and sale of potable liquor, but still this Court held it to be *res extra commercium*. In *Krishan Kumar Narula v. The State of Jammu and Kashmir and others*, 1967(3) SCR 50 at p. 54, the submission was that potable liquor is noxious and dangerous to the community and subversive of its morals. With reference to potable liquor a challenge was made, the Court held :

".....that dealing in noxious and dangerous goods like liquor was dangerous to the community and subversive of its morals....Such an approach leads to incoherence in thought and expression. Standards of morality can offer guidance to impose restrictions, but cannot limit the scope of the right."

63. The Court held that right to trade in liquor was business. However, in *Khoday Distilleries* (supra) it reversed the decision of *Krishan Kumar* case (supra) by holding that right to trade in liquor was not constitutionally protected. However, the Court in this case clearly made three exceptions, (a) trade in alcohol is not *per se* prohibited for medicinal and industrial uses; (b) even though trade in potable alcohol was *res extra commercium* the State itself may sell potable alcohol, set up a monopoly business for that purpose and maximise its revenue by any mode of sale; and (c) the State may on a non-discriminatory basis permit sale of alcohol through private parties. In *Khoday Distilleries* (supra) this Court held :-

"The right to practice any profession or to carry on occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium* (outside commerce). There cannot be business in crime. Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra commercium* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited. For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res commercium*. The restrictions and limitations on the trade and business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions

and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others. The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The *State cannot on that account be said to be carrying on an illegitimate business. It carries on business in products which are not declared illegal* by completely prohibiting their production but in products the manufacture, possession and supply of which is regulated in the interests of the health, morals and welfare of the people. It does so also in the interests of the general public under Article 19(6). The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the *mere fact that the State levies taxes and fees on trade or business in liquor or derives income from it, does not make the right to carry on trade or business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited.*"

[Emphasis supplied]

This decision clearly lays down and demonstrates that manufacture, sale, purchase of potable liquor; which State carries on at common parlance is trade and is a good still held to be an article different from goods and article which are *res commercium*. This holds further that transactions in potable liquor by sale and in spite of levy of taxes, fees on this trade or business, it is held to be *res extra commercium*. Such transactions are also not prohibited, rather authorised by law. Hence, merely there is sanction in law for a transaction or is legalised not prohibited, it would not by itself make it to be *commercium*. Entry 62 of List II of the Seventh Schedule refers to taxes on betting and gambling which inherently permits gambling. Thus, it could be said that gambling is recognised and authorised by law, may be through regulations, licences etc. Thus, imposition of tax on gambling conceives of gambling, of course has to be legal to impose tax on it. In this background, we proceed to examine State lotteries (gambling), whether could it still qualifies to be 'trade or commerce' within the meaning of Chapter XIII of our Constitution or could 'trade' or such transactions seek protection under the protective umbrella of constitutional provisions as it to be free 'trade' ?

64. Next submission is, once the State lotteries are taken out of Entry 34, List II it is no more in the realm of gambling. Not only, because the two types of lotteries find place in two different Lists of the Seventh Schedule of our Constitution, but it is also distinguished out as a crime under Section 294A, I.P.C., further it being organised by the sovereign State by taking all conceivable measures to dismantle any distrust from the mind of participants and its income goes to enhance State revenues. In support, reference is made to the Suman Enterprises (supra) which laid down the conditions for organising State lotteries which ultimately, with some modifications and additions is incorporated in Section 4 of the Impugned Act. This Act provides stringent measures for the compliance of its

conditions. The first step in this regard is Section 6 under which those lotteries contravening the conditions would be prohibited by the Central Government. This is followed by penal consequences to such of the Head of the Department, whose department of the Government is involved in contravention, with rigorous imprisonment for two years under Section 7(1). Penal consequences similarly is also under sub-section (3) to the agents or traders contravening its conditions. It is submitted with this and it having received the authority of law, such State organised lotteries no more remain in the realm of gambling and are *res commercium*. In support, reliance is placed on Fateh Chand case (supra). Submission is that this decision on 'money lending' business holds that there are 'aspects of business or trade', which in one sense may be noxious when conducted by a given class of persons but when entrusted to another who are well organised it is rationalised and is no more noxious. Just as all 'money lenders and money lending' would not necessarily be noxious or pernicious so also all items falling under betting and gambling (State lotteries is contract with other lotteries) would not be pernicious. This submission, in our considered opinion, is misconceived. This case referred to the village based, age-old, feudal pattern of money-lending given to the labourer, the marginal tiller and the broken farmer etc. with unvouched usurious interest which brought such persons into perpetual labour, hereditary service etc. of the lender. It is because of this it was said to be a pernicious species of money lending flourishing in the rural and industrial areas of our country. In contrast it was held that money lending when through recognised financial institutions, banks etc., it is legitimate and valid commercial credit and financial dealing which could not be said to be pernicious species of money lending. We do not find that there could be any equation or parity with this decision and with the question to which we are adverting to. This case itself records at page 850:

"We do not downright denounce all money-lenders but the law-makers have, based on socio-economic facts, picked out a special class of money-lenders whom they describe as unscrupulous."

When this decision referred to about pernicious species of money-lending, it confined this adjective to a limited class of person, but it did not hold, the business of money-lending as such to be pernicious in nature. It held that pernicious because some class of money-lenders made the poor artisan, bonded labourer etc. a perpetual debtor. Thus, the submission, what otherwise was pernicious, was held in that case to be valid and legitimate when executed by well recognised financial institutions and banks, hence when lotteries conducted by one set of hand could be pernicious but when organised by the State with the carved out conditions with stringent check it no more remains pernicious or gambling, cannot be accepted.

65. For this, let us examine, why lotteries have been held to be pernicious or gambling and what element which constitute it to be is filtered out to take it out of gambling jacket. In the matter of money-lending the very transaction of money-lending or borrowing is not held to be pernicious in Fateh Chand case (supra), but only the manner in which certain class of person were operating made it pernicious. Thus, this case would render no help to the challenge. Next, the historical background was referred to distinguish between two forms of lotteries. The State lotteries are not penal offence, which has been understood and recognised so since 1870 when Section 294A, IPC was brought into the Indian Penal Code, 1860. This distinction has also been recognised even in the Government of India Act, 1935 where the State lotteries have been separately placed under Entry 48, List I but other form of lotteries were placed under Entry 34, List II, and the same continues even in our Constitution when State lotteries fall under Entry 40, List I while other lotteries fall under Entry 34, List II. Thus, it is submitted that the State lotteries are a distinct class, and is run under the authority of law hence could neither be pernicious nor *res extra commercium*.

66. For this, we revert to scrutinize as to what made lotteries gambling and how State lotteries cleanses this character. As we have already recorded, the difference between gambling and the trade that a gambling inherently contains a chance with no skill, while trade contains skill with no chance. What makes lottery a pernicious is its gambling nature. Can it be said that in the State organised lotteries this element of gambling is excluded? There could possibly be no two opinions that even in the State lotteries the same element of chance remains with no skill. It remains within the boundaries of gambling. The stringent measures and the conditions imposed under the State lotteries are only to inculcate faith to the participant of such lottery, that it is being conducted fairly with no possibility of fraud, misappropriation or deceit and assure the hopeful recipients of high prizes that all is fair and safe. The assurance is from stage one to the last with full transparency. No doubt holding of the State lotteries for public revenue has been authorised, legalised and once this having been done it is expected from the State to take such measure to see that people at large, faithfully and hopefully participate in larger number for the greater yield of its revenue with no fear in their mind. The Act further ensures by virtue of Section 4(d) that the proceeds of the sale of such lottery tickets is credited to the public accounts of the State. This is to give clear message to the participants that the proceeds is not in the hands of individual group or association but is ensured to be credited in the State accounts. But, as we have said, this by itself would not take it outside the realm of gambling. It remains within the same realm. In this regard, there is no difference between lotteries under Entry 34, List II and a lottery organised by the State under Entry 40, List I. When character of both the State organised lotteries and other lotteries remains the same by merely placing the apparel of the State with authority of law, would not make any difference, it remains gambling as element of chance persist with no element of skill. Even other lotteries under Entry 34, List II could only be run under the authority of the State or the law of the State. Only difference is in one case, authority is that of State and in other, the Parliament. That is why, what is excluded from the penal consequences under Section 294A, IPC is the lotteries authorised by the State, not merely lotteries organised by the State. So, on the reasoning as put forward even lotteries under Entry 34, List II cannot be said to be pernicious. The lotteries authorised by the State is also has a sanction in law. As we have said, a gambling may be taxed and may be authorised for a specified purpose, but it would not attain the status of trade like other trades or become *res commercium*. No gambling could be *commercium* hence in our considered opinion the principle of RMDC case (supra) would equally be applicable even to the State organised lottery. In no uncertain terms the said decision recorded that the constitutional makers could never have conceived to give protection to gambling either under Article 19(1)(g) or it as a trade under Article 301 of the Constitution.

67. Next it is submitted is that the executive power of the State extends not only to matters under Article 162 but also to the field of proviso (b) of Article 298 of the Constitution, thus confers extra territorial jurisdiction. But for Article 298 State could not have organised even its own lotteries until Parliament enacts a law. Thus, when the State runs its own lotteries under Article 298, it does only because it is 'trade and business'. The entrustment of executive power to the State is for carrying on any trade or business. Under the Constitution, the word 'trade' used in Article 298 should be given the same meaning as is given to it under Article 301. If Article 301 does not encompass State lotteries as 'trade', it would also not fall under Article 298 then the State would also have no power to run its own lotteries, until the Parliament makes the law. Reference is made to the Anraj case-I (supra), in which holding of State lotteries by the State under its executive power was held to fall under Article 298. Thus, it is submitted that the lotteries organised by the State has to be treated as trade. Mr. Rakesh Dwivedi, learned counsel for the State of Manipur, further submits that under the Government of India Act, 1935 and the draft Constitution by the Constituent Assembly there was no provision like Article 298. Draft Article 266 (now Article 289) provided for trade and business of

States being subject to Union Taxation. This led in the Constituent Assembly a considerable debate. The Provinces were protesting regarding this. As a consequence not only draft Article 266 underwent modification, but during the last stages Article 298 was inserted as a compromise. This was brought in, so that the States could carry on its 'trade and business' throughout the country even with respect to subject matter covered by List I and earn more revenue. He submits that proviso (b) to Article 298 is not merely a repetition of Article 246 read with entries of List I of the Seventh Schedule but was for a purpose to enhance the revenue earning of the States. Mr. R.N. Trivedi, learned Additional Solicitor General, submitted that Article 298 does not confer any plenary right on any State to carry on any trade or business, even though this Article does not provide specifically, but in substance it is subject to other provisions of the Constitution, like, a State cannot without obtaining a licence under the provisions of the Industries Development Regulation Act start an industry mentioned in its Schedule. Similarly, a State cannot insist as a matter of right to sell liquor in another State where there is complete prohibition. Thus, this extended executive power of the State to carry on any trade or business for any purpose should be a trade which falls under the scheme of the Constitution and not what is impliedly prohibited. Article 298 is subject to Parliamentary legislation, it is also subject to provisions of Articles 245 and 246. He submits that the provisions of Article 298 should be read down to be subject to provisions of Article 53 and 258 of the Constitution. Meaning to the phrase 'trade and business' under Article 298 should be given with reference to Article 19(1)(g). Thus, Article 298 does not refer to 'trade' which are not so recognised under Article 19(1)(g). Mr. R.P. Goel, learned Advocate General of U.P., also submitted to the same effect. Repelling the part of the argument, in respect of Article 258, it is submitted by Mr. Dwivedi that under Article 258(1), the President can entrust powers to the State Government only with the consent of the State Government and further it starts with the words "notwithstanding anything in this Constitution" but there is no non-obstante clause under Article 258(2). Thus, Article 258(2) would be subject to Article 298. When Article 298 inhibits delegation of powers to State Government then Article 258(2) cannot be used to submit entrustment of power by the Union to the State.

68. To test the submission, it is necessary to examine whether the words 'trade or business' used in Article 298 should be given the same meaning as the words 'trade and commerce' used under Article 301.

69. Before we do, we proceed to examine the Anraj case-I (supra). There the Government of Maharashtra and other States requested the Union to authorise them to conduct their lotteries, which was authorised, subject to the condition that their lottery tickets shall not be sold in another State without express consent of the other State concerned. This was done through Presidential order under Article 258(1), which also entrusted the Government of Maharashtra the executive power of the Union, in respect of lotteries. On this basis, the Government of Maharashtra banned the sale of lottery tickets in its State of other States. This was challenged. This Court held that the Government of Maharashtra cannot purport to ban the sale of lottery tickets of other States by virtue of entrustment of the executive power of the Union under Article 258(1). This case records :

"It appears that the Government of Maharashtra and various other State Governments requested the Union Government to authorise them to conduct lotteries for the purpose of "finding funds for financing their development plans". Such authorisation was, of course, *strictly not necessary* in the absence of a law made by Parliament pursuant to Entry 40 of List I of the Seventh Schedule to the Constitution. Article 298 of the Constitution extends the executive power of the Union and each State to the carrying on of any trade or business and the acquisition, holding and disposal of

property and the making of contracts for any purpose, with the stipulation that if the trade, business or purpose is not one with respect to which Parliament may make laws, the said executive power of Parliament shall be subject in each State to legislation by the State..."

[Emphasis supplied]

It further records :

"....Reading and considering Articles 73 and 298 together, as they should indeed be read and considered, it is clear that the executive power of a State in the matter of carrying on any trade or business with respect to which the State Legislature may not make laws is subject to legislation by Parliament but is not subject to the executive power of the Union. That is why we mentioned earlier that the *Government of a State is not required to obtain the permission of the Union Government in order to organise its lotteries, in the absence of Parliamentary legislation...*"

[Emphasis supplied]

This merely records that there was no need for a State to obtain the permission of the Union for organising State lotteries, they could have done so under Article 298. Here there was no issue, whether the words 'trade and commerce' as used under Article 301 and the words 'trade and business' used under Article 298 should be given the same meaning or whether State lotteries are gambling or if it is gambling, would it still be covered by the words 'trade and commerce' under Article 301. In view of what is held in this Anraj Case-I, there could be no doubt that the State could organise its own lotteries by virtue of its executive power under Article 298 until law is made the Parliament.

70. In other words, the question raised is, once it is covered by proviso (b) to Article 298, necessarily it would fall under Chapter XIII of the Constitution. Reply is that Article 298 does not confer any plenary right on any State to carry on any trade or business but it is subject to other provisions of the Constitution and for the other provisions, he referred to Articles 53 and 258 to submit that Union can entrust power to the State Government with the consent of the State Government under Article 258(1). We feel that it is not necessary to go into this as this was considered in the Anraj case-I (supra). In that case, though the Presidential Order was issued under Article 258(1), it was held that this Presidential Order conferring the State to run its own lotteries was not necessary, as State could have exercised its executive power under Article 298 and the State cannot prohibit lotteries of other States under the executive power entrusted to it by the President.

71. This brings us back to Article 298 to see whether there is any significant difference between the words used under Article 298 and Article 301. This difference could indicate the scope and periphery of the field of operation of these two Articles. Relevant portion of Article 298 is quoted hereunder :

"298. *Power to carry on trade, etc.* - The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose :

Provided that -

a) xxx xxx xxx

b) the said executive power of each State shall, in *so far as such trade or business or such purpose* is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament."

[Emphasis supplied]

The executive power of the State is referable in terms of words used therein "to the carrying on of any trade or business....and the making of contracts for any purpose." Title of this Article significantly is "Power to carry on `trade', etc."

Article 301 is quoted hereunder :

"301. *Freedom of trade, commerce and intercourse.* - Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

[Emphasis supplied]

In difference, we find that the words used under this Article are "trade, commerce and intercourse". We find Article 301 is confined to trade and commerce while Article 298 refers to trade and business and to the making of contracts for any purpose. The use of the words `business' and `contracts for any purpose' and its title "....trade, etc." makes the field of Article 298 wider than Article 301. Significantly, the different use of words in the two Articles is for a purpose, if the field of two Articles are to be the same, the same words would have been used. It is true, as submitted, that since `trade' is used both in Articles 298 and 301, the same meaning should be given. To this extent, we accept it to be so, but when the two Articles used different words, in a different set of words conversely, the different words used could only be to convey different meaning. If different meaning is given then the field of the two Articles would be different. So, when instead of the words `trade and commerce' in Article 301, the words `trade or business' are used it necessarily has different and wider connotation than merely `trade and commerce'. `Business' may be of varying activities, may or not be for profit, but it necessarily includes within its ambit `trade and commerce' so sometime it may be synonymous but its stretches beyond `trade and commerce'.

The word "Business" is defined as :

In Stroud's Judicial Dictionary, 5th Edn.:

"Business has a more extensive meaning than the word `trade'".

In Words and Phrases, Butterworths, 3rd Edn.:

"`Business' is a wider term than `trade', and not synonymous with it, and means almost anything which is an occupation as distinguished from a pleasure. However, the term must be construed according to its context. (47 Halsbury's Laws (4th Edn.) para 2).

'Business' includes a professional practice and includes any activity carried on by a body of persons, whether corporate or unincorporate. (Medicines Act 1968, S. 132(1)).

'Business' includes a profession and the activities of any government department (including a Northern Ireland department) or local or public authority. (Sale of Goods Act 1979, S. 61(1))."

Law Lexicon, 1997 Edn.:

"The word business is of large signification, and in its broadest sense includes nearly all the affairs in which either an individual or a corporation can be actors."

"Business" and "Trade" :

"...There may, however, be a "Business" without pecuniary profit being at all contemplated. In such a connection, "Business" is a very much larger word than "trade" and the word "business" is employed in order to include occupations which would not strictly come within the meaning of the word "Trade",,,The words "Trade" and "business" do not mean the same thing....The word "trade" is often confined to buying and selling commodities. Where to draw the line between what is a profession and what is a trade is a matter which it is not possible to deal with any general definition. "Business" is a much wider term than trade. The word "business" at least covers a continuous occupation involving liabilities to others. In re A Debtor, (1927) 1 Ch 9 : 96 LJ (Ch) 28 (CA)."

All this clearly indicates, the word 'Business' is wider than the words 'trade and commerce'. This apart, Article 298 further uses the words "contracts for any purpose", so far lottery tickets are concerned they are held to be 'goods' and when they are sold it is under a contract, between seller, the State, or its agent and the purchaser buying for a consideration. The consideration is the price for which it is purchased. Thus, such a contract would qualify to be the 'contract of any purpose' used in Article 298. Use of the words 'business' and 'contract' widens the scope of State's activity under Article 298. This widening is for a purpose and not to restrict only to 'trade'. No doubt, it includes 'trade' also within its field of activity. So every 'trade' what is covered by Article 301 would be within the field of Article 298, may be this Article was brought in as a compromise formula to widen the scope of the States revenue earning activities, as submitted by Mr. Dwivedi, but this cannot be said to be confined to the trade only, otherwise there was no need to use further words 'business' and 'contract for any purpose'. Restrictive interpretation of Article 298, firstly, would make these additional words superfluous and, secondly, it would curtail State executive activities which is intended to be enlarged. Thus, any other transaction or activity other than 'trade' would be 'business' of that State, which would be apart from the 'trade' would be 'business' of that State, which would be apart from the 'trade' which thus, in our opinion, would include activity, to run State lotteries. Thus, the sale of lottery tickets by the State Government, even if not trade as understood in common parlance as it is gambling, still it would be covered within the executive power of the State under Article 298 being activity in the nature of 'business' and would in any case also be covered by the words 'contract for any

purpose'. Hence the submission that the sale of State lottery tickets is necessarily 'trade and commerce' as the word 'trade' used under Article 301, the same meaning of this word 'trade' is to be given in Article 298 cannot be accepted. So if State lotteries are gambling, it would not be a 'trade' in any case, would not qualify to be 'trade and commerce', as used in Article 301 and if that be so, neither the individual, far less the State can seek enforcement of such right to be declared free throughout the territory of India. If it is construed the Constitution confers on it, would amount to conferring right to gamble throughout the territory of India. Thus, the right of sale of lottery tickets, whether by the State or others could neither be a fundamental right nor a right under Article 301. No one could seek it as a fee 'trade' like other 'trades', even though it may have the authority of law. This authorisation under the Act is solely for the purpose for the States to earn revenue.

72. So far as Anraj case-II (supra) is concerned, it held that 'lottery tickets' to be 'goods' and thus subject to sales tax. We have already held that there may be certain transactions or commodity which are goods and subject to sales tax but still it would not qualify to be 'trade'. In this Anraj case-II (supra) also there was no issue, whether sale of such lottery tickets would be trade and commerce within the meaning of Chapter XIII of the Constitution or not. Once it was held to be good, this case proceeded to adjudicate whether by different measure to tax on the lottery tickets of the home State and of other State there is any violation of Article 304 or not. Neither there was any occasion nor it has referred to the Constitution Bench decision of this Court in RMDC case (supra). So far in the present case, neither we are concerned with any such taxation nor we are entering into that realm to test any violation of Article 304 as it is not an issue here.

73. For the aforesaid reason, we have hesitation to hold that sale of lottery tickets organised by the State could not be construed to be trade and commerce and even if it could be construed to be so, it cannot be raised to the status of 'trade and commerce' as understood at common parlance or 'trade and commerce' as used under Article 301. Hence, question of violation of either Articles 301 and 303 does not arise. Strong reliance was placed on Khazan Singh case, (supra), if a State has a power to carry on trade in its own State it can carry on the same in every part of India. For the finding we have recorded that State lotteries (Gambling) would not be 'trade', this case would have no application. Hence, for these reasons, it is not necessary to go into various submission pertaining to violation of Articles 301 to 303 of Chapter XIII of the Constitution.

74. Next submission challenges Section 5, to be discriminative and violative, both of Article 14 and Article 303 of the Constitution. The discrimination is based on two counts, namely, (1) discrimination between the Bhutan lotteries (Foreign) and the lotteries of the Indian States and (2) discrimination between one State from another State. Challenge is also on the ground of excessive delegation and delegation of essential legislative power of the Parliament without any guidelines. Dealing with discrimination, it is submitted, though it impose restrictions on the lotteries organised by the State Government, it does not impose any restrictions on the Bhutan lotteries. Reference was made to the treaty agreement dated 28th February, 1995 between the Government of India and the Kingdom of Bhutan which came into force with effect from 2nd March, 1995 and which is to remain in force for a period of 10 years. Next reference was to the Union circular letter dated 20th January, 1998 sent to all the States and Union Territories asserting that Section 5 covers only State Lotteries and would not extend to Bhutan lottery. It also referred to the office memorandum of the Ministry of External Affairs, Government of India, dated 27th April, 1998, by which the Home Ministry was requested to advice the State Governments and the Government of Union Territories to allow the sale of Bhutan lotteries in their States. Para 47 of the affidavit of Union of India dated

27th November, 1998 referred and records, "Consequently, the Central Government decided to enact an appropriate legislation to regulate the conduct of lotteries so as to protect the poor and gullible persons....". The submission is, so far the sale of Bhutan lottery tickets, Union stand is clear that Bhutan lotteries are to be sold throughout India without any conditions contrary to the placing of stringent conditions on the State lotteries which is discriminatory. On the one hand, under the garb of regulating these lotteries, power to ban lotteries was delegated to the 'State' so as to protect the poor and gullible persons, on the other hand to permit Bhutan lotteries to be sold throughout India without any condition clearly demonstrates that consideration for poor and gullible a lost sight.

75. It is true that perusal of these various office memorandum, circular letters and the affidavit of Union of India depicts the state of uncertainty in the Union and so took its oscillating stand, as it stood then and now. Then stand was, since Bhutan lottery is under a treaty, all States should permit its sale, now the stand is such lottery would fall under Entry 34, List II hence would be subject to the law of the State. So far the submission that Bhutan lottery cannot be controlled under the impugned Act has merit. Impugned Act is confined to the State organised lotteries under Union list, under Entry 40, List I. However, submission on behalf of the Union, which is also incorporated in its aforesaid affidavit, is, as per agreement, the sale of Bhutan lottery tickets in India and sale of Indian Government/State Government lottery tickets in Bhutan will be subject to the relevant laws as may be enforced in the territory of Kingdom of Bhutan and India, as the case may be. Thus, under the terms of the present treaty itself, the sale of Bhutan lotteries has been agreed and subjugated to be, subject to the relevant laws in India. So far this treaty, there is no law yet framed by the Parliament under Entry 14, List I. Admittedly, Bhutan lottery does not fall under Entry 40, List I. Thus, the restrictions and conditions imposed under the impugned Act would only apply to the State lotteries and not to the lotteries of the Kingdom of Bhutan. Next, it has to be seen that when the treaty makes it obligatory for the Bhutan lotteries to be subject to the Indian laws, and in the absence of any law by the Parliament pertaining to the treaty under Entry 14, List I, under which class of lottery it would fall and to which law it would be subjected to. We also make it clear, in the present case, the aforesaid treaty with the Kingdom of Bhutan is not subject to any challenge. Let us examine first the relevant Entries of the lists under Seventh Schedule of the Constitution. It is admitted that it does not fall under Entry 40, List I. Another relevant Entry is Entry 14, List I which refers to treaty. This treaty could be under this Entry, but in the absence of any law by the Parliament it would be governed by the terms of the treaty itself. Entry 41, List I refers to the trade and commerce with the foreign country. Even if it falls under it, in the absence of the law by the Parliament it would be governed by the terms of the treaty. Entry 42, List I deals with inter-State trade and commerce, under which it will not fall.

76. The sale of lottery tickets of Bhutan but for the aforesaid stipulation in the treaty it possibly could have been said it cannot be subjected to the laws of lotteries in India. But once treaty itself stipulates it to be subject to any law in India, then if the sale of Bhutan lottery tickets are not State organised lotteries, it necessarily falls under other lotteries under Entry 34, List II. There is no other Entry pertaining to lottery. Thus, it necessarily follows that its sale within India will be subject to the laws of the State as is applicable under this Entry. In other words, if the State prohibits sale within its State not only sale of its own lottery but every other lottery, then the sale of lottery tickets of Bhutan will have to be subject to the laws of that State. Thus, prohibition to other lotteries will equally be applicable to the sale of Bhutan lottery. In the present case, learned Additional Solicitor General, Mr. Vaidyanathan, also subscribed to this interpretation on behalf of the Union. As we have said, in the absence of law by the Parliament, so far the treaty with the said stipulation, there could possibly be no other interpretation. This interpretation further eliminates possible discrimination which is subject of attack in the present case. Thus, the Bhutan lottery could not be said to be

privileged or it, in any way, discriminates with other State lotteries.

77. The second limb of argument pertains to discrimination between one State and the other. We having held above, that the State lotteries cannot be construed to be 'trade and commerce' within the meaning of Article 301, there could possibly be no question of any discrimination or violation of Article 303. Even under Article 14, there, possibly, could have been argued discrimination, if the discretion was left on the States to choose as to which State it likes to prohibit; but in the present case in Section 5 the State could only exercise its discretion in case it decides to prohibit sale of lottery tickets of every other State. If this is so, there could possibly be no conceivable discrimination. Hence, we do not find there is any discrimination either on account of Article 303 or Article 14 of the Constitution between States of the Union and the Bhutan lottery and from one State to other State.

78. The last submission in respect of challenge to Section 5 is that the delegation to the State to decide to prohibit sale of lotteries organised by other States is a delegation by the Parliament of its essential legislative power, without any policy or bereft of the guidelines. Thus, there is total abdication of the legislative power of the Parliament, which is a naked delegation, hence violative of Article 14.

79. Further submission is, there is no rationale or policy behind conferring the unbridled power to prohibit the lotteries of other States. There is no nexus, reasonable or otherwise, between the object and the actual prohibition. It is wholly unreasonable, arbitrary and discriminatory. The interpretation of Section 5 given on behalf of the State of Tamil Nadu clearly exposes and reveals the unguided nature of delegation of power to the State. The submission on behalf of the State of Tamil Nadu is that entrustment of power to ban lotteries is unconditional though it supports Union on upholding validity of the Act. So a contrary note is struck against the interpretation given on behalf of the Union that exercise of power to ban could only be when it decides to ban its own lottery. The lotteries of other States were banned in Tamil Nadu though it continued to have its own lotteries because that State felt the practical problems of law and order. Submission for Tamil Nadu is on plain reading of Section 5, a State without banning its own lottery can ban lotteries organised by other States. This may be to create monopoly or in the name of law and order or of moral or ethical grounds or may also be for political reason. Thus, to this large discretion left on the State is submitted it shows the delegation of unbridled power hence violative of Article 14. Mr. Venugopal submits that even though the interpretation sought to be given by the Union may reduce the extent of discrimination to a great extent but cannot neutralise the violation of Article 303(1) of the Constitution. There is nothing in the Act or its preamble to interpret that, it is only the State which decides not to run its own lottery could impose such a ban. Learned counsel Mr. Shanti Bhushan also submitted that the State cannot take up a stand that the law which is applicable to other persons would not apply to the State as it would be inconsistent with the rule of law based on the doctrine of equality which introduces discrimination. Reliance was placed on the case of *State of West Bengal v. Corporation of Calcutta, 1967(2) SCR 170* (Nine Judges). So far the question of total abdication of legislative power by the Parliament to the State Government without any guideline or policy, reliance is placed on cases *Hamdard Dawakhana (supra)*; *Hari Shankar Bangla and Anr. v. The State of Madhya Pradesh, 1955(1) SCR 380*; *A.N. Parasuraman v. State of Tamil Nadu, 1989(4) SCC 683 (685-688)*; *Rajnarain Singh v. The Chairman, Patna Administration Committee, Patna and Anr., 1955(1) SCR 290 (301-304)*.

80. For the State of Uttar Pradesh submission is the same as the Union that Section 5 should be so read as to entitle only such State to ban which, as a policy, does not permit its own lottery to run. If

this be so, there possibly could be no discrimination as it applies uniformly to all the States. Thus, there would be no discrimination between one State and the other. This delegation is on public interest which is writ large and is implicit, in view of the nature of activity. For interpreting any provision, Statement of Objects and Reasons and the debates can be looked into, *Pepper v. Hart*, 1993(1) All.E.R. 42 (HL), *P.V. Narasimha Rao v. State*, 1998(4) SCC 626 paras 80 to 87. Further submission on behalf of the Union is that Section 5 should be read down as to mean only such State which bans its own lotteries as it would be incongruous that a State which as a policy and in public interest does not permit sale of its own lotteries has to permit sale of lotteries of other States. If a State wants to have a "Zero tolerance" State so far as lotteries are concerned, it cannot be prevented from doing so. In support of reading down, reliance is placed on : *DTC v. DTC Mazdoor Sabha*, 1991 (Supp.1) SCC 600 paras 217, 219 and 244 to 246; *Maharao Sahib Shri Bhim Singhji v. Union of India and others*, 1981(1) SCC 166 at 185; *Philips India Ltd. v. Labour Court, Madras and others*, 1985(3) SCC 103 at 112; *State of Punjab v. Kailash Nath*, 1989(1) SCC 321/329-30; 231 ITR 24; 1997(228) ITR 68 at 78. Reference was also made to the case of *Registrar, Trivandrum v. K. Kunjambu*, 1980(1) SCC 340, to support the submission that guidelines can be found from the subject matter of the Act. It can also be deduced from the objects and reasons of the Act, 1997(4) SCC 471. In fact, Section 5 is a piece of conditional legislation thus when a State wants to exercise such power, it is left to its wisdom having regard to its policy in public interest, *P. Orr & Sons (P) Ltd. v. Associated Publishers (Madras) Ltd.*, 1991(1) SCC 301 (para 14).

81. The legal principle which emerges, as submitted, is that delegation of essential legislative power of the principal to the delegatee would amount to abdication of its legislature power and if it is bereft of any guidelines then it is unsustainable in the eye of law. The authorities cited by various learned counsel and the law on the subject, cannot be doubted. But this principle is to be tested by scanning the impugned legislation which may differ one from the other in its nature, setting up or other circumstances which may have bearing to conclude. It is also well settled, first attempt should be made by the Courts to uphold the charged provisions and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever, attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the another upholding, the latter should be adopted. For this, the Courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, may be beneficial, penal of fiscal etc. Cumulatively it is to subserve the object of the legislation. Old gold rule is of respecting the wisdom of legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within its track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts, shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the Constitution. These interpretations springs out because of concern of the Courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingeniously interpretation. The words are not static but dynamic. This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. For doing this, the Courts have taken help from preamble, objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief, if any which existed, which is sought to be eliminated. The Kingdom of interpretation is enriched by the Rule as laid down in Heydon's case as far back in the 16th century. According to this, courts must see what was the law before the impugned provision, what was the mischief for which the then law did not provide, what is the reason to remedy that mischief and what remedy the impugned provision has provided; 76 E.R. 637 = (1584) 3 Co. Rep

7a P.76. This rule has been accepted by this Court in, *Bengal Immunity Co. v. State of Bihar*, 1955(2) SCR 603, A.I.R. 1985 S.C. 1922 (1929). In *Hamdard Dawakhana (Wakf) Lal Kuan, Delhi and Anr. v. Union of India and others*, 1960(2) SCR 671, this Court held :

"Therefore, when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of, the Constitution, the ascertainment of its true nature and character becomes necessary, i.e., its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so it is legitimate to take into, consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy; *Bengal Immunity Company Ltd. v. The State of Bihar*, 1955(2) SCR 603, *RMD Chamarbaghwal v. The Union of India*, 1957 SCR 930; *Mahant Moti Das and others v. S.P. Sahi*, A.I.R. 1959 SC 942.

Another principle which has to borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment. *Charanjit Lal Chowdhuri v. The Union of India and others*, 1950 SCR 869; *The State of Bombay v. F.N. Bulsara*, 1951 SCR 682; *Mahant Moti Das v. S.P. Sahi*."

The following passage in Seervai, Constitution Law of India (3rd Edn.) page 119 found approval in *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, 1991 (Suppl.1) SCC 600. The Court held :

"Seervai in his book Constitutional Law of India (3rd Edn.) has stated at page 119 that

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"...the courts are guided by the following rules in discharging their solemn duty to declare laws passed by a legislature unconstitutional:

1. There is a presumption in favour of constitutionality and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt; 'to doubt the constitutionality of a law is to resolve it in favour of its validity'.

* *

2. A statute cannot be declared unconstitutional merely because in the opinion of the Court it violates one or more of the principles of liberty, of the spirit of the Constitution, unless such principles and that spirit are found in the terms of the Constitution."

218. On a proper consideration of the cases cited hereinbefore as well as the observations of Seervai in his book Constitutional Law of India and also the meaning that has been given in the Australian Federal Constitutional Law by Colin Howard, it is clear and apparent that where any term has been used in the Act which *per se*

seems to be without jurisdiction but can be read down in order to make it constitutionally valid by separating and excluding the part which is invalid or by interpreting the word in such a fashion in order to make it constitutionally valid and within jurisdiction of the legislature which passed the said enactment by reading down the provisions of the Act (sic.)."

This principle of reading down, however, will not be available where the plain and literal meaning from bare reading of any impugned provisions clearly shows that it confers arbitrary, uncanalised or unbridled power. The Delhi Transport Corporation case (supra) was with reference to challenge to the provisions relating to termination of service of a permanent employee. In *The Registrar of Co-operative Societies, Trivandrum and another v. K. Kunjabmu and others, 1980(1) SCC 340*, this Court held :

"...The power to legislate carries with it the power to delegate. But excessive delegation may amount to abdication. Delegation unlimited may invite despotism uninhibited. So the theory has been evolved that the legislature cannot delegate its essential legislative function. Legislate it must, by laying down policy and principle and delegate it may to fill in detail and carry out policy. The legislature may guide the delegate by speaking through the express provision empowering delegation or the other provisions of the statute such as the preamble, the scheme or even the very subject-matter of the statute. If guidance there is, wherever it may be found, the delegation is valid. A good deal of latitude has been held to be permissible in the case of taxing statutes and on the same principle generous degree of latitude must be permissible in the case of welfare legislation, particularly those statutes which are designed to further the Directive Principles of State Policy."

This case holds that guidelines can be gathered from the subject-matter of the Act.

82. Before entering to decide the rival contentions within the approved wide field of interpretation, we look back to the history of the law pertaining to lotteries which is the subject matter for consideration. We have already recorded the concern, ill impact of these lotteries on the public at large not only in this country but all parts of the globe, where this subject allured the public to bring miseries in their life except few lucky ones, ultimately leading to ban all forms of lotteries. It is true that some permitted and protected lottery transactions under the garb of benefit for charitable purposes or augmenting State revenue. Even in India this lottery was looked down as evil of the society, and diagnosed as pernicious in nature. It is this which ultimately led to bringing in Section 294A of the IPC in the 19th Century making it a penal offence. It excludes from its purview the State authorised lotteries, i.e., both falling under Entry 40, List I and falling under Entry 34, List II. Collection of funds through lotteries was never considered laudable or conscienceable but has been and is resorted on the exigencies of the situations recognised for a limited purpose may be for a limited period. Why not 'laudable or conscienceable'? Because it is a gambling as we have held. How can gambling be held to be conscienceable though it may be legitimised for limited objectives. So some States, some countries legitimize it for sometime. May be because of lack of financial potentiality or expertise to achieve a desired financial target. Some other records since gambling is so intoxicating as it goes so deep into the blood, it is difficult to eliminate, hence lotteries are legalised so that participants are not trapped in the clandestine lotteries but be confined to the controlled, regulated lotteries authorised, whether by the State or Union. This eliminates or reduces to the minimum the prospering clandestine lotteries. The State lotteries or State authorised lotteries

have been excluded from the purview of Section 294A IPC. They are placed in distinct entries in the lists of the Seventh Schedule, both in the Government of India Act and Constitution of India. In spite of all this, in India and in other countries this battle to overcome the effect of its pernicious nature goes on which led to in some countries completely banning the lotteries. So, lotteries continue to be mark of interrogation and never looked upon as a fair or universally accepted way to collect funds. It is true that for a public purpose it has been legalised but cannot be equated with other trade or business. It is distinct and different kind in itself, i.e., a class of gambling. Thus, merely putting on the apparel of the State, the State lotteries cannot change from its basic character.

83. As revealed from Anraj case-I (supra), some of the States sought permission of the Union as a policy to raise its revenue through these lotteries, which was conferred by the Presidential Order under Article 258(1), though it records, the State could have exercised their discretion as a policy to have their own lotteries without such permission in view of its extended executive power under Article 298. It further reveals, till the Parliament makes any law, decision to start its lottery or to close it is exclusively within the executive power of each State. This is because it is the policy decision of a State which has to decide as a principle whether it desires to collect in this form the revenue or not. The benefit of Article 298 is, it is extra territorial, applicable beyond its territory, it is for this State lotteries are placed in Entry 40 List I. So in a federal structure, Union has to play a role to coordinate between one State with the other. So by regulation it has to sub-serve the objective. Union cannot enforce a State to gamble if such a State does not want to gamble. To run its own lotteries or to close it is left on the discretion of each State. It is each State which has to decide its policy and has to be concerned about its subject. In any case, the Union cannot force any State that it must run its own lotteries. But control of State lotteries running in the territory of other States is left on the Union. State cannot restrict sales of lotteries organised by other States even in its territory unless authorised by the Union. This difficulty was felt by the State which is indicated in the Anraj case-I (supra). That seems to be the reason that the Parliament has delegated this power to the State under Section 5. In this background, we have to see, whether this delegation could be constituted to be such as amounting to delegation of its essential legislative power and that too unguided or unbridled. As we have said to interpret a provision, its pith and substance, its objects and reason should be gathered, and it is that interpretation which subserve the object of the Act should be accepted. The Preamble of the Act states :

"to regulate the lotteries and to provide for matters connected therewith and incidental thereto."

Thus, the object of this enactment is to regulate the State lotteries and other connected matters therewith. We have already observed above, once as a policy State embarks upon to collect revenue through lotteries, it is necessary to regulate it in such a manner, as to infuse confidence to the participants. This has been done under this Act by providing strict compliance of the conditions imposed under it. In case of violation by any State or others, they brought to the books by penal consequences.

84. In Section 2(b) lotteries are defined to be a scheme for distribution of prizes by a lot or chance. This definition itself recognises that even in State lotteries the prizes are to be collected by chance without any skill, hence gambling in nature. Section 3 prohibits that no State lotteries can be organised without the condition stipulated under sub-section (a) to (k) of Section 4. Section 4 provides, the conditions to be complied with by the State lotteries. To initiate any State lottery it is left to the policy of each State, for this the Act is silent. The only control is, in case it decides, then it must follow the conditions as laid down under Section 4. Next comes section 5 which is subject

matter of challenge, the delegation of power to the State to prohibit the sale of lottery tickets organised by every other State. If a State desires not to subject its people to the lottery gambling, it has no power to restrict lotteries organised by other States. It is to remove this mischief the power is conferred through delegation to the States to do it in terms of its own policy. By virtue of this, now the State Government can prohibit sale of lottery tickets of every other States within its territory. Next, Section 6 seeks strict compliance of Section 4. Under this the Central Government may prohibit any State lottery which is being conducted in contravention of the conditions as laid down under Sections 4 or 5. Section 7 shows the rigor of this Act by making it a penal offence as against all, who violate the provisions of this Act, may be the Head of the Department of the Government or the agent, promoter to trader, to be punishable with two years rigorous imprisonment. Section 8 makes such an offence cognizable and non-bailable. Similarly, Section 9 deals with offences committed by the Companies. Section 10 entrusts the Central Government power to give directions to the State Government for carrying into execution the provisions of this Act, Rule or Order. Sections 11 and 12 are the rule making power entrusted to the Central and the State Government respectively. Section 13 repeals the Ordinance. Thus, the whole Act makes clear that the subject it is dealing is gambling in nature. The object of the Act is not to control the policy decision of each State to start or to close its lotteries, but to regulate it in case a State decides to run its own lottery through modalities and conditions laid down therein. Emphasis of the whole Act is to abide by the condition strictly if you want to run a lottery. Thus, regulation is through conditions to eliminate even the remotest possibility of mal-practices by providing stringent measures for its compliance. Perusal of the Act reveals, the scheme of the Act is limited in its application, and it admits the subject it is dealing is gambling in nature. As we have said, decision to collect or not to collect revenue through State lotteries is exclusively within the policy decision of the State and for this, neither the Union nor the Parliament interferes nor there is any indication under the Act. Thus, the question which remains is, if any State decides that it does not want any lotteries but if it feels helpless as having no jurisdiction over the lotteries organised by other States, what is the way out ? This can only be done by Parliament or by entrusting this power on such State desiring so, which has been done through Section 5. In this background, for this helplessness of a State as recorded in the Anraj case-I (supra) remedy is provided by entrusting this power on the State under the impugned provision. This help such State to achieve its objective of lottery (gambling) free zone within its territory. A well concerned remedy. Next question is what could have been the guideline ? If State lotteries are gambling and it cannot be termed as 'trade and commerce' at common parlance for any free right under the Constitution. Such right though recognised under Article 298 so other States may continue to enjoy till prohibited by valid law, and if any State want within its State lottery free zone and for which the power is entrusted to such State, it cannot be said in this setting and background and the nature of the subject that such a delegation is of its essential legislative power. The only guidelines necessary in such delegation is to see State does not pick and choose one State from the other, which guideline is already provided in this Section. It provides that such a ban could only be if it is applied to every other State. Only residual field of attack so far this delegation could be, which has been attacked in this case, that State could on one hand ban lotteries of every other State but run its own lotteries. It is argued while a State bans lotteries of other States not to permit any gambling activity in the public interest as a policy but this very public interest is flouted by having lotteries of its own. It is true that unless this provision is read down to mean a State can only ban lotteries of other States when it bans as a policy its own lotteries it is bound to be subjected to the vagaries as pointed out and on deeper scrutiny it may not successfully stand. But by reading down the provision, which has to be read that it is only that State which decides lottery free zone within its State can prohibit lotteries of other State clearly provides the guidance for the exercise of such a power. It is inbuilt and inherent in the provision itself in view of the scheme of

the Act and nature of subject in issue. If interpretation as given on behalf of the State of Tamil Nadu is accepted that delegation of power is absolute, then the submission that such delegation is unbridled without any guideline carries great weight. Submission for the Tamil Nadu is that the lotteries may be prohibited in phases, viz., while running its own lotteries yet prohibiting other lotteries, may be as a public policy, for law and order, for political reasons, morality, etc. For surviving such an interpretation given by Mr. Ganguli, the Parliament should have provided some guidelines. Such an interpretation falls into the trap of the submission that this delegation is unbridled. So if there are two interpretations, the interpretation which upholds the validity should be accepted. So the interpretation as given by Mr. Ganguli cannot be accepted.

85. There are two parts of the attack of the delegation of power to the State under Section 5. The later part, by which it can prohibit sale of lottery tickets organised by every other State which leaves no scope of any discretion on the States to discriminate from one State to other. So if it decides no lottery tickets of any State to be sold it cannot pick or choose from one State to the other. Once it, as a policy, decides to prohibit the sale of lottery tickets of other States it must prohibit every other State, that is to say, all the States and such a delegation cannot be said to be either abdication of the legislative power of the Parliament or to be unbridled or unguided. As we have said looking to the nature of subject and object of the Act which is to help each State in its endeavour to run State lotteries which would include starting or closing its lotteries and when a State wants to have lottery free zone in its State, then such a delegation to ban lottery of every other State cannot be said to be invalid. To the first part, there are two interpretations, one on the plain reading of Section 5, a State may run its own lottery yet may prohibit the sale of lotteries of other States. This construction leads to discrimination and opens for criticism of unbridled delegation. The submission further is, if the ban of sale of lottery tickets of every other State is as a public policy, affecting the morality and resultant ill effect on its subject then there is no justification that State may run its own lottery affecting the very subject for which the power is exercised prohibiting the lotteries of other States. It is true, if such an interpretation is accepted then this submission has a force. On the other hand, on behalf of the Union the submission is that language of the Section has to be read down. The decision to have its lottery or not to have its lottery has to be in the public interest. Every decision to have either lotteries authorised by the State or organised by the State has to be in public interest. May be for collection of public revenue or for a public purpose. It has been held in *Central Inland Water Transport Corp. Ltd. and another v. Brojo Nath Ganguly and Anr.*, A.I.R. 1986 SC 1571 para 93 :

"There must be no injury or harm to the public interest, public good and public welfare."

Thus, the decision to run State lottery has to be made with the conscience of its evil consequences on its subject, thus before deciding the State has to equate the public welfare with the injury on its public. It may be in a given case within the limitation of its financial capacity with the need of the hour it has to decide to run its own lotteries to augment its revenue in the larger interest of the public which if weighed with the evil consequences on its subject, the public welfare gains more by running it then the evil consequence on its subject has to give way till situation changes by finding better way for this additional source or evil consequences inflicting on its subject overweighing. This exercise has to be by each State, Union not coming in its way. It is for each State to decide what is its public welfare and what constitutes an injury to the public interest. *Rattan Chand Hira Chand v. Askar Nawaz Jung*, 1991(3) SCC 67 (para 17) holds, what constitutes public interest or welfare would depend upon the time. The social milieu in which the contract is sought to be enforced would

decide the factum, the nature and the degree of injury.

86. So, whenever a State decides to run or not to run its lotteries it is the State which has to decide as a public policy in the public interest. Once such a decision is taken to have in its State lottery free zone, the entrustment of power by the Parliament cannot be said to be *ultra vires*.

87. We find on plain reading of Section 5, it empowers the State Government within its State to prohibit the sale of tickets of the lotteries organised by every other State. There is also nothing in the language reading by itself so as to say, whether such power can be exercised by State while running its own lottery or can be exercised only where such State does not run its own lottery. This leads to two possible interpretations, as referred to above. In view of settled principle of interpretations, the interpretation given by the Union to read down the provision has substance. This would mean State could only exercise such discretion if it decides not to have any lottery within its territory including its own lottery. In this situation, the delegatee is tied down by this limitation which itself is a clear guide to a State hence cannot be said to be unbridled delegation. So even to the first part it cannot be said to be arbitrary nor unbridled. So, we have no hesitation to approve the interpretation given by the Union to uphold the validity of Section 5.

88. It is true, as submitted on behalf of some of the North-Eastern States, Nagaland etc. or the State of Sikkim that in the exigencies they are placed with the lack of harnessing their revenue, if this right is curtailed it would badly affect their revenue. It may be true to some extent so far as these States are concerned. However, we find that the impugned provision does not prohibit such State not to run its own lotteries. Such State can continue to have their own lotteries. Only where any State decides not to have any lottery the territorial area of such State is only curtailed. What would be the shortfall of the revenue, if any, the figure of which has not been effectively placed before us, whether there is going to be of any substantial loss, but if at all there is, it is for that State to find an alternative or for the Union to lend support if that is essential within its permissible limits. These again are matters in the realm of policy to which this Court has no jurisdiction to enter into. But this cannot mean to permit any such State to have right to its lotteries (gambling) in other territory in spite of other State prohibiting such activity in its territory. That right could have been if State Lotteries were trade as understood under Chapter XIII of our Constitution.

89. Lastly, the challenge is to Section 4(a), (g) and (h) of the Act. The main contention with some specific vehemence to which various counsel have referred to is condition (g) of Section 4 which deals with place of draw to be located within the State concern. Argument is the condition of law and order in the State of Nagaland is not such where a draw of any lottery could be held. We do not find any merit in the submission. It is again a question of policy and it is for the State executive to take decision pertaining to law and order, for that reason no legislation can be held to be *ultra vires* or to be struck down. Similar condition of (a) that prizes shall not be offered on any pre-announced number or on the basis of single digit or that no lottery shall have more than one draw in a week (h); or other conditions in Section 4 are all those which cannot be said to be such to hold these provisions to be *ultra vires*, on invalid. None of them are such which would constitute to be violative of any provisions of the Constitution. Hence, we have no hesitation to conclude that this last submission is also without any merit.

90. In view of the findings recorded by us above, holding lotteries organised by the State is also gambling in nature, thus the principle as laid down in RMDC case (supra) would equally be applicable to the case of State lotteries. Thus, State lotteries cannot be construed to be a 'trade and business' within the meaning of Articles 301 to 303 of the Constitution of India. We also hold that

the impugned provisions are not violative of Article 14 nor the delegation of power by the Parliament to the State Government could be said to be delegation of its any essential legislative power or a delegation, which is unguided or unbridled. Thus, we uphold Section 5 and various sub-clause of Section 4 to be valid piece of legislation.

91. Accordingly, the decision of the Guwahati High Court which holds the provisions of the Ordinance to be *ultra vires* and consequently staying the provisions of the impugned Act cannot be sustained which is hereby quashed. Any decision of any Court or any interim order contrary to the decision, as aforesaid, are hereby set aside. The various petitions which have been transferred and which are subject matter of decision, as aforesaid, stand disposed of in terms of this decision. We will be failing in our duty if we do not express our gratitude to learned counsel for the parties whose contribution to this vexed issue has been commendable. Their contributions helped us greatly to decide this case.

92. In view of the aforesaid findings, all the aforesaid matters stand disposed of by upholding the impugned provisions and the Act to be valid. Costs on the parties.