

SUPREME COURT OF INDIA

M/s. Yasha overseas

Vs.

Commissioner of Sales Tax

C.A.No.2155 of 2000

(B.N.Agarwal and G.S.Singhvi and Aftab Alam JJ.)

06.05.2008

JUDGMENT

Aftab Alam, J

1. Leave granted in the three Special Leave Petitions in this batch of six cases.
2. Does the three-Judge Bench decision of this Court in *Vikas Sales Corporation Vs. Commnr. of Commercial Taxes*¹, holding that the transfer/sale of an import licence called Replenishment Licence (REP licence) granted under the 1992-97 Exim Policy was exigible to sales tax stands impliedly overruled by the Constitution Bench decision in *Sunrise Associates Vs. Govt. of NCT of Delhi*² that held that lottery tickets were actionable claims and were, therefore, excluded from the definition of 'goods' under the Sales Tax Act and, hence, the sale of lottery tickets was not subject to sales tax and the earlier two-Judge Bench decision of the court in *H. Anraj Vs. Govt. of Tamil Nadu*³ holding otherwise, did not lay down the correct legal position? It is to consider this question that this batch of six cases was referred to the three-Judge Bench.
3. Apparently, lottery tickets are not the same thing as REP licences but on behalf of the appellants it was submitted that the decision in *Vikas* while upholding the taxability of REP licences, referred approvingly to *Anraj* which was expressly overruled by *Sunrise*. Further, the additional reasons given in *Vikas* for holding that REP licences were 'goods' were also disapproved by the Constitution Bench and, therefore, it must be held that the decision in *Vikas* too stood impliedly overruled.
4. REP licences were granted under the Import and Export Policy for the period April 1988 to March 1991 issued under the *Imports and Exports (Control) Act, 1947*. Those were replaced by Duty Entitlement Passbook (DEPB) provided for in the Exim Policy 1997- 02 under the *Foreign Trade (Development and Regulation) Act, 1992*. Out of six cases before us only one relates to the sale of REP licences; the other five arise from the sale of DEPB. In those five cases it is contended on behalf of the appellants that DEPB has materially different

features than REP and in any event the decision in *Vikas* shall not apply to the case of DEP.B.

5. We are thus required to consider two questions; whether the decision in *Vikas* can be said to be impliedly overruled by the Constitution Bench decision in *Sunrise*? And, if the answer to this question is in the negative and *Vikas* is still good law, would it also apply to sale of DEP.B?

6. It may also be mentioned here that out of the six cases in the batch, four (including the one relating to REP) arose under the Delhi Sales Tax Act, one under the Kerala General Sales Tax Act and one under the Bombay Sales Tax Act.

7. In order to consider the first question we propose to examine the three decisions (*Anraj*, *Vikas* & *Sunrise*) in the order in which those came to be delivered. In *Anraj* the issue before the court was whether the sale of lottery tickets could be subjected to tax under the T. N. General Sales Tax Act and the Bengal Finance (Sales Tax) Act. On behalf of the assesses, dealers in lottery tickets and agents and stockists of various lotteries organised by different states, including the State of West Bengal, it was contended that the sale of a lottery ticket is nothing more than a sale of a chance to win a prize and no transaction of sale of moveable property takes place or is involved in the sale of a lottery ticket, the ticket itself being merely a token of the chance purchased. It was alternatively argued that assuming, though not admitting that lottery tickets are a kind of movable property or some kind of merchandise they would be so only in the limited sense but in pith and substance they are 'actionable claims' that are expressly excluded from the definition of 'goods'. A two-Judges' Bench of this Court repelled both the contentions and in paragraph 27 of the judgment held that:

".....a sale of a lottery ticket confers on the purchaser thereof two rights (a) a right to participate in the draw and (b) a right to claim a prize contingent upon his being successful in the draw. Both would be beneficial interests in movable property the former 'in praesenti', the latter 'in futuro' depending on a contingency. Lottery tickets, not as physical articles, but as slips of paper or memoranda evidence not one but both these beneficial interests in movable property which are obviously capable of being transferred, assigned or sold and on their transfer, assignment or sale both these beneficial interests are made over to the purchaser for a price. Counsel for the dealers sought to contend that the concept of a lottery cannot be sub-divided in two parts, namely, a right to participate and a right to receive the prize but the two together constitutes one single right. It is not possible to accept this contention for the simple reason that the two entitlements which arise on the purchase of a lottery ticket are of a different character, inasmuch as the right to participate arises in praesenti, that is to say it is a choate or perfected right in the purchaser on the strength of which he can enforce the holding of the draw, while the other is inchoate right which is to materialize in future as and when the draw takes place depending upon his being successful in such draw. Moreover, on the date of the purchase of the ticket, the entitlement to participate in the draw can be said to have been delivered unto the possession of the purchaser who would be enjoying it from the time he has purchased

the ticket and as such it would be a chose in possession while the other would be an actionable claim or a chose in action as has been held in *Jones v. Carter*⁴ and *King v. Connare*⁵ on which counsel for the dealers relied."

On the basis of the above the court, in paragraph 33 of the judgment concluded as follows:

"In the light of the aforesaid discussion my conclusions are that lottery tickets to the extent that they comprise the entitlement to participate in the draw are "goods" properly so called, squarely falling with the definition of that expression as given in the Tamil Nadu Act, 1959 and the Bengal Act, 1941, that to that extent they are not actionable claims and that in every sale thereof a transfer of property in the goods is involved."

Ten years later the question of taxability of REP license under the sales tax enactments of Tamil Nadu, Kerala and Karnataka came up for consideration before this court in *Vikas*. Before referring to the decision it will be useful to see what exactly REP license is and how the matter came to this court.

8. *The Imports and Exports (Control) Act, 1947 (now replaced by the Foreign (Development and Regulation) Act, 1992)* empowered the Central Government to prohibit, restrict or otherwise control imports and exports. In exercise of the powers conferred by this Act, the *Imports (Control) Order, 1955* was issued. Schedule I to the Order contained the list of articles of which imports were controlled. The import of the scheduled items was prohibited except (i) under and in accordance with a licence or a customs clearance permit issued under that Order, or (ii) if they were covered by an Open General Licence (subject to such conditions as might be stipulated), or (iii) if they were covered by the Savings Clause 11 of the Imports (Control) Order. Under the provisions of the 1947 Act and the Control Order 1955, the Government of India issued the Import and Export Policy for the period April, 1988 to March, 1991. The Policy had the definition clauses in Chapter I where 'Registered Exporter' was defined to mean a person holding a valid Registration Certificate issued by the specified designated authorities for the purposes of Export Promotion'. Chapter XV of the policy document dealt with the Import Policy for Registered Exporters. Paragraph 164 in that chapter declared that the object of the scheme was to provide to the Registered Exporters by way of import replenishment, the essential inputs required in the manufacture of the products exported and also to allow certain flexibilities to enable diversification of the export products. Paragraph 165(1) provided that all exports subject to certain specified exception would qualify for the grant of import replenishment and paragraph 166(1), dealing with the extent of replenishment read as follows :

"The extent of import replenishment permissible against each product enumerated in column 2 of Appendix 17 shall be that set out in column 3 thereof. These percentages will apply in the case of exports made on or after 1.4.1988, except for registered contracts, to which the relevant provisions would The two special features of REP licence were the flexibility utilisation and its easy transferability (paragraphs 175 &

183(1) respectively of the policy document). Under the Import and Export regime in existence at that time all imports against licences or even under the Open General Licence were subject to 'actual user condition'. A REP licence allowed its holder to import licensed goods, free from 'actual user condition' but a REP licence was freely transferable and it did not require any approval or endorsement by the Licensing Authority. The registered importer to whom it was granted in the first instance could transfer it to anyone else and the transferee in turn could further transfer it to others. It could be endorsed in favour of another party by the previous endorsee. Its transfer did not require any approval or endorsement by the licensing authority and it was simply governed by the ordinary law of the land. It remained valid for a period of 18 months from the date of its issue. In a nutshell during the previous licence-bound import and export regime the REP licence was a kind of freely transferable, pre-duty paid import licence not subject to 'actual user condition'. It was thus a highly attractive and sought after instrument/means for importing goods. In *Vikas* this Court noted that a number of registered exporters who obtained REP licences sold them to others for profit. In fact those licences were being traded freely in the market and stock exchanges.”

9. The taxing authorities in some of the states (Karnataka, Tamil Nadu and Kerala) subjected the transfer of REP licences to sales tax. The imposition of tax was challenged before the respective High Courts on the plea that REP licence was not 'goods' within the meaning of the sales tax laws and its transfer, therefore, was not exigible to sales tax. The Karnataka High Court rejected the plea holding that REP licence did not merely give its holder the right of undertaking a business but it also excluded competition. Hence, it could not be said that it was only a beneficial interest in some moveable property, not in the holder's possession but it was itself a valuable right and it was undeniably freely transferable. In taking the view that REP licence was not merely actionable claim but it constituted 'goods', amenable to sales tax, the Karnataka High Court substantially relied on the earlier decision of this court in *Anraj*. It pointed out that if a lottery ticket that gave its holder only the right to participate in the lottery draw was 'goods' (as held by this court in *Anraj*) there was no reason why REP licence carrying a far more valuable and tangible right may not be 'goods'.

10. The Madras High Court also rejected the challenge to imposition of tax on transfer of REP licences.

11. The matter finally came to this court in a batch of appeals from the High Courts' decisions and writ petitions directly filed here, with the leading case being *Vikas Sales Corporation* and was decided by a Bench of three-Judges.

12. In *Vikas* it was noticed at the outset that the High Courts' judgments were influenced mainly by the decision in *Anraj* (Paragraphs 2 & 6 of the decision reported in SCC) but then this court went on to examine the matter on its own. It referred to Entry 54 in List II of the Seventh Schedule to the Constitution to which the Sales Tax Acts of the different States are referable and also Entry 92-A of List I that is the legislative head for the Central Sales Tax Act (Paragraph 10). It then referred to the definition of 'goods' as given in clause 12 of Article 366 of the Constitution and the expanded definition of the expression 'tax on the sale

or purchase of goods' as contained in clause 29-A of that Article after its amendment by the *Forty-sixth Amendment Act, 1982* and observed that sub-clauses (c) & (d) of the amended definition were relevant to the controversy before the court. The two clauses are as follows:

"366 (29-A) - "tax on the sale or purchase of goods" includes -

(a) xxx xxx xxx xxx

(b) xxx xxx xxx xxx

(c) A tax on the delivery of goods on hire-purchase or any system of payment by installments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

(e) xxx xxx xxx xxx

(f) xxx xxx xxx xxx"

The court then examined the definition of `goods' as given in section 2(7) of the Sales of Goods Act and since it means, subject to certain exceptions, every kind of movable property, and since that expression is not defined in any of the Sales Tax enactments, it turned to the meanings of `moveable property' and `immoveable property' under the General Clauses Act. It further noticed that the General Clauses Acts of the three States gave identical definition of the two expressions.

13. The Court then referred to the definition of `goods' in the Central Sales Tax Act, 1956 and the sales tax enactments of the three States, Tamil Nadu, Karnataka and Kerala and found that in all the three states `goods' was defined to mean all kinds of moveable property, subject to certain exceptions like newspapers, actionable claims, stocks, shares, securities etc.

14. In view of the definition of `goods' it became vital to correctly understand the nature and attributes of moveable property. The Sales Tax Acts had no definition of the expression and the meaning given in the General Clauses Acts of the three States was also found to be not of much help. The court, therefore, proceeded to examine in detail the legal notions of property and moveable property. It referred to Black's Law Dictionary (6th. Edn. 1990), Dictionary of Commercial Law by A.H. Hudson (published by Butterworths, 1983) and Jowitt's Dictionary of English Law (Sweet and Maxwell Limited, 1977) and noted that all the commentaries and the referred case law uniformly emphasised the expansive manner in which the expression `property' was understood. The court also referred to the meanings of the term `property' set out in Chapter 13, "The Law of Property" in Salmond's Jurisprudence (12th. Edn. 1966) cited by the counsel for the assesses and observed that in Salmond's there was nothing that would militate against the meanings ascribed to the expression in the authorities earlier referred to by the court and as a matter of fact those were consistent with each other.

15. The court then examined the features of REP licence and in particular its free transferability for consideration and finally recorded its conclusions in paragraph 29 of the judgment as follows:

"The above provisions do establish that REP Licences have their own value. They are bought and sold as such. The original licensee or the purchaser is not bound to import the goods permissible thereunder. He can simply sell it to another and that another to yet another person. In other words, these licences/Exim Scrips have an inherent value of their own and are traded as such. They are treated and dealt with in the commercial world as merchandise, as goods. A REP Licence/Exim Scrip is neither a chose-in-action nor an actionable claim. It is also not in the nature of a title deed. It has a value of its own. It is by itself a property - and it is for this reason that it is freely bought and sold in the market. For all purposes and intents, it is goods. Unrelated to the goods which can be imported on its basis, it commands a value and is traded as such. This is because, it enables its holder to import goods which he cannot do otherwise. (With effect from 1.3.1992, of course, the very policy and system under which these licences/scrips were being issued, has been discontinued.)"

Having thus arrived at its conclusion quite independently, the court observed that the Karnataka and Madras High Courts in their respective judgments had placed strong reliance upon the earlier decision in Anraj. The court then briefly examined Anraj and, in paragraph 32 of the judgment, expressed its agreement with the view taken in the earlier decision as follows:

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

The court also rejected the submission that REP licence was in the nature of an actionable claim and was, therefore, expressly excluded from the definition of 'goods' in the Sales Tax Acts. In this regard, in paragraphs 34 and 35 of the judgment the court observed and held as follows:

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

"'Actionable claims' means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognise as

affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."

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

The court then considered the decisions relied upon on behalf of the assesseees and held those were of no assistance to the appellants/petitioners before the court. Then commenting upon the decision relied upon by the counsel for the State of Tamil Nadu the court made the following observation in paragraph 42 of the judgment:

"....Having regard to the context in which the said question had arisen, we do not think it necessary to refer to the observations relied upon since the material referred to by us on the meaning of the expression "moveable property" and the decision in Anraj is more to the point."

The court also rejected the various other ancillary submissions made on behalf of the assesseees and finally upheld the levy of tax on the transfer of REP licences under Karnataka and Tamil Nadu Sales Tax Acts."

16. This was Vikas.

17. Coming back to the lottery tickets, the decision of this court in Anraj was understood and applied differently by different High Courts. The Karnataka High Court, in Nirmal Agency v. CTO held that according to Anraj a sale of lottery tickets conferred on its purchaser two rights (a) a right to participate in the draw and (b) a right to claim a prize depending upon his being successful in the draw. Further, according to the decision it was the transfer of the first right alone that amounted to sale of goods exigible to tax. The taxing authority would therefore be obliged to determine how much of the consideration was referable to the right to participate in the draw and how much to the chance of winning, and thereafter assess the dealer on the first part.

18. The Delhi High Court, on the other hand, relying upon the same decisions in Anraj and Vikas took the view that in the sale of a lottery ticket the full consideration would be subject to tax because the lottery ticket in itself was 'goods', properly so called.

19. The appeal from the decision of the Delhi High Court in Sunrise Associates v. Govt. of NCT of Delhi came to this court in which the need was felt for reconsideration of the decisions in Anraj and Vikas (insofar as it affirmed the decision in Anraj) and because the

decision in *Vikas* was rendered by a three-Judge Bench the appeal was referred to a Constitution Bench. Here it is important to bear in mind that the decision in *Vikas* dealing with the question of taxability of REP licences was not the subject of reference and *Vikas* came under reference only to the extent it approved *Anraj*. The Constitution Bench hearing the appeal, as we shall see presently, never lost sight of this aspect of the matter.

20. The Constitution Bench hearing *Sunrise* began by making a survey of the provisions of the Constitution and the other laws within the frame work of which the issue arose for consideration. It referred to Entry 54 of List II of the Seventh Schedule and Article 246(3) of the Constitution. It also referred to Entry 92-A of List I of that Schedule. It noted that Clause 12 of Article 366 of the Constitution, before its amendment, defined 'goods' as including "all materials, commodities and articles" but it did not define the expression 'sale of goods'. It then referred to the Constitution Bench decision in *State of Madras V. Gannon Dunkerley & Co. (Madras Limited)*⁶, that held that in the absence of a definition in the Constitution the expression must have the same meaning as given to it in section 4 (1) of the Sales of Goods Act where it is defined as a "contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price". The narrow meaning ascribed to the expression by this court was naturally followed by courts all over the country and this led to the amendment of Article 366 by insertion of clause 29A, defining 'Sale of Goods' so as to include the six kinds of transactions which, as a result of the Court's decision in *Gannon Dunkerley*, were excluded from the expression. It took note of sub- clause (a) of clause 29-A which is as follows:

"29-A "tax on the sale or purchase of goods" includes--

(a) A tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration; and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

The Court summed up the legal position emerging from the insertion of clause 29A in Article 366 of the Constitution in paragraph 7 of the judgment as follows:

"Therefore in order to constitute a deemed sale within the meaning of Article 366(29-A) (a), there has to be (1) goods (2) a transfer of property in the goods (3) valuable consideration. The requirement of an agreement for sale is not necessary for constituting a sale under this sub- clause. The absence of any one of these elements would mean that the transaction far from being a sale within *Gannon Dunkerley* definition, would not even be a deemed sale within the extended definition of sale under Article 366(29-A) (a)."

The Court then went on to note that following the insertion of clause 29-A in Article 366 of the Constitution, consequential amendments were made in the States' Sales Tax laws to take full benefit of the expanded meaning given to the expression 'sale or

purchase of goods' and observed that in all the States' Acts the expression "goods" was given the same meaning as in the Sale of Goods Act and more importantly, in all those definitions 'actionable claim' was expressly excluded from the definition of 'goods'. It further noted that 'actionable claim' was defined in Section 3 of the Transfer of Property Act, 1882 as meaning

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

Having thus laid out the statutory framework the decision in Sunrise examined the dealers' contention that a lottery ticket was only a slip of paper or memoranda evidencing the right of the holder to share in the prize or the distributable funds and was merely a convenient mode for ascertaining the identity of the winner. It then examined the conclusion arrived at by the Court in Anraj and in paragraph 14 of the judgment summed up the ratio of the Anraj decision as follows:

"The Court in H.Anraj came to the conclusion that the transfer of a lottery ticket upon consideration paid by the purchaser was not a mere contract creating an obligation or right in personam between the parties, but was in the nature of a grant. The Court noted the various definitions of the word "lottery" in dictionaries and authoritative text books and decisions of the courts and held that a lottery was composed of three essential elements, namely, (1) chance, (2) consideration; and (3) prize. As we have mentioned earlier, according to the learned Judges a sale of a lottery ticket conferred on the purchaser two rights viz. (a) the right to participate in the draw, and (b) the right to claim a prize contingent upon the purchaser being successful in the draw. Both were held to be beneficial interests in movable property, the former in praesenti, and the latter in futuro depending on the contingency."

The Sunrise decision then proceeded to note how the decision in Anraj was interpreted by the Karnataka Court (paragraph 19 of the judgment) and quite differently to it by the Delhi High Court (paragraph 23 of the decision).

21. The Court then noted the plea of the appellants/dealers in the sale of lottery tickets that Anraj was wrong in drawing a distinction between the right to participate in the draw and the chance to win the prize; that such bifurcation was artificial as both were part of the same transaction and further that even on the "two rights" theory each of those rights would be choses-in-action. It also noted the criticism meted out to the decision in Vikas Sales insofar as it cited the free transferability of REP licence as an additional reason holding that it was 'goods' within the meaning of the sales tax laws.

22. Here, it is significant to note that in Sunrise an attempt was made to address the Court on the question whether the sale of DEPB would attract sales tax under the Bombay Sales Tax

Act, 1959. On behalf of the State of Maharashtra it was submitted that considering the valuable right conferred by the DEPB, it was an item of movable property and therefore "goods" within the definition of the word in Section 2(13) of the Act. However, the Court firmly refused to go into that controversy observing that the validity of the decision in *Vikas* was not an issue before it for consideration. In paragraph 29 of the decision in *Sunrise* it was clearly stated as follows:

"It is necessary at this stage to clarify that the order of reference in *Sunrise v. NCT, Delhi* is limited to the question whether lottery tickets are "goods". We have not been called upon to answer the question whether REP licences (or the DEPB which has replaced the REP licences) are "goods". Although we have heard counsel at length on this, having regard to the limited nature of the reference, we do not decide the issue. The decision in *Vikas Sales* was referred to only because it approved the reasoning in *H.Anraj* and not because the referring court disagreed with the conclusion in *Vikas Sales* that REP licences were goods for the purposes of levy of sales tax. Indeed REP licences were not the subject-matter of the appeal before the referring court and could not have formed part of the reference. The only question we are called upon to answer is whether the decision in *H.Anraj* that lottery tickets are goods for the purposes of Article 366(29-A) (a) of the Constitution and the State sales tax laws, was correct."

Having thus identified the issue that came up for consideration before it, the Court, in view of the apparent divergence in understanding *Anraj*, once again analysed the decision and in paragraphs 32 and 33 of the judgment held and found that in *Anraj* the lottery ticket was held to be 'goods' - not as a physical article but as a slip of paper or memorandum evidencing (a) the right to participate in the draw, and

(b) The right to claim a prize contingent upon the purchaser being successful in the draw. Further, for the purpose of levy of sales tax, lottery ticket could be regarded as 'goods' properly so called insofar as it entitled its holder to take part in the draw. In other words, lottery ticket, to the extent it evidenced the right to claim the prize, was not 'goods' but an actionable claim and, therefore, expressly excluded from the definition of 'goods' under the sales tax laws. A transfer of it was consequently not a sale. The lottery ticket per se had no innate value. The Delhi High Court was, therefore, plainly in error in interpreting and following *Anjar*."

23. Having thus settled the precise ratio of the decision in *Anjar*, the Court turned to the meaning of 'goods' for the purposes of imposition of sales tax and in paragraph 35 of the judgment observed as follows:

"The word "goods" for the purposes of imposition of sales tax has been uniformly defined in the various sales tax laws as meaning all kinds of movable property. The word "property" may denote the nature of the interest in goods and when used in this sense means title or ownership in a thing. The word may also be used to describe the thing itself. The two concepts are distinct, a distinction which must be kept in mind when considering the use of the word in connection with the sale of goods. In the

Dictionary of Commercial Law by A. H. Hudson (1983 Edn.) the difference is clearly brought out. The definition reads thus:

"'Property' -- In commercial law this may carry its ordinary meaning of the subject-matter of ownership. But elsewhere, as in the sale of goods it may be used as a synonym for ownership and lesser rights in goods.

Hence, when used in the definition of "goods" in the different sales tax statutes, the word "property" means the subject-matter of ownership. The same word in the context of a "sale" means the transfer of the ownership in goods."

(Emphasis added)

At this stage the decision in *Vikas* once again came under reference; it was pointed out (in paragraphs 38 to 40 of the decision in *Sunrise*) that in *Vikas* the Court observed that REP licences were being bought and sold freely in the market as goods and took their saleability as an additional ground to hold that it would be idle to contend that those licences were in the nature of actionable claim. In other words, saleability was a feature of distinction between goods and actionable claim (which but for its express exclusion from the definition is also a kind of goods). Goods were saleable but actionable claim was not. The decision in *Sunrise* by giving many illustrations showed that transferability for value was as much an attribute of actionable claim as any other kind of goods and transferability was not the point of distinction between actionable claim and other goods that could be sold. Hence, to say that an article or right was goods and not actionable claim because it was saleable was pointless. Commenting upon this aspect of the decision in *Vikas* the Constitution Bench in paragraph 38 of the decision in *Sunrise* observed as follows:

"It was assumed that actionable claims are not transferable for value and that that was the difference between "actionable claims" and those other goods which are covered by the definition of "goods" in the *Sale of Goods Act, 1930* and the sales tax laws. The assumption was fallacious and the conclusion insofar as it was based on this erroneous perception, equally wrong."

The decision in *Sunrise* then examined the nature of a ticket. It referred to Webster's Words and Phrases, Permanent Edn., Vol.25-A and in paragraph 43 came to hold as follows:

"The sale of a ticket does not necessarily involve the sale of goods. For example, the purchase of a railway ticket gives the right to a person to travel by railway. It is nothing other than a contract of carriage. The actual ticket is merely evidence of the right to travel. A contract is not property, but only a promise supported by consideration, upon breach of which either a claim for specific performance or damages would lie (*Said v. Butt*)⁷. Like railway tickets, a ticket to see a cinema or a pawnbroker's ticket are memoranda or contracts between the vendors of the ticket and

the purchasers. Cases on whether the terms specified on such tickets bind the purchaser are legion. It is sufficient for our purpose to note that tickets are themselves, normally evidence of and in some cases the contract between the buyer of the ticket and its seller. Therefore a lottery ticket can be held to be goods if at all only because it evidences the transfer of a right." (Emphasis added) It further pointed out that the purchaser of lottery ticket simply a claim to a conditional interest in the prize money which was not in the purchaser's possession. It, therefore, followed that the would fall squarely within the definition of actionable claim would therefore be excluded from the definition of 'goods' under Sale of Goods Act and the sales tax statutes. Finally, in paragraph 45 of the decision Sunrise found and held as follows:

"45. The further distinction sought to be drawn in H.Anraj between the chance to win and the right to participate in the draw was in our opinion unwarranted.

A lottery having been held to be in essence a chance for a prize, the sale of a lottery ticket can only be a sale of that chance. There is no other element. Every right can be sub-divided into lesser rights. When these lesser rights culminate in a legally recognizable right, it is the latter which defines the right. The right to participate in the draw is a part of the composite right of the chance to win and it does not feature separately in the definition of the word "lottery". It is an implicit part of the chance to win. It is not a different right. The separation is specious since neither of the rights can stand without the other. A draw without a chance to win is meaningless and one cannot claim a prize without participating in the draw. In fact the transfer of the chance to win assumes participation in the draw." (Emphasis added)

It further held that even if the right to participate in the draw was held to be a separate right there would be no difference and in paragraph

48 of the decision observed as follows:

"Even if the right to participate is assumed to be a separate right, there is no sale of goods within the meaning of sales tax statutes when that right is transferred. When H.Anraj said that the right to participate was a beneficial interest in movable property, it did not define what that movable property was. The draw could not and was not suggested to be the movable property. The only object of the right to participate would be to win the prize. The transfer of the right would thus be of a beneficial interest in movable property not in possession. By this reasoning also a right to participate in a lottery is an actionable claim."

It thus arrived at the conclusion that the decision in Anraj wrongly held that sale of lottery ticket is a sale of goods.

24. The decision in Sunrise makes two very significant points and to us it appears that the decision mainly turns on those two points. The first is with regard to the two different meanings of 'property', as highlighted in paragraph 35 of the judgment and the second is

with regard to the distinction between interests in goods and a contract as highlighted in paragraph 43 of the judgment. In paragraph 35 of the decision the court explained that the word 'property' occurring both in the definitions of 'goods' and 'sale' carries different meanings. In the definition of 'goods' the word 'property' is used to mean the subject matter of ownership, that is to say, the thing itself. In the definition of 'sale' the same word is used to mean the nature of interests in goods, that is, title or ownership.

25. In paragraphs 42 and 43 of the decision, the court examined the nature of a ticket and by giving illustrations of a railway ticket, a ticket to see a cinema or a pawnbroker's ticket pointed out that the tickets were normally evidence of and in some cases the contract between the buyer of the ticket and its seller. Being a contract or evidence of a contract, naturally a ticket can not be property either as a thing (of value) in itself or title or ownership to anything. It, therefore, followed that the sale of lottery ticket did not involve transfer of 'property' either in the sense of the thing itself (goods) or in the sense of title or ownership (sale).

26. On purchasing a lottery ticket one merely gets a claim to a conditional interest in the prize money that is not in the purchaser's possession and the right would, therefore, squarely fall within the definition of actionable claim. The Constitution Bench decision in Sunrise further held that Anraj wrongly split up the right accruing to the purchaser of a lottery ticket. The right was one and indivisible. But even assuming the right to participate in the draw to be a separate right there would still be no sale of goods within the meaning of sales tax laws because the draw itself could not be any movable property and the participation in the draw was only with the object to win the prize. The transfer of the right would thus be of a conditional beneficial interest in movable property that is not in possession, in other words, once again an actionable claim.

27. Thus on a detailed examination, we are unable to see how the decision in Sunrise can be said to alter the position in regard to the sale of REP licenses as held by the earlier decision in Vikas. It is noted above that the Constitution Bench in Sunrise firmly and expressly declined to go into the question whether REP licences (or DEPB which replaced REP licences) were 'goods'. It is indeed true that the Constitution Bench in Sunrise did not approve the decision in Vikas insofar as it gave their free marketability as an additional reason to hold that REP licences were not actionable claim but goods' properly so called. The Constitution Bench held that the assumption that actionable claims were not transferable for value was quite unfounded and the conclusion drawn on that basis was quite wrong. In paragraphs 39 and 40 of the decision, the Sunrise decision gave illustrations of a number of actionable claims which are transferable.

28. But to our mind that does not in any way change the position insofar as REP licenses are concerned. While examining the three- Judge Bench decision in Vikas earlier in this judgment it is seen that the Court first came to hold that REP licence/exim scrip fell within the definition of goods quite independently. The court found and held that REP licenses had their own value; they were freely bought and sold in the market for their intrinsic value and for that reason alone those were goods. (See paragraph 29 of the decision in Vikas that is

reproduced above). It was only after coming to the conclusion that the Court proceeded to examine the matter in light of the observations made in Anraj relating to lottery tickets and that too because the Karnataka and Madras High Courts had heavily relied upon the Anraj decision for holding that the sale of REP licences was exigible to sales tax. On a careful reading of the decision in Vikas it is apparent that it was the intrinsic value of REP licence that brought it within the definition of goods.

29. At this stage we feel obliged to put in a caveat in regard to the observations made in Sunrise about marketability being a feature of distinction between 'goods' proper and actionable claims. What was said in Vikas, as we understand it, was that the innate value of REP licence and its free transferability made it into a market commodity. The illustrations given in paragraphs 39 and 40 of the decision in Sunrise, namely, (i) a right on the fulfillment of certain conditions to call for delivery of goods mentioned in a contract, (ii) negotiable instruments, (iii) right to recover insurance money, (iv) a partner's right to sue for an account of a dissolved partnership, (v) the right to claim the benefit of a contract not coupled with any liability, (vi) a claim for arrears of rent and (vii) a right to the credit in a provident fund account are all indeed transferable for consideration but none of these is a market commodity. The holder of any of the above rights or claims may or may not be able to find a ready buyer at a given time; conversely a prospective buyer may not find any of the above rights or claims available for purchase by going to the market at any time. Contrary to this, REP licenses had always a market, that is to say, there were people willing to sell and others willing to buy REP licences at all times. Its innate value coupled with free transferability made REP licences into a market commodity and it was that aspect of the matter that Vikas referred to for holding that REP licences could not be classified as actionable claims. Those were goods properly so-called having innate value and a ready market. The position becomes further clear by the completely contrasting findings in Sunrise (in regard to lottery tickets) and in Vikas (in regard to REP licences). In Sunrise after giving illustrations of transferable actionable claims (paragraphs 39 and 40) paragraph 41 begins as:

"A lottery ticket has no value itself. It is a mere piece of paper."

On the contrary, in Vikas paragraph 29 begins as follows:

"The above provisions do establish that REP licences have their own value. They are bought and sold as such."

We thus have not the slightest doubt in our mind that the decision in Sunrise in no way affects the position insofar as REP licences are concerned and the legal position in regard to their sale is concluded by the decision in Vikas."

30. This takes us to the next question, whether what is said in Vikas in regard to REP licences would also apply in the case of DEPB. On behalf of the appellants it is strongly contended that DEPB has materially different features and hence, the decision in Vikas will have no application to it. Mr.A.K.Jain, learned counsel appearing for the appellants in Civil Appeal No.4075/2007 especially made elaborate arguments to bring out the points of

distinction between REP licence and DEPB. But before proceeding to examine what is DEPB and how far it is different from REP licence it will be useful to take a look at the provisions of law under which the present cases arise and to establish their similarity with the statutory provisions that came up for consideration in *Vikas* and *Sunrise*. As noted above, the present appeals arise under the *Delhi Sales Tax Act, 1975*, the *Kerala General Sales Tax Act, 1963* and the *Bombay Sales Tax Act, 1959*.

31. In the Delhi Sales Tax Act 'goods' is defined in Section 2(g) as follows:

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

The expression "sale" is defined in Section 2(l) as follows:

"Sale" with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another for cash or for deferred payment or for any other valuable consideration, and includes ---

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In the Kerala General Sales Tax Act "goods" is defined in Section 2 (xii) As follows:

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

"Sale" is defined here in Section 2(xxi) as follows:

"Sale" with all its grammatical variations and cognate expressions means every transfer [whether in pursuance of a contract or not] of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation charge or pledge;

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(3B) - a transfer of right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration shall be deemed to be a sale.

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In the Bombay Sales Tax Act "goods" is defined in Section 2(13) as follows:

"Goods" means every kind of movable property (not being newspapers or actionable claims or money, or stocks, shares or securities), and includes growing crops, grass, and trees and plants (including the produce thereof) and all other things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

"Sale" is defined in Section 2(28) as follows:

"Sale" means a sale of goods made within the State for cash or deferred payment or other valuable consideration, and includes any supply by a society or club or an association to its members on payment of a price or of fees or subscription, but does not include a mortgage, hypothecation, charge or pledge; and the words "sell", "buy" and "purchase" with all their grammatical variations, and cognate expressions, shall be construed accordingly."

Schedule C of the Bombay Act contains a list of 'Goods, Other Than Declared Goods, The Sale Or Purchase Of Which Is Subject To Sales Tax Or Purchase Tax'. At Sl.No.26(6) of the Schedule, 'credit of duty entitlement pass book' is entered with sales tax or purchase tax leviable at the rate of four per cent."

32. A perusal of the aforesaid provisions would show that the definitions of "goods" and "sale" under the Delhi, Bombay and Kerala Acts are much the same as the definitions of the two expressions in the Tamil Nadu, Karnataka and West Bengal enactments. Hence, what is said in *Vikas* and *Sunrise* in regard to the legal provisions fully applies to the cases in hand.

33. Coming now to DEPB it may be recalled that it was part of the export and import policy for the period April 1, 1997 to March 31, 2002 issued under the *Foreign Trade (Development and Regulation) Act, 1992*. In order to appreciate the differences between DEPB and REP licences it needs to be borne in mind that after the regimen of licences and permits was greatly relaxed it became possible to import goods free from licencing control apart from a few items which were under the negative list, requiring a licence for import. In the changed circumstances the 'licence' part of REP licence became useless and REP licence was, therefore, replaced by DEPB broadly retaining the other features of REP licence.

34. The 1997 export and import policy in Chapter 7 dealt with 'Duty Exemption Scheme'. Paragraph 7.1 under that chapter stated that the Duty Exemption Scheme would consist of Duty Free Licence and Duty Entitlement Pass Book (DEPB). Paragraphs 7.2 to 7.7 dealt with

different kinds of duty free licences. Paragraph 7.25 described Duty Entitlement Pass Book as follows:

"The objective of Duty Entitlement Passbook Scheme is to neutralize the incidence of basic customs duty on the import content of the export product. The neutralization shall be provided by way of grant of duty credit against the export product. The duty credit under the scheme shall be calculated by taking into account the deemed import content of the said export product as per Standard Input Output Norms and determine basic customs duty payable on such deemed imports. The value addition achieved by export of such product shall also be taken into account while determining the rate of duty credit under the Scheme.

Under the Duty Entitlement Pass Book (DEPB) Scheme, an exporter shall be eligible to claim credit as a specified percentage of job value of exports made in freely convertible currency. The credit shall be available against such export products and at such rate as may be specified by the Director General of Foreign Trade by a Public Notice issued in this behalf.

Any item except those appearing in the Negative List of Imports shall be allowed for import without payment of basic customs duty, special duty of customs as well as additional duty of customs, against the credit under a Duty Entitlement Pass Book (DEPB). The holder of Duty Entitlement Pass Book (DEPB) shall have the option to pay additional customs duty, if any, in cash as well."

Paragraph 7.26 provided that third party exports would also be admissible for grant of credit under DEPB. Paragraph 7.29 provided that DEPB might be issued on (a) Post export basis and (b) Pre export basis.

35. Paragraph 7.32 dealt with transferability and provided as follows:

"The DEPB on post export basis and/or the items imported against it are freely transferable. The transfer of DEPB shall however be for import at the port specified in the DEPB which shall be the port from where exports have been made. However, imports from a different port shall be allowed as per the terms and conditions of notification issued by Department of Revenue."

Paragraph 7.40 stated that pre-export DEPB would be non-transferable and also subject to actual user condition but in this case we are not concerned with pre-export DEPB."

36. It is thus to be seen that in two vital aspects, relevant to the issue under consideration, DEPB is exactly the same as REP licence. Like REP license it has an innate value and for which it freely sells in the market. Much argument was advanced on the point that DEPB, unlike REP licence was not a licence for import of goods but the submission is clearly misconceived and unacceptable. DEPB is not a licence simply because under the liberal

import policy no licence is required to import a very large number of goods and very few items, placed under the negative list, require a licence for import. We are, therefore, unable to accept the submission that DEPB is materially different from REP licence and its transfer by way of sale would not be exigible to sales tax.

37. Mr.Soli J. Sorabjee, learned senior advocate, appearing in Civil Appeal No.6893 of 2003 led the arguments on behalf of the appellants. Mr. Sorabjee referred to Entry 26(6) in Schedule C of the Bombay Sales Tax and submitted that what was sought to be taxed was the transfer of "Credit" in Duty Entitlement Passbook. Learned counsel submitted that `credit' could never mean `goods' under the sales tax laws. Elaborating the point he submitted that credit was earned on the basis of export(s) made by the assessee and the credit lying with the Government in favour of the assessee was in the nature of debt. The credit represented an ascertained sum of money and it was clearly a debt even though it was not refundable or payable in cash. A debt that could be discharged by way of a set-off is nonetheless a debt. In this case the credit represented a conditional debt that could be discharged by way of a set-off against the duty payable on a future import. Being in the nature of debt, the DEPB credit plainly fell within the first part of the definition of actionable claim.

38. Learned counsel alternatively submitted that even if the credit is seen not as a debt but as movable property, the sale of DEPB only involved the transfer of the right to claim credit. The credit not being in possession of the claimant, the right to utilize it against duty payable on a future import was certainly a beneficial interest in that movable property. Seen thus the credit would still fall within the second part of the definition of actionable claim.

39. In support of the submission, Mr. Sorabjee sought to derive support from the Constitution Bench decision in Sunrise which, according to him, laid down that in the sale of a lottery ticket what is transferred is the conditional right to claim a beneficial interest in the prize money which was movable property, not in possession of the purchaser. He also submitted that the saleability of DEPB would not make any difference because many other actionable claims were equally saleable.

40. We are afraid, we find the submission unacceptable. We are unable to see DEPB either as a debt or as a beneficial interest in movable property not in possession of the claimant. To us it is plain that DEPB like REP licence has its own intrinsic value and the purchaser, on payment of consideration, buys something for its value. The DEPB credit is thus clearly `goods' within the meaning of sales tax laws and its sale clearly exigible to tax.

41. We may observe here, if DEPB (or for that matter REP license!) has to be compared with a lottery ticket, it can only be compared with a lottery ticket that has won the prize. The prize- winning lottery ticket ceases to be a mere piece of paper having no value itself. It acquires inherent value and becomes itself a thing of value. Imagine a situation where prize winning lottery tickets are freely available for sale. (As a matter of fact, clandestine sale of the prize winning lottery ticket for conversion of black money into white is not completely unknown!). In buying the prize winning lottery ticket the purchaser would pay the

consideration for the value that the piece of paper has acquired and in that situation we fail to see how that ticket can be described as anything else but `goods'.

42. If any more analogies are to be given one might compare DEPB with prepaid meal tickets or prepaid petrol coupons or accumulated flying miles. A meal ticket, a petrol coupon or flying miles credit has its own intrinsic value. If permitted free transferability those would soon become market commodities and would be sold and bought for their value as `goods'.

43. In light of the discussions made above, the two questions framed at the beginning of the judgment are to be answered as follows:

“The Constitution Bench decision in Sunrise does not alter the position in regard to levy of tax on sale of REP licence and on that issue the three-Judge Bench decision in Vikas continues to hold the field. DEPB has an intrinsic value that makes it a market commodity. Therefore, DEPB, like REP licence qualifies as `goods' within the meaning of the Sales Tax laws of Delhi, Kerala and Mumbai and its sale is exigible to tax.”

44. We thus find no merit in any of these appeals. All the appeals are dismissed but with no order as to costs.

¹[(1996) 4 SCC 433]

²[(2006) 5 SCC 603]

³[1986) 1 SCC 414]

⁴[8 QB 134: 115 ER 825]

⁵[61 CLR 596]

⁶[1959 SCR 379]

⁷[1920 (3) KB 497]