

ANDHRA PRADESH HIGH COURT

L.B., Paradise Lottery Centre

Vs.

State (A.P)

Writ Petn. No. 363 of 1972

(Chinnappa Reddy, J.)

25.02.1974

ORDER

Chinnappa Reddy, J.

1. The petitioners are agents of the Government of the States of Assam, Bihar, Haryana, Himachal Pradesh, Kerala, Madhya Pradesh, Mysore, Tamil Nadu, Rajasthan and Uttar Pradesh for the sale of tickets, in Andhra Pradesh, of lotteries conducted by these Governments. Sri N. V. B. Sankar Rao, learned counsel for the petitioners, tells me that except the Govt. of the States of Andhra Pradesh, Gujarat and Nagaland, all other State Governments conduct lotteries and utilize the proceeds for their development plans. All these years such lottery tickets were being freely sold in the State of Andhra Pradesh. But on 24-12-1971 the Government of Andhra Pradesh issued the following memorandum to the Inspector General of Police;

"The attention of the Inspector General of Police is invited to the reference cited and he is informed that sale of lottery tickets of other States in this State is unlawful under the provisions of the Andhra Pradesh Lotteries Act, 1968 and action under Section 3 of the said Act can straightway be taken in such cases. The Inspector General of Police is requested to issue suitable instructions to all concerned in the matter."

2. The petitioners question the legality of this memorandum and seek a writ to restrain the respondents from preventing in any manner, the sale of tickets of lotteries conducted by other State Governments.

3. Article 246 (1) of the Constitution provides that, notwithstanding anything in clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. Article 246 (2) provides that, notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule. Article 246 (3) provides that subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters

enumerated in List II in the Seventh Schedule. Thus Parliament has exclusive power to make laws with respect to the matters enumerated in List I notwithstanding the power of the Legislatures of the States to make laws with respect to the matters enumerated in Lists II and III, while, the exclusive power of the Legislature of a State to make laws even ; in respect of matters enumerated in List II is made subject to the power of Parliament to make laws with respect to the matters enumerated in Lists I and III. Since the power of the State Legislature to legislate with respect to matters in List II is made subject to the power of Parliament to Legislate with respect to matters in List I, it follows that if an entry in List I and an entry in List II appear to overlap, that is, if they appear partly to cover the same field, the field of legislation covered by the entry in List I must be considered to be taken out of the scope of the entry in List II and reserved to be specially dealt with by Parliament; in other words, to that extent the power of the State Legislature must be considered to be curtailed. This position was clearly explained by the Federal Court in *Subrahmanyam v. Muthuswamy*¹, where it was observed :

"The Federal Legislature (Parliament) has full and exclusive power to legislate with respect to matters in List I and has also power to legislate with respect to matters in List III. A Provincial Legislature (State Legislature) has exclusive power to legislate with respect to List II, minus matters falling in List I or List III; has concurrent power to legislate with respect to matters in List III, minus matters falling in List I..... .The dominant position of the Central Legislature with regard to matters in List I and List II is thus established."

4. Now Entry 40 in List I is "Lotteries organized by the Government of India or the Government of a State." Entry 34 of List II is "betting and gambling." The expression "betting and gambling" has always been understood to include the conduct of lotteries and this was not disputed before me by the learned counsel. There is an apparent overlapping between Entry 40 in List I and Entry 34 in List II. It must follow that out of the field of legislation comprised by the expression "betting and gambling" (including the conduct or lotteries), lotteries organized by the Government of India or the Government of a State are taken out and reserved to be dealt with by the Parliament. No Legislature of a State can, therefore, make a law touching lotteries organized by the Government of India or the Government of a State.

5. In *State of Bombay v. R. M. D. Chamarbaugwala*², Chagla C. J. observed :

"We are, therefore, of the opinion that the better and the mere interpretation of the expression "gambling" is that Parliament was given the competence to deal with lotteries organized by the Government of India or the Government of a State under Entry 40 of List I and with regard to all other types of lotteries competence was conferred upon the State Legislature under Entry 34."

In *Kamal Agency v. State*³, Mody, Acting C. J. observed :

'Lottery depends purely on chance and involves no skill or knowledge. It is, therefore, gambling. The above two entries therefore overlap to the extent that the lotteries mentioned in the above Entry 34. Article 246 confers on the Union

¹(1940) 45 CWN (FC) 1

³ AIR 1971 Bom 332

Parliament exclusive power to legislate in respect of entries in List I which would include lotteries organized by a State. On the basis of the ratio laid down by the Supreme Court in *Gujarat University v. Shri Krishna*⁴, when there is such overlapping between the entries in List I and List II, the power conferred on the Union Parliament under any entry in List I must prevail over the power of a State Legislature under any entry in List II. As a consequence, the power of a State to legislate in respect of gambling would not include a power to legislate in respect of a lottery organized by a State. The power to legislate in respect of the latter vests exclusively in the Union Parliament."

In *Shri Indravadan Chimanlal Thakkar v. State of Gujarat*⁵ Bhagwati C. J. observed :

"Now Entry 34 of List II deals with the topic betting and gambling and this would *prima facie* cover lotteries, because in lotteries even where they are organized by the Government of India or a State Government, there is an element of gambling so far as purchasers of tickets of lotteries are concerned. But there is another entry, namely, Entry 40 in List I which reads "lotteries organized by the Government of India or the Government of a State." The State Legislature can, therefore, in the exercise of the legislative power conferred upon it under Entry 34 of List II make a law with respect to lotteries but such law cannot seek to affect lotteries organized by the Government of India or the Government of a State, which can be dealt with only by Parliamentary legislation under Entry 40 of List I."

6. Bearing the relevant constitutional provisions and their interpretation in-mind let me now proceed to examine the Andhra Pradesh Lotteries Act 1968. Section 3 declares all lotteries unlawful, subject to the provisions of the Act. Section 4 creates and defines various offences in connection with lotteries whether such lotteries are promoted or conducted in the State or elsewhere. Sections 5 and 6 provide for the licensing of certain lotteries and such licensed lotteries are saved from the penal consequences prescribed by Section 4. Section 26 (1) saves from the operation of the Act lotteries organized by the Government. 'Government' is defined by Section 2 (1) (b) as meaning 'the State Government'. The learned counsel for the petitioners urged that Section 26 (1) was apparently enacted in view of Entry 40 of List I of the Seventh Schedule and therefore, 'the State Government' referred to in Section 2 (1) (b) must mean the Government of any State. On the other hand, the learned Government Pleader urged that the expression 'the State Government' could only mean, in the context of a law made by the legislature of the State of Andhra Pradesh, the Government of the State of Andhra Pradesh. If the interpretation placed upon the expression by the learned Government Pleader is accepted it would mean that the lotteries organized by the Governments of other States are unlawful within the State of Andhra Pradesh and persons associated with the publication and advertisement of such lotteries, the sale and distribution of lottery tickets, etc., within the State of Andhra Pradesh are liable to be punished under Section 4 of the Act. Such a construction would make the Act *ultra vires* in regard to lotteries organized by the Government of India or the Government of a State in view of Item 40 of List I of the Seventh Schedule. There is no reason why such a

construction should be placed upon the

⁴AIR 1963 SC 703

⁵(Special Civil Application No. 1309 of 1970) (Guj)

expression "the State Government" when it is possible to place upon that expression a construction in tune with the division of legislative powers under the Constitution.

7. The learned Government Pleader urged that the expression 'lotteries organized by the Government of India or the Government of a State' should be construed to mean lotteries lawfully organized by the Government of India or the Government of a State. The learned Government Pleader argued that under Article 73 of the Constitution the executive power of the Union extended to matters with respect to which Parliament had power to make laws and therefore, the executive power of the Union extended to the organization of lotteries by the Government of India or by the Government of a State. Since Article 258 of the Constitution provided for the conditional or unconditional entrustment to the Government of a State or to its officers functions in relation to any matter to which the executive power of the Union extended, the Government of a State could lawfully organize a lottery where the President in exercise of his power under Article 258 entrusted to the State Government that function which was within the executive power of the Union. The learned Government Pleader urged that lotteries organized by Governments of States without any entrustment of executive power by the President as contemplated by Article 258 were lotteries unauthorized by the Constitution, therefore unlawful and, therefore not within Entry 40 of List I but within Entry 34 of List II. According to the learned Government Pleader, the Legislature of a State was competent to legislate in regard to lotteries run by Governments of other States without any entrustment by the President.

8. It should be noticed here, straightway, that on the interpretation placed by the learned Government Pleader on the expression 'the State Government' in Section 2 (1) (b) of the Andhra Pradesh Lotteries Act, Section 26 (1) of that Act does not save even lotteries organized by the Government of another State pursuant to an entrustment by the President of the executive power of the Union in accordance with Article 258 of the Constitution. All lotteries organized by Governments of other States are unlawful, on such interpretation, whether or not organized pursuant to the entrustment of any power under Article 258.

9. Nor is there any justification for reading the word 'lawful' into Entry 40 of List I and then proceeding to interpret the word 'lawful' as meaning a lottery organized pursuant to the entrustment of the executive power under Article 258 of the Constitution. Assuming that lottery can properly be organized by the Government of a State only on the entrustment of such power by the President pursuant to Article 258 it does not follow that the Legislature of a State has the competence to make laws with respect to a lottery organized by the Govt. of a State notwithstanding Entry 40 of List I. If the Government of a State organizes a lottery without the entrustment of executive power as contemplated by Art, 258 or in disregard of Article 73 of the Constitution or even in defiance of any executive instruction that may be issued by the Union Government or any condition that may be imposed while entrusting executive power under Article 258 it will be a matter for the Parliament to step in and pass appropriate legislation in exercise of its power under Entry 40 of List I of the Seventh Schedule. Under no circumstances can the Legislature of one State take upon itself the power to declare unlawful a lottery run by the Government of another State. The Parliament has exclusive legislative power to that extent the Legislature of a State has no power to legislate with respect to lotteries organized by the

Government of India or the Government of a State. Legislative power cannot be fed into Entry 34, by feeding the word 'lawful' into Entry 40 of List I and thus artificially restricting the scope of Entry 40. The learned Government Pleader relied upon the decision of the Bombay High Court in AIR 1971 Bombay 332. In that case, the learned Judges were considering Section 32 (b) of the Bombay Lotteries (Control and Tax) and Price Competitions (Tax) Act, 1958 which saved from the operation of the Act lotteries organized by the Central Government or a State Government. The learned Judges held that the lotteries which were saved by Section 32 (b) were lotteries organized by the State Government lawfully. Mody, Acting C. J., said

"It was then contended that it is not competent for the respondent State to take any action under the Bombay Lotteries Act to prevent the sale or distribution in the territory of the respondent State of lotteries of other States because sub-section (b) of Section 32 specifically states that nothing in that Act shall apply to, inter alia, a lottery organized by a State Government. In our opinion, the reference in this sub-section (b) to a lottery organized by a State Government must be read to a lottery organized and conducted by a State Government lawfully i.e. with due authority, and that the exception cannot apply if the lottery is not organized or conducted by a State Government otherwise than lawfully i.e. otherwise than with due authority. If such a lottery is not organized or conducted lawfully, it must for the purpose of this clause (b) be treated as being not lawful so as to take it out of the exemption granted by clause (b).

Now, in our opinion, as already stated earlier, both in clause (b) of Section 32 and Entry 40 of List I, a 'Lottery organized by a State' must be construed to refer to a lottery lawfully, i.e. with proper authority, organized by a State. If a lottery is not lawfully organized by a State the State Government is empowered to legislate in respect of the same, because such a legislation would fall under Entry 34 of List II under "gambling". Similarly a State, like the respondent State, can take action even executive action, in respect of a lottery of another State which is unlawful."

With great respect to the learned Judges, for the reasons already mentioned by me, I do not agree. I prefer the view expressed by the Gujarat High Court in Special Civil Application No. 1309 of 1970 (Guj) where the learned Judges considered the identical provision, Bhagwati C. J., observed.

"The words 'Lottery organized by the Central Government or a State Government' in Section 32, clause (b) on a plain grammatical construction means lottery actually organized by the Central Government or a State Government without reference to the question whether the Central Govt. or the State Government had executive authority to do so. Even where the Central Government or a State Government had no executive authority and yet it organizes a lottery, the lottery would, on a plain natural connotation of the words, be covered by the expression 'lottery organized by the Central Government or a State Government'. If that be so, there is no reason why, in defiance of the principle of construction of a penal statute to which we have just referred, the word lawfully should be added in Section 32, clause (b) so as to narrow down the ambit and coverage of the

exempting provision contained in that clause. Moreover, it would indeed be unreasonable to expect a person who is about to engage himself in an activity connected with a lottery which is actually organized by the Central Government or a State Government to inquire whether the Central Government or State Government had executive authority under the Constitution to do what it has actually done. All that a citizen can be legitimately expected to inquire is whether the lottery is one which is actually organized by the Central Government or a State Government. If it is, he can safely proceed on the basis that he is not committing an offence under the Lotteries Act. To ask him to inquire into the Constitutional authority of the Central Government or the State Government to organize a lottery on pain of incurring a penal liability would be to throw an intolerable burden on him which could never have been intended by the Legislature."

Again he observed :

"If there is a lottery actually organized by the Central Government or a State Government but without executive authority under the Constitution, it would, on the construction of the respondent, not fall within Section 32, clause (b) and would be unlawful by reason of Section 3. This would mean that the State Legislature has power to legislate in regard to such lottery. But that would be possible only if such lottery is not covered by Entry 40, List I, for Parliament alone and not the State Legislature would have power to legislate in regard to it. The Lotteries Act would, therefore, be a valid piece of legislation only if a lottery organized by the Government of India or the Government of a State but without executive authority to do so, does not fall within Entry 40, List I, and in order that such lottery does not fall within Entry 40, List I, the words "lottery organized by the Government of India or the Government of a State" in Entry 40, List I, would have to be read to mean lotteries lawfully organized by the Government of India or the Government of a State, but that would reduce Entry 40, List I, to an absurdity. Entry 40, List I is a head of Legislative power and it is difficult to see how the word 'lawfully' can be read in an entry which deals with a head of legislation. How can it be said that Parliament shall have exclusive power to legislate with respect to lotteries lawfully organized by the Government of India or the Government of a State? That would be begging the question. Entry 40, List I can refer only to lotteries organized in fact by the Government of India or the Government of a State. It refers to a postulate of facts in reference to which the power of legislation is conferred. It is, therefore, clear that both in Entry 40, List I, and Section 32 clause (b) lotteries, organized by the Government of India or a State Government which are referred to are lotteries actually organized by the Government of India or a State Government without reference to the question whether the Government of India or a State Government had executive authority to do so."

The learned Government Pleader relied upon a letter dated 1-7-1968 of the Government of India addressed to the Chief Secretaries of all the States in which it was stated.

"It is felt that suitable steps should be taken to safeguard the interests of such State Governments, who, as a matter of policy do not desire to start State Lotteries or permit sale of tickets of lotteries organized in other States, within their jurisdiction. In order to avoid objections from such States, it has been decided that the Central Government's permission for conducting State Lotteries is available on the condition that tickets of such a lottery will not be sold in another State without the express consent of the State Government concerned. I am to add that in order to achieve this object an amendment of Section 294-A, I. P. C. is being undertaken to make sale of tickets without the consent of the State Government concerned a penal offence."

He argued that the instructions of the Government of India showed that the consent of the State Government should be obtained before tickets of lotteries conducted by Governments of other States are sold within the State. It is true the letter says so. But there is no way of enforcing the instructions of the Government of India except by the Parliament making a law in that behalf. This is recognized in the letter itself by the reference to the proposed amendment to Section 294-A of the Penal Code.

10. I therefore hold that neither by legislative enactment nor by executive act can a State ban the sale of tickets etc. of a lottery organized by another State.

11. In the result, I have no option but to allow the writ petition. There will, however, be no order regarding costs. Advocate's fee Rs. 100/-.

Petition allowed.