

BOMBAY HIGH COURT

Kamal Agency

Vs.

State of Maharashtra

Misc. Petn. No. 748 of 1969

(Mody, Ag. C.J. and Vaidya, J.)

08.09.1970

JUDGMENT

Mody, Ag. C.J.

1. This is a petition by prayer (b) of which the petitioners pray for a Writ of Mandamus under Article 226 of the Constitution of India against the State of Maharashtra ordering the respondents to forbear from doing any act or thing so as to prevent, obstruct or interfere in any manner with the free and unrestricted sale and distribution of and/or leadings in lottery tickets of lotteries organized or conducted by any other State in India by the Petitioners.

2. The question raised by this Petition is : Whether a State Government has power or authority to prevent sale of or dealings in tickets of State Lotteries organized and conducted by any other State in the Union of India in so far as such sales or dealings take place within the territory of the State of Maharashtra, which is the respondent in this Petition.

3. The first petitioner is a partnership firm, of which the second petitioner is a partner. The first Petitioner has been appointed an Agent by each of the States of Kerala, Punjab, Haryana, Rajasthan, Uttar Pradesh, west Bengal, Tamilnadu, Jammu and Kashmir, Madhya Pradesh and Assam for sale within the territory of the respondent State of tickets of lotteries organized and conducted by each of those States. The first petitioner also sells within the territory of the respondent State tickets of lotteries organized and conducted by the respondent State.

4. The third petitioner has been appointed by the respondent State as an agent for the sale within the territory of the respondent State of tickets of lotteries organized and conducted by the respondent State. The third petitioner also sells within the territory of the respondent State tickets of lotteries organized and conducted by many other States of the Union of India.

5. There exists in the respondent State the Bombay Lotteries (Control and Tax) and Prize Competitions (Tax) Act, 1958, hereinafter referred as "The Bombay Lotteries Act". Section 3 of the Act provides : "Save as provided by this Act, all lotteries are unlawful". Material portions of Section 32 are :-

"32. Nothing in this Act shall apply to -

x x x

- (b) A lottery organized by the Central Government or a State Government;
- (c) a lottery specially authorized by the State Government."

6. The Act prohibits organizing of lotteries and sale and distribution of tickets of such lotteries as also certain acts and transactions connected therewith except under a license granted to the respondent State and makes violation of such prohibition a punishable offence. The provisions of the Act would not, however, by reason of the exceptions made in clauses (b) and (c) of Section 32, apply to lotteries organized and conducted by the Central Government or a State Government or by the respondent State itself.

7. The police authorities seized from the petitioners certain tickets of lotteries organized and conducted by certain States other than the respondent State.

8. By prayers (a), (b-1) and (b-2) of this Petition the petitioners pray for return of the seized tickets and for damages in respect of such seizure. As a result of an order made in this Petition on 29th October 1969, prayers (a), (b-1) and (b-2) do not survive and what survives is only the relief prayed for as aforesaid by prayer (b). By the said order the petitioners were ordered to serve the Rule issued to this Petition, together with a copy of this Petition, upon the States of Assam, Haryana, Jammu and Kashmir, Kerala, Madhya Pradesh, Orissa, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh and West Bengal and also the Union of India. All the States and the Union of India have been served in accordance with the said order. Only the State of Uttar Pradesh, however, has appeared at the hearing before us.

9. Mr. Parikh, the learned Counsel for the petitioners, argued.

(1) The language of Entry 40 of List I of the Seventh Schedule to the Constitution itself pre-supposes that a State has power to organize and conduct a lottery; a lottery organized by a State would, therefore, be lawful, that the Parliament can legislate in respect of such lottery only after it is organized by the State and further, as a consequence, that any activity of a State relating to the organizing and conducting of such a lottery would be a lawful activity;

(2) Articles 73 and 162 of the Constitution deal with only distribution of executive powers between the Union and a State. The executive powers of a State are not only those mentioned in Article 162. A State has an executive power under Article 298 to carry on

any trade or business and to make contracts for any purpose. A lottery conducted by a private person may be shunned but a lottery organized by a State would stand on a different footing because it would be for the benefit of the public generally and that therefore a lottery organized by a State is a business or trade or the making of a contract and is therefore within the executive powers of a State. It may be stated straightway that Mr. Parikh specifically stated that he did not at this stage canvass protection under Article 19 (1) (g) and further that, as a matter of fact, he did not advance any argument based upon Article 301.

(3) In respect of the Bombay Lotteries Act Mr. Parikh contended that in respect of a lottery organized by a State no other State has power to legislate because under the provisions contained in Entry 40 of List I the power is in the Parliament and that therefore the provisions of the Bombay Lotteries Act, in so far as they are sought to be invoked in respect of a lottery organized by a State, are beyond the competence of the respondent State.

(4) In view of the provisions of Article 73 no State can have any executive power in respect of a lottery organized by another State and the former State can take action against or in respect of such a lottery only if the Parliament passes legislation in respect of such lottery already organized and then delegates power in respect of it to another State to take preventive action. He pointed out that there is no such legislation passed by the Parliament, nor any such order in favour of the respondent State. He contended that therefore the respondent State can take no executive action against sale, distribution, etc., within the territory of the respondent State of a lottery organized by another State.

(5) He pointed out that under Section 32 (b) of the Bombay Lotteries Act a lottery organized by a State is exempted from the application of that Act, that a lottery organized by another State is lawful, but that even if the lottery is not lawful it is yet a lottery organized by a State and is entitled to the exemption under Section 32 (b) and the respondent State cannot take any action under that Act in respect of such a lottery.

10. On behalf of the State of Uttar Pradesh, however, not only were the arguments advanced by Mr. Parikh adopted as their arguments, but, in addition, reliance was placed on the Circular letter of the Government of India dated 1st July 1968, relied upon by the State of Uttar Pradesh in the affidavit filed herein on its behalf. It was contended that, that letter amounts to an entrustment of the nature mentioned in Article 258 (1) and, secondly, that the only object of that letter was to safeguard the interests of only those State Governments which, as a matter of policy, did not desire to start State lotteries and that accordingly a State like the respondent State which does not as a matter of policy abstain from running a State Lottery cannot have any objection on principle to the sale of lottery tickets of other States within its territory.

11. It may be noted that Mr. Parikh did not advance any argument on the basis of, or in respect of, the said letter dated 1st July 1968.

12. Mr. Setalvad, the learned Counsel for the respondent, has urged certain arguments which can conveniently be reduced to five groups as follows :-

- (1) Under the relevant provisions of the Constitution of India a lottery organized and conducted by a State is unlawful unless it is in accordance with a law, if any, enacted by Parliament or unless the functions or powers of the Government of India have been entrusted to the State Government under the provisions of Article 258 (1);
- (2) There is no such law enacted by Parliament, nor any valid entrustment by the Government of India. He contended that the said Circular letter of the Government of India dated 1st July 1968 is not such a valid entrustment;
- (3) If that letter dated 1st July 1968 be treated as such valid entrustment, the conditions laid down therein have not been shown to have been fulfilled by the State whose lottery tickets are being sold and distributed within the territory of the respondent State.
- (4) Lottery is per se gambling and is not trade or business or commerce and is therefore not entitled to protection under Article 19 (1) (g) or Article 301 of the Constitution of India, nor has a State any executive power in respect thereof under Article 298; and
- (5) What are excepted under Section 32 (b) of the Bombay Lotteries Act are lotteries lawfully organized by a State and therefore, unless a lottery organized by another State is lawful, in the sense that it is authorized, the respondent State is entitled to take action against or in respect of it under the provisions of the Bombay Lotteries Act.

13. Now Entry 40 of List I provides :-

"Lotteries organized by the Government of India or the Government of a State."

14. Entry 34 of List II provides :-

"Betting and gambling."

15. 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 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*¹, 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.

16. Articles 73 and 162 deal with distribution of executive power of the Government of India and

of the States. Article 73 (1) provides that subject to the provisions of the Constitution, the executive power of the Union extends to the matter with respect to which the Parliament has power to make laws. Article 162 provides that subject to the provisions of the Constitution, the executive power of a State extends to the matters with respect to which the Legislature of that State has power to make laws. As the power to legislate in respect of lotteries organized by a State is exclusively in the Union Parliament, the executive power also in respect of lotteries organized by a State would be exclusively in the Government of India by reason of the operation of Article 73 and conversely a State would have no executive power in respect of a lottery organized by a State. As pointed out by the Supreme Court in *Ram Jawaya Kapur v. The State of Punjab*², Articles 73 and 162 of the Constitution do not contain any definition as to what

¹ AIR 1963 SC 703

²(1955) 2 SCR 225 : AIR 1955 SC 549

the executive function is and what activities would legitimately come within its scope as they are primarily concerned with the distribution of executive power between the Union on the one hand and the component States on the other, but they do not mean that it is only when Parliament or the State Legislature has legislated on certain items appertaining to their respective lists that the Union executive or the State executive, as the case may be, can proceed to function in respect of them. It has further pointed that the language of Article 162 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already and that the same principle underlies Article 73.

17. Now the material words in the above Entry 40 are "Lotteries organized by a State". Although the word used in Entry 40 is "organized", it refers to a lottery which a State can organize. A State's power to legislate in respect of organizing a lottery for that State would have to be found, if at all, within List II. As seen earlier, inasmuch as the Union Parliament has the exclusive power to legislate in respect of a lottery organized by a State, no State would have legislative power in respect of that matter. Consequently, by reason of the provisions of Article 73, the executive power to organize a State lottery would vest exclusively in the Government of India and no State would have such executive power. There can however be one exception and it would be if there is an entrustment of such power in favor of a State in accordance with the provisions of sub-article (1) of Article 258. The latter provides :

"Notwithstanding anything in this Constitution, the President may with the consent of the Government of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends."

The non obstante clause in the beginning of this sub-article shows that the provision of that sub-article overrides the provision relating to the distribution of executive powers under Articles 73

and 162. What is to be noted is that the entrustment contemplated by this sub-article is to be by the President of India and that too with the consent of the Government of the State in whose favor the entrustment is to be made.

18. It is, therefore, clear from the above provisions of the Constitution that no State Government can organize or conduct a lottery save and except according to the provisions of the law, if any, enacted by the Parliament or unless the functions or powers of the Government of India are entrusted to the State Government under and in accordance with the provisions of Article 258 (1) and only to the extent that the functions or powers are so entrusted. It follows, therefore, that as State lotteries are exclusively within the legislative competence of the Parliament and therefore, in view of Article 73, within the executive competence of the Government of India, no State Government can organize a State lottery in the absence of such an entrustment under Article 258 (1). If a component State of the Union organizes a lottery in the absence of any legislation in that behalf of the Parliament or in the absence of a valid entrustment under Article 258 (1), the lottery would not be lawful. The word "unlawful" can have two meanings. The word can be used in the sense of unauthorized or prohibited. It can also be used in another sense, as referring to something which is not only unauthorized or prohibited, but which is a punishable crime or offence. It is, in the former sense of "unauthorized" that a lottery not organized by a State under or in accordance with a legislation of Parliament or in accordance with a valid entrustment under Article 258 (1) would not be lawful.

19. Mr. Parikh contended that Entry 40 of List I itself contemplates that a lottery can be organized by a State and that such a lottery would therefore be lawful. In our opinion, the function of Entry 40 is merely to set out a matter in respect of which the Union Parliament has legislative power. A lottery can, if at all, be organized either in accordance with the legislation passed by a State or in exercise of the executive power of the State. If the validity of a lottery has to be adjudicated upon from the point of view of the exercise of power by a State Legislature, such a power must be found in List II. If a lottery is organized by a State in exercise of its executive power, the requisite executive power or authority must be found in the relevant provisions of the Constitution. In view of the said Entry 40 no State Legislature can have power to legislate in respect of a lottery organized by that State. It is only the Union Parliament which can legislate in respect thereof. If a State lottery is organized by any State in the exercise of its executive power authority for it must be found in some provision of the Constitution itself. Simply because Entry 40 mentions "Lotteries organized by a State", it does not mean that this Entry, by itself, without anything else, envisages authority in the State to lawfully, i.e., with authority, organize a lottery for that State.

20. The said letter dated 1st July 1968 relied upon on behalf of the State of Uttar Pradesh is as under :-

"No. 29/11/67-P. IV

IMMEDIATE :

Government of India,
Ministry of Home Affairs.

To,

The Chief Secretary to the Government of (all States)
New Delhi-11,

the 1st July, 1968.

10 Ashadha, 1890.

Sub : Conduct of Lotteries by the State Governments.

Sir,

I am directed to say that the conduct of lotteries by State Governments has been engaging the attention of the Government of India for some time. The constitutional position in this regard is that while State Governments are competent to grant sanction for the conduct of lotteries organized by private individuals, organizations, institutions etc., lotteries organized by State Governments themselves are covered by Item 40 of List I of the Seventh Schedule of the Constitution of India. The executive power of the Union, therefore, extends to lotteries conducted by State Governments and the State Governments are not competent to conduct lotteries without the necessary authorisation of the Central Government.

2. As regards the question of authorizing States to hold lotteries, the Central Government were therefore, in principle opposed to the holding or authorization of lotteries. However, some State Governments have represented that conduct of lotteries by them would help them to mobilise savings and to find funds for financing their development plans. Considering all aspects of the matter, it has, now, been decided that the policy regarding authorizing State Governments to conduct lotteries be liberalized, if the State Governments consider such action desirable.

3. At the same time, it is also 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 the 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, Indian Penal Code is being undertaken to make sale of tickets, without the consent of the State Government concerned, a penal offence.

4. *This disposes of the Government of Rajasthan, Finance (Small Savings and State Lotteries) Deptt. Letter No. 56-NAB/Finance/68 dated May 1968.

5. @ This disposes of the Government of West Bengal, Finance Department (Audit Branch) Letter No. 2142-F, dated 20th June, 1968.

6. % This disposes of the Government of Haryana, Home Department letter No. 283-IH-68/1774 dated 29-1-1968.

Yours faithfully,
SD/- D. D. Joshi,
Deputy Secy, of the Govt. of India.
*For Govt. of Rajasthan only.
@For Govt of West Bengal only.
%For Govt. of Haryana only."

21. A plain reading of the language of this letter clearly shows that it is not an entrustment by the President within the meaning of Article 258 (1). The first paragraph of the letter contains the Government of India's view that State Governments are not in law competent to conduct lotteries without the necessary authorization of the Central Government. It emphasizes that a State Government can conduct a lottery only if so authorized by the Central Government. Paragraph 2 of the letter sets out that "has been decided" by the Government of India as a matter of its policy, the decision being that the policy regarding authorizing State Governments to conduct lotteries be liberalized if the State Governments consider such action desirable. This paragraph merely conveys to the Governments of States that the Government of India would be willing to confer authorization as mentioned therein if the State Governments consider such action desirable. Paragraph 3, however, first states that certain State Governments do not, as a matter of policy, desire to start State lotteries or promote sale of tickets of lotteries organized in other States within their jurisdiction and then that paragraph intimates that in order to avoid objections from such States it has been decided by the Government of India that the latter's permission for conducting State lotteries would be "available" on the condition that tickets of such a lottery would not be sold in another State without the express consent of the State Government concerned. In our opinion, the clear language in paragraph 2 shows that what is stated therein was a decision as to the policy of the Central Government and on intimation that the necessary authorization would be "available" if the State Governments consider it desirable. The use in paragraph 3 of the word "decided" and the statement that permission would be "available" shows, without any doubt, that the letter is merely an intimation by the Government of India to the various State Governments that the Government of India had arrived at a policy decision and that if any State Government wanted and applied for the authorization as mentioned in that letter it would be available to the State Government, but, of course, fully depending on the conditions set out in paragraph 3 of the letter. There is not the slightest doubt in our mind that this letter does not, by itself, confer, or even intend to confer, any authorization of entrustment in accordance with the provisions of Article 258 (1). Moreover, what Article 258 (1) requires is an entrustment by the President. This letter is not a conferment of any authorization or entrustment, not only by the President, but even in the name of the President. This letter, therefore, cannot be construed as an entrustment of power by the Government of India in favor of States within the meaning of or in accordance with the provisions of Article 258 (1). Along with a copy of this letter which is annexed as part of Ex. No. 1 collectively to the affidavit in reply filed on behalf of the respondent State there is also annexed a copy of an order dated 2nd April 1969 as a part of the same exhibit. In contrast to the said letter dated 1st July 1968 this order clearly shows that by that order an entrustment was

made in accordance with the provisions of Article 258 (1). It is made in the name of the President and the last paragraph of the order specifically states : "The President is further pleased to entrust to the Government of Maharashtra under clause (1) of Article 258 of the Constitution the executive power of the Union in respect of lotteries organized by that Government."

22. Mr. Setalvad has drawn our attention to the letter dated 25th October, 1969 from the Government of India in its Ministry of Home Affairs to the Secretary of the respondent State in its Finance Department, a copy of which letter is annexed as Ex. No. 1 to the Supplemental affidavit filed on behalf of the respondent State. That letter appears to have been written in pursuance of an inquiry made on behalf of the respondent State and in answer it is stated that it was only in the case of Maharashtra lottery that a specific order permitting the State Government to conduct such a lottery and entrusting to them the executive power of the Union in respect of that lottery was issued and that since no other State Government had requested for an authorization, such an order had not been issued in the case of State lottery organized by them. In spite of the statement contained in this letter no authorization other than the said letter dated 1st July 1968 has been relied upon or even pointed out on behalf of the State of Uttar Pradesh. It may be stated, although Mr. Parikh did not argue this point, that even the petition does not refer to any such authorization. We must, therefore, proceed on the basis that there is no such specific authorization contemplated under Article 258 (1) in favor of any of the State Governments other than the respondent State. As we have come to the definite conclusion that the said letter dated 1st July 1968 does not effect any entrustment within the meaning thereof in Article 258 (1), it is unnecessary to consider, and we therefore do not proceed to consider, the point whether the said letter, if construed as conferring such authorization, imposes a condition and that the condition is not fulfilled.

23. Mr. Parikh contended that independently of the provisions of Article 162 and independently of any authorization or the absence of it under Article 258 (1), a State Government can lawfully, i.e., with authority, organise a lottery under Article 298 of the Constitution. That Article provides, in so far as it is material, that the executive power of each State shall extend to the carrying on of any trade or business and the making of contracts for any purpose. He contended, firstly that organising and conducting a lottery amounts to carrying on of a trade or business and, secondly, that it amounts to the making of a contract. Now the Supreme Court has held in *The State of Bombay v. R.M. D. Chamarbaugwala*³, that gambling activities are in their very nature and essence extra-commercium although they might appear in the trappings of trade; they were considered to be a sinful and pernicious vice by the ancient seers and law-givers of India and have been deprecated by the laws of England, Scotland, United States of America and Australia; the Constitution-makers of India, out to create a welfare State could never have intended to raise betting and gambling to the status of trade, business, commerce or intercourse and that therefore there can be no fundamental right under Article 19 (1) (g) or freedom under Article 301 of the Constitution. As stated by us earlier in this Judgment, a lottery is a gambling activity. On the basis of the ratio of this judgment of the Supreme Court, a lottery is res extra-commercium and

cannot, therefore, be the subject-matter of any trade or business. The executive power conferred by Article 298 is in respect of trade or business, but as a lottery cannot form the subject matter of trade or business, Article 298 cannot be read as conferring executive power in respect of lotteries. That Article confers executive power for the making of contracts for any purpose. What was emphasised is that the words are, not merely "making of contracts", but that they are "making of contracts for any purpose". Now it is true that the words "for any purpose" are very wide. But all the provisions of the Constitution have to be read harmoniously and that would apply with greater force when construing the provisions of the same Article, viz., Article 298. That Article first provides in respect of "trade or business". So far as trade or business is concerned, it cannot include gambling. A harmonious construction requires that the phrase "the making of contracts for any purpose" should not be so interpreted as to include the making of contracts in respect of or for or in the organisation or conduct of lotteries, because lotteries cannot form the subject matter of a trade or business. What is more, what Mr. Parikh contended was that when a State organises and conducts a lottery, it offers a prize and that the conducting of a lottery and the offer of a prize and the purchase of tickets of the Lottery involves an offer and acceptance which results into a contract. Therefore, what is sought to be relied upon by Mr. Parikh as a contract for the purposes of Article 298 is the activity of a lottery. According to the Judgment of the Supreme Court in 1957 SCR 874 : AIR 1957 Supreme Court 699, gambling is something which is to be shunned as it results in grave prejudice and harm to the persons who indulge in it and we have held gambling to include lotteries. In our opinion, therefore, if the executive power of a State cannot extend to lotteries as on the basis of organising and conducting lotteries being carrying on of trade or business, similarly, the executive power cannot extend to the making of a contract when the contract is merely a part of the activity of the organising or conducting of a lottery.

24. Mr. Parikh contended that the principle that gambling is *res extra-commercium* was laid down by the Supreme Court in a case where the particular gambling activity was carried on by a private individual and not in the case of a lottery organized or conducted

³1957 SCR 874 : AIR 1957 SC 699

by a State. He contended that in the former case the activity would be for furthering the individual interest of the person who carried on the activity, whereas in the case of a State lottery the lottery would be organized by the State in the interest, i. e., the financial interest, of the public generally, because the funds realized by the lottery would go to augment the finances of the State. He contended that therefore the ratio laid down by the Supreme Court in that case cannot and should not be applied to the case of a State lottery. Now, in our opinion, the distinction which Mr. Parikh has sought to make is without a difference. The Supreme Court has held gambling to be *res extra-commercium*, not because it goes to swell the riches of a private individual, but because of the consideration, as pointed out by it in its Judgment, that it results in grave prejudice and harm to the persons who participate in that activity. The ratio of that Judgment is from the angle of persons who participate in the activity and not from the angle of the person who promotes that activity. In our opinion, therefore, this distinction cannot justify us not to apply the principle laid down by the Supreme Court in that Judgment to a lottery even if it is organized by

a State.

25. Mr. Parikh then drew our attention to another Judgment of the Supreme Court in the case of *Krishna Kumar Narula v. Jammu and Kashmir State*⁴, The Supreme Court was considering whether the carrying on of a business in liquor would amount to carrying on of "trade or business". The Supreme Court held that the meaning of the expression "trade or business" depends upon and varies with the general acceptance of the standards of morality obtaining at a particular point of time in our country, but that standards of morality can afford a guidance to impose restrictions but cannot limit the scope of the right and that a Legislature also can impose restrictions on, or even prohibit, the carrying on of a particular trade or business. Relying upon this Judgment Mr. Parikh contended that in spite of the said earlier decision of the Supreme Court in the case of Chamarbaugwala a lottery may be considered to be carrying on of a trade or business, although in a given set of circumstances the Legislature may put restrictions on its activities or even completely prohibit it. Chamarbaugwala's case was cited before the Supreme Court in the said later case of Krishna Kumar. As a matter of fact, the relevant passage from the Judgment of Das, C. J. in Chamarbaugwala's case has been reproduced in the Judgment. All that the Supreme Court has however stated in its said later Judgment is that the decision in Chamarbaugwala's case only lays down that gambling is not business or trade, but that they were not concerned in that later case with gambling. It is, therefore, clear, that in that later case the Supreme Court does not in any way affect or detract from what was held in the earlier case of Chamarbaugwala, viz., that gambling is *res extra-commercium* and an activity to be shunned.

26. Mr. Parikh then drew our attention to an unreported Judgment of Division Bench of our High Court constituted of Patel and Madon, JJ., (*Navinchandra C. Shah v. State of Maharashtra*⁵). The Division Bench held that the clear effect of Article 298 was that irrespective of the powers of making legislation as provided by the Lists in the Seventh Schedule the Union as well as each of the States has got power to do such business as it chooses to do, subject only to one qualification in the case of a State that if such business is prohibited by the Central Legislature, that business cannot be done. It further holds that therefore unless there was any prohibition enacted by the Central Legislature preventing

⁴ AIR 1967 SC 1368

⁵ D/d. 25-3-1969 in O.O.C.J. Appeal No. 21 of 1969 (Bom)

the States from carrying on the lottery business, it would have the right to carry on the lottery business. The Judgment then adds : "It is not contended, and cannot possibly be contended, that the floating of lotteries is not a business." The Judgment has held that organizing of lotteries is a business which a State can carry on under its executive power under Article 298. But the sentence from the Judgment which we have quoted above clearly shows that it was not at all contended in that case that the floating of lotteries is not a business. The Judgment does not refer to the decision of the Supreme Court in Chamarbaugwala's case. If that decision has been brought to the attention of the Division Bench, we have not the slightest doubt that their decision would not have been that organizing of lotteries is a business. In the absence of the attention of that Division Bench having been drawn to the decision of the Supreme Court in

Chamarbaugwalla's ' case, which is binding on this High Court, we are of the opinion that this particular finding is, with due respect to the learned Judges, a finding per incuriam and therefore not binding upon us. In any event the Judgment of the Supreme Court is of a greater binding force on us than the Judgment of the Division Bench. We, therefore, do not feel ourselves bound by that judgment of the Division Bench, although it is a Judgment of a Bench of co-ordinate jurisdiction, because of the far greater weight of the Judgment of the Supreme Court which is to the contrary.

27. Our attention was also drawn to the provisions of Section 294-A of the Indian Penal Code, which provides that whoever keeps any office or place for the purpose of drawing any lottery not being a State lottery or a lottery authorized by the State Government shall be punished as provided in that section. It was pointed out that the Indian Penal Code is an all India legislation. It was pointed out that out of the various activities in connection with the organizing and conducting of a lottery only the activity of keeping any office or place for the purpose of drawing any lottery is singled out in Section 294-A and that the section does not make any other activity of or incidental to a lottery punishable. It was further pointed out that this all India piece of legislation makes a distinction between a private lottery and a State lottery. It was contended that this piece of Central legislation does not contemplate all activities of even a private lottery to be unlawful; nor does it consider any other activity in connection with State lottery to be unlawful. It was contended that therefore a lottery cannot be considered to be unlawful except to the extent that it is made punishable under Section 294-A. In our opinion, this is not a correct appreciation of the provisions of Section 294-A of the Indian Penal Code because it would not be correct to say merely from the fact that only a particular activity out of the series of activities involved in organizing and conducting a lottery is made punishable, the other activities are lawful. We have already pointed out the distinction between the two categories into which acts which are not lawful can be divided. An act may not be lawful and may be made into a penal offence and therefore punishable, but in the other category would fall acts which are not lawful but yet not punishable crimes but which may entail only civil consequences. It is not necessary to elaborate on this point, but if any illustration is required, it can be stated that under certain branches of our civil law a marriage between prohibited degrees is not lawful. It will therefore not be valid as a marriage and civil consequences may flow from its invalidity. But although it is not lawful, it is not yet a criminal offence which is punishable. Simply because no penal consequences are prescribed, it cannot necessarily lead to a conclusion that the act is lawful.

28. 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 mean 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). In this connection Mr. Setalvad had invited our attention to certain passages in Maxwell on the Interpretation of Statutes, 12th Edition, at pages 274, 275 and 276 to the effect that words are prima facie to be taken in their lawful and rightful sense, and particularly when construing an Act or legislation Mr. Parikh sought to make some distinction by reading out and commenting on these passages relied upon by Mr. Setalvad. In our opinion, apart from what is stated in these passages in Maxwell, the reference to a lottery organized by a State in this clause (b) must refer to a lottery lawfully organized by a State. In our opinion, therefore, as the exemption does not apply, a lottery unlawfully, i. e., without authority, organized by a State, becomes unlawful by reason of Section 3 of the Bombay Lotteries Act and the other provisions of that Act are therefore attracted.

29. Mr. Parikh had also contended that the Union Parliament has exclusive power in respect of a lottery organized by a State and that therefore even if a lottery organized by another State without lawful authority is to be included as attracting the provisions of the Bombay Lotteries Act, the respondent State Government has no authority to legislate in respect of such a lottery. 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.

30. An unreported judgment of the Mysore High Court *on the file of that Court (K. K. Vasudevan v. The State of Mysore⁶)* was cited before us by Mr. Setalvad. As, in our opinion, it was not necessary to refer to the same, we have not discussed it.

31. Under the circumstances the petitioners are not entitled to the relief claimed in prayer (b) of the Petition. The Petition, in so far as it now survives, is therefore dismissed and the Rule is discharged. There will be no order as to costs.

Rule discharged.

⁶ D/- 2-4-1969 delivered in the Writ Petn. No. 4174 of 1969