REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS.10466-10476 OF 2011

STATE OF KARNATAKA & ANR. ETC. APPELLANT(S)

VERSUS

STATE OF MEGHALAYA & ANR. ETC. RESPONDENT(S)

WITH

CIVIL APPEAL NOS.101-102 OF 2012

CIVIL APPEAL NO.911 OF 2021

CIVIL APPEAL NOS.869-870 OF 2022

CIVIL APPEAL NO.871 OF 2022

J U D G M E N T

NAGARATHNA J.

INDEX

These appeals have been preferred by the States of Karnataka, Kerala and others being aggrieved by the judgments passed by the Division Benches of the High Courts of the respective States. The Division Bench of the High Court of Karnataka *vide* impugned judgments dated 27th December, 2010 and 7th March, 2011 held that the Karnataka Legislature had no legislative competence to pass the Karnataka Tax on Lotteries Act, 2004 (hereinafter referred to as, "Karnataka Act, 2004") and, consequently, directed the amounts deposited by the respondents-States who had organised the lottery schemes to be refunded to them within four months from the date of receipt of the copy of the impugned judgment.

2. Similarly, the Division Bench of the High Court of Kerala by the impugned judgments dated 30th April, 2020, 9th August, 2021 and 10th August, 2021, held that the Kerala legislature had no legislative competence to enact the Kerala Tax on Paper Lotteries, Act, 2005 (hereinafter referred to as, "Kerala Act, 2005") and declared it as unconstitutional and invalid. Liberty was reserved to the respondents-States to seek refund of the tax already collected by the State of the Kerala under the said Act on producing proper account and proof and a direction was issued to the State of Kerala to pass appropriate orders making refund of

the amounts due based on evaluation of such proof, without any delay.

3. Being aggrieved, the States of Karnataka, Kerala and others are in appeal before this Court. The respondents herein are the States of Nagaland, Arunachal Pradesh, Meghalaya, Sikkim, and others who are the organisers of the lotteries as well as promoters, *inter alia,* in the States of Karnataka and Kerala.

Bird's eye view of the controversy:

4. The controversy in these cases is regarding the interpretation to be given to the expression 'betting and gambling' in Entries 34 and 62 of List II of the Seventh Schedule of the Constitution of India. Further, whether the 'lotteries organised by the Government of India or Government of a State', which is a subject in Entry 40 of List I also encompasses the power to levy tax on the said lotteries? Consequently, whether under Entry 62 of List II the State Legislature is denuded of the power to levy tax on the said subject? In other words, whether the subject covered in Entry 40 of List I restricts the scope and ambit of Entries 34 and 62 of List II? If the answer is in the affirmative, whether the State Legislatures have no legislative competence to levy tax on lotteries organised by the Government of India or Government of a State. Consequently, the question in these cases is, whether, the legislature of States of Karnataka and Kerala had the legislative

competence to enact Karnataka Act, 2004 and Kerala Act, 2005 respectively. Further, whether these Acts are unconstitutional as being extra territorial in operation?

Submissions on behalf of Appellants:

Submissions on behalf of State of Karnataka:

5. Sri N. Venkataraman, learned Senior Counsel and Additional Solicitor General appearing on behalf of the appellant-State of Karnataka contended that the impugned legislation passed by the Karnataka State Legislature does not seek to impose a tax on the sale of lottery tickets. He referred to the following two cases in support of his contention: (i) ***Sunrise Associates vs. Govt. of NCT of Delhi – [(2006) 5 SCC 603]*** wherein it was held that lottery tickets are only actionable claims and not goods or services and cannot be taxed invoking Entry 54 of List II and; (ii) ***Skill Lotto Solutions Pvt. Ltd. vs. Union of India – [2020 SCC Online SC 990]*** wherein it was held that under the new Central Goods and Services Tax (CGST) regime, post 1st July, 2017, actionable claims are brought under the tax network of Goods and Services Tax (GST).

6. Learned Senior Counsel submitted that the tax under question, is neither a tax on sale of lottery tickets nor on lotteries as actionable claims and any reference to Entry 54 of List II will be

of no avail as tax on lotteries is not a sales tax or Value Added Tax (VAT) or GST. He contended that the tax under question is a tax on gambling traceable to Entry 62 of List II which, *inter alia*, deals with tax on betting and gambling. It was contended that the Karnataka Tax on Lotteries Act, 2004 was passed in pursuance of the power under the aforesaid entry and the Karnataka State Legislature had the legislative competence to pass such a legislation.

7. Elaborating further, it was pointed out that Entry 40 of List I is only a 'regulatory entry' and the Lotteries (Regulation) Act, 1998 (hereinafter referred to as "Lotteries Act, 1998") was enacted by the Parliament in light of the same. That said Act deals with only 'regulation' and not with 'taxation' owing to the jurisdictional incompetence of the Parliament in the area of taxation of State lotteries. Entry 34 of List II is also a 'regulatory entry'. The said entry deals with betting and gambling, including lotteries that do not fall under the ambit of Entry 40 of List I. To the contrary, Entry 62 of List II is a specific taxing entry *inter alia* on gambling and betting. Learned Senior Counsel submitted that the source of taxation is Entry 62 of List II and not Entry 54 of List II and the tax is not on sale or purchase of lottery tickets.

8. It was further contended that on a conjoint reading of Section 2(4) and Section 6 of the Karnataka Act, 2004 it would indicate that the 'charge' or 'tax' is a tax on lotteries i.e., on the chance of those persons participating in a lottery and the chance to win a prize in a lottery, which comes within the nomenclature of gambling. The measure of taxation, in case of a bumper draw is Rs.1,50,000/- and in case of any other draw is Rs.1,00,000/-.

9. Learned Senior Counsel further referred to Paragraph 6 of ***Govind Saran Ganga Saran vs. Commissioner of Sales Tax – [AIR 1958 SC 1041]*** to state that when the source of taxation and occurrence of taxable event, along with the measure are available to tax a person, such a levy cannot be questioned.

10. Sri Venkataraman next urged that where a regulatory power and taxing power are traceable to different sources and are kept distinct under the Constitutional scheme, in such a case, the regulatory entry cannot subsume a taxing entry as was held in ***M.P.V Sundararamier and Co. vs. State of Andhra Pradesh – [AIR 1958 SC 468]*** and ***State of West Bengal vs. Kesoram Industries Limited – [(2004) 10 SCC 201].*** He further relied upon a Seven Judge Bench decision in ***Synthetics and Chemicals Ltd. vs. State of Uttar Pradesh – [(1990) 1 SCC 109]*** wherein it was held that the power to regulate, develop or control

would not include within its ken a power to levy tax or fee except when the said impost is only for a regulatory purpose. That it is permissible for the power to levy tax or fee for augmenting revenue to continue to vest with the State Legislature despite the regulatory power being with the Union. That ratio in ***synthetics and chemicals*** (supra) was reiterated recently in ***Jalkal Vibhag Nagar Nigam vs. Pradeshiya Industrial and Investment Corporation – [2021 SCC Online SC 960]*** and had first been laid down in ***RMDC vs. State of Mysore – [AIR 1962 SC 594]***.

11. Sri Venkatraman further contended that the tax imposed in the instant case is not extra-territorial in its operation since the tax is on the act of gambling in the State of Karnataka and when more than one State is involved, the nexus theory test has to be applied. Reliance was placed on ***State of Bombay vs. R.M.D. Chamarbaugwala – [AIR 1957 SC 699],*** wherein the requirement of fulfilling three principles, namely, real and not illusory connection; liability sought to be imposed be pertinent to that connection and the connection affecting merely the policy and not validity of legislation, were stipulated. In such a case, when there are participants from State of Karnataka in the act of gambling, there is a real connection to the taxable event and the levy under the impugned legislation is pertinent to that

connection although the lottery is organised by any other State in the State of Karnataka.

12. It was further contended that lotteries are *res extra commercium* i.e., outside the ambit of trade and commerce and therefore, it will neither get protection under Art. 19(1)(g) relating to trade, occupation, business or commerce nor the protection under Article 301 dealing with inter-state trade, commerce and business, even if the State happens to be the operator, as was held in the cases of ***R.M.D. Chamarbaugwala*** (supra) and ***B.R. Enterprises vs. State of Uttar Pradesh – [(1999) 9 SCC 700]***.

Submissions on behalf of State of Kerala:

13. Sri Pallav Shishodia, learned Senior Counsel appearing for the appellant-State of Kerala, adopted the submissions made by learned Senior Counsel for the State of Karnataka. He made the following additional submissions:

He submitted that under the Kerala Act, 2005 and the Rules made thereunder, the respondents were liable to pay the tax in advance before any draw, under Section 10 thereof. The respondents herein in fact filed a writ petition seeking a writ of mandamus against the appellant-State of Kerala directing them to accept advance tax. In addition, a companion petition was filed challenging Section 10 of the aforesaid Act which was decided by

the learned Single Judge of the High Court of Kerala on 10th January, 2007 and thereafter affirmed by the Division Bench on 30th March, 2007. The matter came up to this Court and *vide* Order dated 16th July, 2014 the High Court's finding was affirmed in respect of accepting advance tax; however, it did not accept the challenge to the aforesaid section.

14. Sri Shishodia, learned Senior Counsel, contended that opportunity was granted to the respondents to prove that the burden of tax paid during the period 2006-2010 was not passed on to consumers/purchasers of lottery tickets. That the same is contrary to law and was completely unwarranted in the present case. In support of his argument, he fervently relied on ***Mafatlal Industries Ltd. vs. Union of India - [(1997) 5 SCC 536]*** where it was held that there is a rebuttable presumption that an indirect tax borne by an assessee is passed on to consumers. Even when challenge to constitutionality of a tax succeeds, the relief of refund can be granted only when the assessee makes a claim to allege and establish that as a fact, the burden of tax collected in the interregnum was not passed on to consumers.

15. Lastly, Sri Shishodia, learned Senior Counsel, contended that the tax period in the instant case is limited to the years 2006-2010 whereafter lotteries of the State of Sikkim were discontinued

in the State of Kerala because large scale frauds were reported. The said ban was made by the Central Government in exercise of power under Section 6 of the Lotteries Act, 1998 which was confirmed on 12th June, 2015 after an investigation by the CBI and further enquiry. He urged that if the submission that the State cannot tax lotteries at all is to be accepted by this Court, then the same should be held prospectively to validate non-refund of recoveries made of far. He drew our attention to ***Somaiya Organics (India) Ltd. vs. State of Uttar Pradesh – [(2001) 5 SCC 519]*** wherein ***I.C. Golaknath vs. State of Punjab – [AIR 1967 SC 1643]*** and ***India Cement Ltd. vs. State of Tamil Nadu – [(1990) 1 SCC 12]*** have been relied upon.

Submissions on behalf of Respondents:

Submissions on behalf of Nagaland:

16. Sri C. Aryama Sundaram, learned Senior Counsel appearing on behalf of the State of Nagaland in Civil Appeal No.10467 of 2011 raised the following main contentions:

(i) Contentions pertaining to the legislative competence, or the lack thereof, of the State of Karnataka.

(ii) That the impugned Act, in effect seeks to impose tax on the sale of lotteries.

(iii) That the impugned Act seeks to operate extra-territorially.

(iv) Contentions pertaining to the exigencies faced by North-Eastern States in generating revenue.

17. Sri. C. Aryama Sundaram, learned Senior Counsel, supported the judgment of the High Court of Karnataka and contended that the State of Karnataka had no legislative competence to impose tax on the lotteries organised by the Governments of the Respondents-States. It was submitted that lotteries organised by the Government of India or by the Government of any State, fall within the ambit of Entry 40 of List I and therefore any legislation pertaining to such lotteries may only be enacted by the Parliament.

18. It was next contended that lotteries organised by the Government of India or by the Government of any State, were not within the legislative fields covered under Entries 34 or 62 of List II which pertain to the power of the State Legislature to make laws to regulate 'betting and gambling' and to impose 'taxes on luxuries, including taxes on entertainment, amusements, betting and gambling,' respectively. That although the expression 'betting and gambling' may be construed as the genus, within which 'lotteries' is a species, the specific field of lotteries organised by the Government of India or by the Government of any State, has been carved out of the genus of 'betting and gambling' and been placed under Entry 40 of List I, meaning thereby, that the same may be regulated or subjected to tax, only by the Parliament. In

other words, it was contended that taxes on betting and gambling as envisaged under Entry 62 of List II, would be limited to those lotteries which are neither organised by the Government of India nor by the Government of any State. It was submitted that since the Act in question, enacted by the Legislature of the State of Karnataka, seeks to impose tax on the lotteries organised by the Central Government or by the Government of a State, it is beyond the legislative competence of State of Karnataka. That the State of Karnataka by enacting the impugned Act has attempted to legislate on an aspect which lies within the exclusive legislative domain of the Parliament and therefore the said Act is *ultra vires* the Constitution and is liable to be declared so.

19. In order to buttress the above contentions, learned Senior Counsel placed reliance on the following judgments of this Court:

(i) ***H. Anraj vs. State of Maharashtra*** **– [*1984 (2) SCC 292*]** wherein this Court considered whether the State of Maharashtra could impose a ban on the sale of lottery tickets of other States, by relying on an executive order of the President under Article 258 (1) of the Constitution which entrusted the State Government with the executive power of the Union as regards the conduct of lottery. This Court held that the Parliament has exclusive power to make laws in respect of lotteries organised by the Government of India or the

Government of a State. It was further observed that State organised lotteries were specifically taken out of the ambit of the legislative field of States from the expression 'betting and gambling' under entry 34 of the State list.

(ii) ***State of Haryana vs. M/s Suman Enterprises – [(1994) 4 SCC 217]*** is a case where this Court, in deciding whether the State of Haryana could issue a Notification imposing a ban on the lotteries of other states, held that regulation of lotteries organised by other states is not a State subject but is within the exclusive regulatory power of the Parliament under Entry 40 of List I.

20. It was submitted that although the afore-cited decisions make no specific reference to Entry 62 of List II and only observe that State organised lotteries were specifically taken out of the ambit of Entry 34 of List II, 'betting and gambling' as appearing in both these entries must be construed in a similar manner; i.e. that they are inclusive only of those lotteries which are organised other than by the Government of India or by the Government of any State. In this regard, ***Jindal Stainless Ltd. vs. State of Haryana – [2017 (12) SCC 1]*** was pressed into service to contend that the same expression, if used in different entries in the same List, would have the same meaning. Therefore, although State organised lotteries have specifically been carved out of the expression

'betting and gambling' as appearing in Entry 34 of List II, it may be deemed that 'betting and gambling' as appearing in Entry 62 of List II is also not inclusive of State organised lotteries.

21. It was further urged in this regard that if Entry 34 of List II is a general entry which deals with the regulatory power of the State Legislature in the area of 'betting and gambling', Entry 62 of List II vests a more specific power of taxation over 'betting and gambling' with the State Legislature. Once it has been held that a given expression, as appearing in a general entry would be construed to exclude a certain item, then it would naturally follow that such item would also be excluded from a specific entry which employs the said expression. In the instant case, lotteries organised by the Government of India or the Government of any State have been specifically excluded from the ambit of 'betting and gambling' as appearing in Entry 34 of List II, therefore, it would follow that it would also be excluded from Entry 62 of List II which is a narrower power, only dealing with taxation. Reference was made to ***Prof. Yashpal vs. State of Chhattisgarh – [2005 (5) SCC 420]*** wherein it was held that a narrow or restrictive interpretation would generally not be accorded to a legislative heading which is general in nature. In this regard it was contended that although a general entry is not usually given a restrictive meaning, when in exceptional cases a restrictive

interpretation is given, such interpretation should be given effect to not only in connection with the general entry, but should also be extended to specific entries which employ the same term as was interpreted.

22. It was next contended that the sole and exclusive power of imposition of taxes which are beyond the legislative fields covered under entries specified in List I and List II, would vest only with the Parliament by virtue of Entry 97 of List I read with Article 248 (3) and Article 265 of the Constitution of India. In support of the above contention, learned Senior Counsel for the State of Nagaland relied on the decision in ***Union of India vs. Harbhajan Singh Dhillon – [1971 (2) SCC 779],*** wherein this Court while dealing with the question as to the legislative competence to enact a Legislation pertaining to wealth tax, held that while the subject matter of wealth tax is not specifically covered under any of the entries of the three Lists of the Constitution, the Constitution has not denied the Union Government power to levy wealth tax and such power would be traceable to Entry 97 of List I.

That the impugned Act, in effect seeks to impose tax on the sale of lottery tickets:

23. It was submitted on behalf of the State of Nagaland that the impugned Act in fact, seeks to impose a tax on lotteries organized by the Government of India or by the Government of any State

and that legislative competence to enact such statute could not be traced to Entry 62 of List II. The said Entry deals with the power to impose 'taxes on luxuries, including taxes on entertainment, amusements, betting and gambling.' The event or incidence for imposition of such tax would be either the conduct of lotteries or the sale and purchase of lottery tickets. That by enacting the impugned Act, what the State Legislature sought to tax was the sale of lottery tickets, which was not permissible in light of the decision of this Court in ***Sunrise Associates vs. Government of Delhi – [(2006) 5 SCC 603].*** In the said case, it was held that lottery tickets were not goods within the meaning of the Sales Tax Act and therefore they cannot be subject to sales tax.

That the impugned Act, in a clandestine manner, sought to impose sales tax on the sale of lottery tickets which is not permissible.

24. In support of the said contention, the statement of objects and reasons of the impugned Act was referred to, which provides that it has been enacted with an intention "*to regulate the actual number of draws held by any lottery promoter."* It was submitted that while the statement of objects and reasons has been worded in a manner as if the legislation would seek to regulate the quantum of betting and gambling activities or the number of

draws held by a lottery promoter, in effect, the tax sought to be imposed by the impugned legislation is in the nature of sales tax. That tax was being levied on the proceeds from the sale of lottery tickets and this would point to the tax being in the nature of sales tax. It was submitted that the impugned Act does not expressly employ the term 'sale of lottery tickets' but seeks to tax the same under the guise of regulating the number of draws held by a promoter.

25. Alternatively, it was contended that even if it is assumed for the sake of argument that the tax was being imposed, not on the sale of lottery tickets but on the conduct of lottery activities, including formulation and notification of scheme of lotteries, printing of lottery tickets, transportation of lottery tickets, conducting of the draw, declaration of winners, no taxable event relatable to activities listed hereinabove had occurred within the State of Karnataka. That in order for a tax to be imposed by a State, the taxable event would have to occur within the State. That, the only event that has occurred within the State of Karnataka, was the sale of lottery tickets and the same is not taxable. Hence, it was submitted that the Appellants herein were seeking to do indirectly, that which could not have been done directly.

That the impugned Act seeks to operate extra-territorially:

26. Sri Aryama Sundaram next contended that for a State to impose tax on any activity, there ought to be a territorial nexus between the activity sought to be taxed and the levy of the tax. In the instant case, even if the submission made by on behalf of the State of Karnataka that the activity sought to be taxed is the propensity to participate in lotteries, no part of such activity has arisen or taken place within the State of Karnataka. All activities which are to be undertaken for the conduct of lotteries, such as formulation and notification of the scheme of lotteries, printing of lottery tickets, transportation of lottery tickets, conducting of the draw, declaration of winners, were undertaken outside the territorial limits of Karnataka and therefore, the conduct of lotteries cannot be subject to tax by the State of Karnataka. In this regard, reference was made to Article 246 (3) of the Constitution of India to contend that a State Government has the power to enact laws for the State or any part thereof. A State Government does not have the power to extend its laws beyond its territorial limits. If a State law is allowed to operate in relation to activities which are conducted beyond its territorial limits, it would have the effect of encroaching upon the legislative power of other States.

27. Learned Senior Counsel appearing for the State of Nagaland next submitted that the decision of this Court in ***R.M.D. Chamarbaugwala*** (supra) relied upon by the appellants would not come to their aid in the instant case. That in the said case, several activities, such as the sale and distribution of forms for the lottery and prize competitions, the collection of entry fees, publication of advertisements pertaining to the lottery and prize competitions, were all conducted within the State of Bombay and it was in that context that this Court held that the State of Bombay possessed legislative competence to enact the Bombay Lotteries and Prize Competitions Control and Tax Act, 1948 which sought to control and levy tax on lotteries and prize competitions in the State of Bombay. In the said case, two conditions were laid down by this Court in order to establish territorial control: (a) real and not illusory connection; (b) the liability sought to be imposed must necessarily pertain to the said connection. In this context, it was urged that the State Acts impugned in these cases would satisfy the aforestated conditions only qua the sale and distribution of lottery tickets, which activity is in any case not taxable. Therefore, reliance placed by the appellants on the said case was misplaced.

Contentions pertaining to the exigencies faced by North-Eastern States in generating revenue:

28. It was submitted that Section 10 of the impugned legislation requires the State which organises the lottery sought to be taxed, to deposit taxes in advance. This has resulted in a situation which is detrimental to the economic necessities of the State of Nagaland. Learned Senior Counsel explained the difficulty that may arise if the said scheme is permitted to continue: The State of Karnataka collects the tax amount in advance. The amount of tax to be paid is calculated having no regard to the number of tickets sold but is based on the entire scheme or draw. Such a requirement may result in an absurd situation where despite there being negligible or no sale of lottery tickets, as may be the case sometimes, the State of Karnataka would be entitled to enjoy the tax on the entire scheme.

29. It was also urged that if the impugned Act is held to be valid then it would be open to the Legislatures of each of the States in the Country to enact a similar legislation and this would result in a situation of multiple taxation of the same event. Further, if the organising State is required to pre-deposit the tax pertaining to the scheme floated, in each State where a similar enactment may be made, it would result in a situation where lottery schemes would no longer be a source of revenue to the organising State.

Reference was made to the decision of this Court in ***B.R. Enterprises*** (supra) wherein the importance of lotteries, as a source of revenue to North-Eastern States was recognised. It was urged that the State of Karnataka must not be permitted to curtail the rights of North- Eastern States to conduct lotteries.

30. On the aforesaid submissions, learned Senior Counsel appearing for the State of Nagaland sought dismissal of the appeals.

Submissions on behalf of State of Sikkim:

31. Sri S.K. Bagaria, learned Senior Counsel appearing for the State of Sikkim, First Respondent in Civil Appeal No. 911 of 2021, adopted the contentions advanced by Sri Aryama Sundaram, learned Senior Counsel appearing on behalf of the State of Nagaland in Civil Appeal No. 10467 of 2011. He further elaborated on the submissions as regards the exclusion of the species of 'lotteries' from the genus of 'betting and gambling' as appearing in Entries 34 and 62 of List II *vide* ***H. Anraj*** (supra) and ***M/s Suman Enterprises*** (supra). He contended that although the decision of this Court in ***H. Anraj*** (supra) excluded 'lotteries' from the legislative field of the State Legislature while examining Entry 34 of List II and no reference was made in the said judgment to Entry 62 of List II, it may be construed that 'lotteries' organised by the Government of India or the Government of a State are not

included within the expression 'betting and gambling' appearing in Entry 34 as well as Entry 62 of List II. In support of this contention, reference was made to a decision of this Court in ***R.M.D. Chamarbaugwala*** (supra) wherein a co-relation was established by the Court between the expression 'betting and gambling' as appearing under Entry 34 of List II and Entry 62 of List II, by holding that once it is held that a legislation falls under the topic of 'betting and gambling' under Entry 34 of List II, it would follow that the tax imposed by the same legislation would fall under Entry 62 of List II. In this context, it was contended that since it has been unequivocally declared that the tax imposed on 'betting and gambling' under Entry 62 of List II seeks to tax the same activity which is regulated under Entry 34 of List II, it logically follows that the expression 'betting and gambling' must be given the same meaning and interpretation in both these entries. In other words, an interpretation which suggests that 'lotteries' has been carved out of 'betting and gambling,' should be made equally applicable to Entry 62, as is applicable to Entry 34 of List II.

32. It was next contended that the impugned Act, namely, the Kerala Lotteries Act, makes no distinction between the taxing event and the measure of tax, i.e., a distinction between the subject matter of tax and the standard by which the amount of

tax is to be measured. Reference was made to ***Federation of Hotel and Restaurant Association of India vs. Union of India - [(1989) 3 SCC 634]*** to contend that the subject of a tax is different from the measure of the levy of tax. That the measure of tax is not determinative of its essential character or the competence of the legislature. In this regard, it was submitted that 'draw' of lotteries, as appearing in Section 6 of the impugned Act, is only a measure and not the taxable event. That the impugned Act is ambiguous and uncertain and in the guise of tax on lotteries, seeks to levy tax on sale of lotteries.

33. Reference was made to specific provisions of the impugned Act of State of Kerala to contend that the tax sought to be imposed was in effect a tax on sale of lottery tickets. Section 6 of the said Act is the charging provision. It merely states that the tax sought to be levied under the Act is 'tax on paper lotteries'. Therefore, it is unclear as to what aspect of the conduct of lotteries is sought to be subjected to taxation. That while section 2 (i) of the said Act has defined 'lottery' to mean a lottery organised by the Government of India or the Government of any State, nothing can be imputed from such definition as to the chargeability or the taxing event. It was further urged that Section 7(1) and 8(1) of the Act mandatorily require that any promoter involved in the sale of lottery tickets be registered under the Act and file returns. Section

8(2) imposes the liability of tax on a promoter who has registered and filed returns under Section 7(1) and 8(1) of the Act. In this regard it was submitted that it is the promoter, who is involved in the sale of the tickets, who is required to bear the burden of tax and therefore, what the State Government has done is to levy sales tax on the sale of paper lotteries in Kerala, which is impermissible in light of the decision of this Court in ***Sunrise Associates*** *(supra).* That in the absence of any clarity in the charging provision as to what would be the taxable event and on a conjoint reading of Section 7 and 8 of the impugned Act, the only deduction that could be made would be that the event taxed was the sale of lotteries.

34. In reply to the contention advanced on behalf of the State of Kerala, to the effect that the burden of tax imposed on the State of Sikkim was being passed on to the consumer and therefore, the State of Sikkim was not entitled to claim refund of tax imposed even in the event that the impugned Act was struck down, as receiving a refund would amount to unjust enrichment, it was urged that the doctrine of unjust enrichment was not applicable to a State *vide* ***Mafatlal Industries Ltd.*** (supra). Therefore, the amount of tax collected by the State of Kerala without jurisdiction is liable to be refunded.

Submissions on behalf of the State of Meghalaya:

35. Sri Arvind P. Datar, learned Senior Counsel appearing for the State of Meghalaya and Sri Amit Kumar, learned Advocate General for the State of Meghalaya adopted the contentions of Sri C. Aryama Sundaram, learned Senior Counsel appearing for the State of Nagaland. He made an additional argument as regards the exclusive Parliamentary power to impose taxation on lotteries organised by the Government of a State. It was submitted that in determining the legislative competence pertaining to the legislative field of 'State Lotteries' reference must be made to the Government of India Act, 1935. The said Act provided in Entry 47 of List I for the regulation of 'State Lotteries.' The said Act provided for regulation of 'betting and gambling' in Entry 36 of List II and the power to impose 'taxes on luxuries, including taxes on entertainments, amusements, betting and gambling' under Entry 50 of List II. In that context, it was urged that State lotteries have always been within the exclusive legislative domain of the Parliament and have been carved out of the expression 'betting and gambling' as appearing in List II.

36. It was further contended that the power to impose taxation on lotteries is inherent in the general legislative power under Entry 40 of List I. Learned Senior Counsel referred to certain Entries of List I and II to contend that wherever the legislative competence

relatable to the general legislative field or regulatory field is different from the taxation field, such separation has been expressly stated in the Constitution. Since such distinction has not been made in the context of lotteries covered under Entry 40 of List I, the scope of this entry is unrestricted and every type of legislation qua Central and State organised lotteries is within its ambit.

37. Sri Datar next contended that to uphold the validity of the impugned legislations and allow them to operate, would be against the principles of federalism and inter-governmental immunity. In this regard, reliance was placed on ***New Delhi Municipal Council vs. State of Punjab – [(1997) 7 SCC 339]*** wherein this Court, after discussing the principle of inter-governmental immunity as it operates in the United States of America, held that the said principle would operate in India as well, although to a limited extent. In the Indian context, the immunity conferred on the Union, from any action of the State, is absolute; while immunity to States from the actions of the Union is as per Article 289 of the Constitution. It was submitted in this regard that the impugned Legislations seek to impose interest and penalties on the Union for non-payment of taxes levied on it and also prescribes withholding monies due to the Union in order to recover the tax due. That such provisions of the statute pose a threat to the

principle of inter-governmental immunity, which is well recognised and currently operating in India.

38. Learned Senior Counsel appearing for the State of Meghalaya urged that the doctrine of pith and substance and the aspects theory have no relevance to the instant matter. That the doctrine of pith and substance is employed by a Court to save a statute from being declared *ultra-vires*, when the main purpose of the statute is to legislate on an aspect which is within the legislative competence of the legislature that has enacted it, while an incidental or ancillary purpose sought to be achieved by the statute has the effect of branching into another list. However, in the instant case, the impugned Statutes have only one purpose viz. taxing Central and State organised lotteries. Therefore, they are in their entirety encroaching on the exclusive legislative domain of the Parliament. In a similar vein, it was contended that the aspects doctrine cannot be pressed into service in order to uphold the *vires* of the impugned Legislations as the said doctrine may be employed only when two aspects are found in the statute and each of such aspects is traceable to a legislative field in a different List. However, in the instant case, the impugned legislations only have one aspect, traceable to the legislative field covered by a single Entry, viz. Entry 40 of List I.

Reply Arguments:

39. Learned Senior Counsel, Sri Venkataraman, appearing for the State of Karnataka, in response to the submissions made on behalf of State of Nagaland, stated that if the submission is that by virtue of Entry 40 of List I, the Union gains taxing power under Entry 97 of List I, it would be a self-defeating submission. It was also contended that recourse to Entry 97 of List I can only be taken after exhausting specific Entries under List I and List II. It cannot be contented that the power is secured under Entry 97 of List I as Entry 62 of List II has never undergone any change, mutilation or any denudation till date.

40. In this regard it was explained that Entry 42 of List I refers to inter-state trade and commerce. That originally the tax on inter-state trade and commerce along with local sales tax was levied only by the State under Entry 54 of List II. Only after the 6th Constitutional Amendment Act in 1956, the powers of the State were denuded and the Union was vested with the exclusive power by insertion of Entry 92A in List I. When Entry 62 of List II has not been denuded, it cannot be construed that Entry 40 of List I can subsume within itself, the taxation power as would be available under Entry 97 of List I, overlooking the *Dhillon* Test.

41. In response to the submissions of the State of Meghalaya in respect of Article 246(1) that under the said provision, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I and therefore, Entry 40 of List I is good enough to include power of taxation on lotteries organised by Central or State Governments, it was urged that the said provision cannot be read in insolation. He submitted that List I and II vest exclusive powers in Union and States respectively and therefore one cannot be read in insolation to the other.

42. It was further submitted that the Constitution Bench in ***RMDC vs. State of Mysore*** (supra) had clearly stated that the surrender of a regulatory or any other power to the Union cannot mean a surrender of the taxation power. Taxing powers are always identified independently and unless such power is transposed, denuded or mutilated, it cannot be read by implication as held in ***M.P.V. Sundararamier*** (supra).

43. In respect of the submission relating to Article 289, Sri Venkataraman pointed out that there is a 'Constitutional bar' against the Union taxing the Income of a State, and the same cannot be taxed by virtue of Article 289. He stated that any activity conducted *per se* by the State, in this case conducting State Lotteries, cannot be taxed under Article 289.

44. Learned Senior Counsel then addressed the submission raised by the State of Nagaland that since the Union is imposing tax on lotteries under the GST regime, the power of taxation would vest with the Union even under the pre-GST era. He stated that the aforesaid submission was not right as it was incorrect to say that the Union is taxing under the GST regime. It was urged that GST is a unique tax traceable to Article 246A both in terms of power and field of legislation, under which the taxable event is one, namely supply and the taxing power vests both with the Union and the States. However, in the present case at hand, Article 246 is the source of power and Entries in List I and II are fields of legislation which have to be interpreted.

45. In response to the argument that lottery is the main source of income for the North - Eastern States and grave prejudice would be caused to State revenue if the appellant-States are permitted to tax, learned Senior Counsel urged that there is no equity is taxation laws. It was submitted that the respective North - Eastern States have earned their lottery revenues using the territory of other States. In such a case, it is not open to plead that such States should not use their taxing powers only because that would be detrimental to North - Eastern States.

46. Learned Senior Counsel Sri Pallav Shishodia for the State of Kerala, in furtherance of the contentions of the learned Senior

Counsel appearing for the State of Karnataka, placed reliance on the decision of the Constitution Bench of this Court in ***Kesoram Industries Limited*** (supra) wherein it was held that the 'power of regulation and control' is separate and distinct from the 'power of taxation' and so are the fields for the purpose of legislation. It was submitted that the States can legislate to regulate 'betting and gambling' in their respective states except with respect to lotteries organised by other States which shall remain governed by the Lotteries Act, 1998 enacted by the Parliament having legislative competence under Entry 40 of List I. However, levy of tax on 'betting and gambling' is a different field of legislation under Entry 62 of List II.

47. It was further contended that the regulation of gambling and taxing of gambling activity being two separate and distinct fields of legislation, the width of legislative power of States to tax State organised lotteries under Entry 62 of List II cannot be curtailed by regulatory powers of Centre under Entry 40 of List I even though only regulatory powers of states to regulate State organised lotteries are taken out from Entry 34 of List II.

48. To buttress his contention, learned Senior Counsel for the State of Kerala referred to Chapter 5, Subsidiary Rules in Principles of Statutory Interpretation authored by Justice GP Singh under the heading 'Same Word Same Meaning'. He

contended that it is a settled principle of interpretation that the same expression can have different meanings in the same statute or even the same provision, if the context so required. Learned Senior Counsel cited the case of ***Maharaj Singh vs. State of UP – [1977 (1) SCC 155]*** in this behalf.

49. It was further urged that the respective contexts of the expression 'betting and gambling' under Entry 34 and Entry 62 both in List II are very different. Entry 34 of List II describes the legislative field of regulatory powers of the State over 'betting and gambling' while Entry 62 of List II describes the legislative field of taxation on 'betting and gambling' by States. Learned Senior Counsel for the State of Kerala emphasized upon the judgment of this Court in ***Kesoram Industries Limited*** (supra) and stated that the principles in the aforesaid case have also been approved in the case of ***Jindal Stainless Limited*** (supra).

50. Learned Senior Counsel submitted that there were several examples where regulatory powers are with the Centre and the taxing power is with the States. To fortify his argument, he relied upon ***State of Uttar Pradesh vs. Vam Organic Chemicals Limited and Ors. – [2004 (1) SCC 225]*** wherein it was held that the tax or fee imposed for regulatory purposes must not be mistaken as tax under taxing entry. The regulatory power cannot be used for plenary taxation. However, the levy of some regulatory

charges under the Lotteries Act, 1998 is not a tax and does not in any manner whittle down the scope of Entry 62 of List II. To conclude, learned Senior Counsel for the State of Kerala submitted that one transaction can have several aspects to attract both central and state taxes as was held in ***Federation of Hotel and Restaurant Association of India*** (supra).

51. Further, learned Senior Counsel brought to the attention of this Court, the principle, that 'specific' excludes 'general' and that the taxing entry would limit the scope of general regulatory entry, as was explained in the Commentary on Constitution of India (2nd Edition, Volume 2, Pg.2145) authored by Sri Arvind P. Datar, Senior Advocate.

52. Learned Senior Counsel for the State of Kerala stated that Entry 62 of List II is now whittled down in view of the now firmly established GST regime. He stated that the interpretation of Entry 62 of List II in the present set of appeals concerns taxes paid in the past.

Points for consideration

53. Having heard learned Senior Counsel and learned counsel appearing for the respective parties and upon perusal of the record, the following points would arise for our consideration:

(i) Whether the subject 'lotteries organised by the Central Government and the State Governments' being carved out

of 'betting and gambling' which is dealt with under Entry 34 of List II and being placed in Entry 40 of List I would also exclude the power of taxation on the same in Entry 62 of List II?

(ii) Whether the power of taxation on 'betting and gambling' is within the ambit of Entry 62 of List II?

(iii) Whether the impugned Acts passed by the Karnataka and Kerala State Legislatures are within the legislative competence of Entry 62 of List II, and are therefore valid pieces of legislation?

(iv) What order?

Constitutional Scheme

54. For easy and immediate reference, the following provisions of the Constitution of India are extracted as under :

> **"245. Extent of laws made by Parliament and by the Legislatures of States –**
>
> (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
>
> (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation.
>
> **246. Subject matter of laws made by Parliament and by the Legislatures of States -** (1) 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 (in this Constitution referred to as the 'Union List').

(2) 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 (in this Constitution referred to as the 'Concurrent List').

(3) 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 (in this Constitution referred to as the 'State List').

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.

246A. Special provision with respect to goods and services tax -

1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.

(2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Explanation. - The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council.]

X X X

248. Residuary powers of legislation –

(1) Subject to Article 246A, Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List
(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists

X X X

265. Taxes not to be imposed save by authority of law -

No tax shall be levied or collected except by authority of law.

X X X

Entries 40 and 97 of List I

40. Lotteries organised by the Government of India or the Government of a State.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

Entries 34 and 62 of List II

34. Betting and gambling.

62*. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

[*As it stood prior to its substitution with effect from 16.09.2016 which is relevant for the purpose of these cases]."

Some of the salient aspects concerning the distribution of the legislative powers between the Parliament and State Legislature as per the three Lists of Seventh Schedule of the Constitution in the backdrop of provisions could be alluded to. Article 246 of the Constitution deals with the distribution of legislative powers between the Union and the States. The said Article has to be read along with the three Lists namely the Union List, the State List and the Concurrent List. The taxing powers of the Union as well as the States are also demarcated as separate Entries in the Union List as well as the State List i.e. List I and List II respectively. The Entries in the Lists are the fields of

legislative powers conferred under Article 246 of the Constitution. In other words, the Entries define the areas of legislative competence of the Union and State Legislature.

55. Article 246 deals with subject matter of laws made by Parliament and by the Legislatures of States as follows :

(a) Clause (1) of Article 246 states 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 (Union List). In this case, we are concerned with Entry 40 of List I, which deals with Lotteries organised by the Government of India or the Government of a State.

(b) Clause (2) of Article 246 of the Constitution, states that notwithstanding anything in clause (3), the Parliament and the Legislature of any State also have the power to make laws with respect to any matters enumerated in List-III (Concurrent List).

(c) Clause (3) thereof, states that the Legislature of any State has exclusive power to make laws for the State with respect to any matters enumerated in List-II (State List). However, clause (3) of Article 246, is subject to clauses (1) and (2) which begin with a non-obstante clause.

56. The power to legislate which is dealt with under Article 246 has to be read in conjunction with the Entries in the three Lists which define the respective areas of legislative competence of the Union and State Legislatures. While interpreting these entries, they should not be viewed in a narrow or myopic manner but by giving the widest scope to their meaning, particularly, when the *vires* of a provision of a statue is assailed. In such circumstances, a liberal construction must be given to the Entry by looking at the substance of the legislation and not its mere form. However, while interpreting the Entries in the case of an apparent conflict, every attempt must be made by the Court to harmonise or reconcile them. Where there is an apparent overlapping between two Entries, the doctrine of pith and substance is applied to find out the true character of the enactment and the entry within which it would fall. The doctrine of pith and substance, in short, means, if an enactment substantially falls within the powers expressly conferred by the Constitution upon the legislature which enacted it, it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another legislature. Also, in a situation where there is overlapping, the doctrine has to be applied to determine to which Entry, a piece of legislation could be related. If there is any trenching on the field reserved to another legislature, the same would be of no consequence. In order to

examine the true character of enactment or a provision thereof, due regard must be had to the enactment as a whole and to its scope and objects. It is said that the question of invasion into another legislative territory has to be determined by substance and not by degree.

57. In case of any conflict between Entries in List I and List II, the power of Parliament to legislate under List I will supersede when, on an interpretation, the two powers cannot be reconciled. But if a legislation in pith and substance falls within any of the Entries of List II, the State Legislature's competence cannot be questioned on the ground that the field is covered by Union list or the Concurrent list *vide* ***Prafulla Kumar Mukherjee vs. Bank of Commerce, Khulna - [AIR 1947 P.C. 60]***. According to the pith and substance rule, if a law is in its pith and substance within the competence of the Legislature which has made it, it will not be invalid because it incidentally touches upon the subject lying within the competence of another Legislature *vide* ***State of Bombay vs. FN Balsara – [AIR 1951 SC 318].***

58. In ***Atiabari Tea Company Ltd. vs. State of Assam – [AIR 1961 SC 232],*** it has been observed by this Court that the test of pith and substance is generally and more appropriately applied when a dispute arises as to the legislative competence of the Legislature and it has to be resolved by reference to the Entries to

which the impugned legislation is relatable. When a question of legislative competence is raised, the test is to look at the legislation as a whole and if it has a substantial and not merely a remote connection with the Entry, the same may well be taken to be a legislation on the topic *vide* ***Ujagar Prints vs. Union of India*** **– [AIR 1989 SC 516].**

59. The expression used in Article 246 is 'with respect to' any of the matters enumerated in the respective Lists. The said expression indicates the ambit of the power of the respective Legislature to legislate as regards the subject matters comprised in the various Entries included in the legislative Lists. Hence, where the Entry describes an object of tax, all taxable events pertaining to the object are within that field of legislation unless the event is specifically provided for elsewhere under a different legislative head. Thus, the Court has to discover the true character and nature of the Legislation while deciding the validity of the Legislation. Applying the doctrine of pith and substance while interpreting the legislative Lists what needs to be seen is whether an enactment substantially falls within the powers expressly conferred by the Constitution upon the Legislature which enacted it. If it does, it cannot be held to be invalid merely because it incidentally encroaches on matters assigned to another Legislature vide ***FN Balsara*** (supra)**.**

60. In ***Ujagar Prints*** (supra), it was observed that the Entries in the legislative Lists must receive a liberal construction inspired by a broad and generous spirit and not in a narrow and pedantic manner. This is because the Entries are not sources of legislative power but are merely topics or fields of Legislation. The expression 'with respect to' in Article 246 brings in the doctrine of pith and substance in the understanding of the exertion of the legislative power and wherever the question of legislative competence is raised, the test is whether the Legislation, looked at as a whole, is substantially 'with respect to' the particular topic of Legislation. For applying the principle of pith and substance, regard must be had (i) to the enactment as a whole, (ii) to its main object, and (iii) to the scope and effect of the provision.

61. Once the Legislation is found to be 'with respect to' the legislative Entry in question unless there are other constitutional prohibitions, the power would be unfettered. It would also extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in that topic or category of Legislation *vide* ***United Provinces vs. Atiqa Begum – [AIR 1941 FC 16].***

62. Another important aspect while construing the Entries in the respective Lists is that every attempt should be made to harmonise the contents of the Entries so that interpretation of one

Entry should not render the entire content of another Entry nugatory *vide* ***Calcutta Gas Company vs. State of West Bengal – [AIR 1962 SC 1044]***. This is especially so when some of the Entries in a different List or in the same List may overlap or may appear to be in direct conflict with each other, in such a situation, a duty is cast on the Court to reconcile the Entries and bring about a harmonious construction. Thus, an effort must be made to give effect to both Entries and thereby arrive at a reconciliation or harmonious construction of the same. In other words, a construction which would reduce one of the Entries nugatory or dead letter, is not to be followed.

63. The sequitur to the aforesaid discussion is that if the Legislature passes a law which is beyond its legislative competence, it is a nullity *ab-initio*. The Legislation is rendered null and void for want of jurisdiction or legislative competence *vide* ***RMDC vs Union of India – [AIR 1957 SC 628***].

64. Since these appeals concern interpretation, *inter alia*, of Entry 62 of List II, which is a taxation entry, it would be useful to refer to certain other articles of the Constitution. Article 265 of the Constitution of India states that no tax shall be levied or collected except by authority of law. That means not only the levy but also the collection of a tax must be authorized by law. The tax to be levied must be within the competence of the Legislature

imposing the tax and the validity of the tax has to be adjudged with reference to the competence of the Legislature at the time the statute authorizing the tax was enacted. Further, the law imposing the tax must have been validly enacted. Thus, power to tax cannot be inferred by implication. The source of power which does not specifically speak of taxation cannot be interpreted by expanding its width as to include therein the power to tax by implication or by necessary inference. There must be a charging section specifically empowering the State to levy the tax *vide* ***Kesoram Industries Limited.*** (supra).

65. Bearing in mind the issues raised in this batch of cases, it is unnecessary to consider the other aspects touching upon the validity of the taxation laws made by a Legislature *viz.*, that they ought not to violate any fundamental right etc., as what is of more significance to the present appeals is the question, whether, the impugned Acts contravene the specific provisions of the Constitution which impose limitation on legislative power relating to particular matters.

66. Further, under Article 289, the Union cannot tax the property and income of a State *vide* ***Re. Sea Customs Act – [AIR 1963 SC 1760].*** This is based on the principles of federalism and inter-governmental immunity as adverted to by learned Senior Counsel Sri Datar. However, under clause (2) of Article 289, the Union can

impose or authorize the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith. Clause (2) of Article 289 states that Parliament may by law declare any trade or business or any class of trade or business to be incidental to the ordinary functions of government in which event, clause (2) of Article 289 would not apply.

67. Further, when a power is conferred on the Legislature to levy a tax, the power itself must be widely construed. It must include the power to impose a tax and select the articles or commodities for the exercise of such power. It must also include the power to fix the rate and prescribe the machinery for the recovery of tax. In imposing taxes, the Legislature can also appoint authorities for collecting taxes and may prescribe the procedure for determining the amount of tax payable by any individual and also ensure that there is no evasion of tax. All these provisions are subsidiary to the main power to levy a tax *vide* ***Khyerbari Tea Co. Ltd. vs. State of Assam – [AIR 1964 SC 925]***.

68. If a tax is *ultra vires* or unconstitutional then the party is entitled to have a refund of it from the government whether it has

been paid under protest or not. This Court has held that the payment of tax which is without authority of law is payment made under a mistake within the meaning of Section 72 of the Indian Contract Act. Then, in such a case, question would arise, whether, the government to whom the payment had been made by mistake must repay it. Thus, the principle of restitution or repayment of the tax simpliciter has been considered in light of the doctrine of unlawful enrichment. The doctrine envisages that when the State collects a tax from the tax payer without authority of law, but if the taxpayer has already passed on the burden of the tax money paid by him to the State to someone else and has recouped the money then the taxpayer is not entitled to ask for the restitution from the State the money paid by him as unauthorised tax. In such circumstances, the State cannot be asked to refund the tax money to the taxpayer on the principle of unlawful enrichment. The Court may refuse the relief to the concerned taxpayer who had ultimately paid the above but not to the intermediary to collect the amount from them and paid the same to the government. It would all depend upon the facts and circumstances of each case. With the passage of time, it has been held that no refund can be granted so as to cause a windfall gain to any person when he has not suffered the burden of tax. That the right of restitution is neither automatic nor unconditional *vide*

Mafatlal Industries (supra). In the said case it was held that refund claim can be allowed only when a person establishes that he has not passed on the burden to others.

69. With the above preface, we shall consider the relevant case law cited at the Bar on interpretation of an Entry in respect of taxation.

70. Under the Seventh Schedule of the Constitution, Lists I & II are divided essentially into two groups: One, relating to the power to legislate on specified subjects and the other, relating to the power to tax. In ***Hoechst Pharmaceuticals Ltd. vs. State of Bihar – [AIR 1983 SC 1019]***, it has been categorically held that taxation is considered as a distinct matter for purposes of legislative competence.

71. It would be relevant to discuss the following judgments of this Court in detail so as to bring out the pertinent principles of interpretation of taxation Entries in List II even when regulation of an activity is provided under an Entry in List I. They are (i) ***M.P.V. Sundararamier*** (supra) and (ii) ***Kesoram Industries Ltd.*** (supra) while delving on these judgments reference would also be made to other cases cited at the Bar, particularly ***Synthetics and Chemicals Ltd.*** (supra) and ***Harbhajan Singh Dhillon*** (supra)**.**

M.P.V. Sundararamier :

72. In ***M.P.V. Sundararamier*** (supra), the petitioners were dealers carrying on business in the city of Madras (now Chennai) for the sale and purchase of yarn, and they had filed petitions under Article 32 of the Constitution before this Court for the issuance of a writ of prohibition or any other appropriate writ restraining the erstwhile State of Andhra Pradesh from taking proceedings for imposing tax on certain sales effected by them in favour of merchants who were residing or carrying on business in what was the erstwhile State of Andhra Pradesh, on the ground, *inter alia*, that the said sales were made in the course of inter-State trade, and that no tax could be levied on them by reason of the prohibition contained in Article 286(2) of the Constitution. One of the questions considered in the said case was, whether, tax on inter-State sales was within the exclusive competence of Parliament, and whether the Act impugned in the said case (Madras General Sales Tax Act, 1939; 'Madras Act', for short) and the amendment made thereof by the Madras General Sales Tax (Amendment) Act No.25 of 1947, was in consequence bad, as it authorized the State to levy the sales tax.

73. The contention was that Entry 42 of List I dealt with inter-State trade and commerce and under that Entry, the Parliament had the exclusive power to enact laws in respect of inter-State trade and commerce which also included the power to impose a

tax on inter-State sales and the State Legislature had therefore no competence under the Constitution to enact a law imposing tax on such sales and the laws passed by the States after the enactment of the Constitution, imposing such a tax were *ultra vires* and void and therefore, the Act impugned in the said case was also *ultra vires*. It was contended that the content of Entry 42 in List I was the same as that of the Commerce Clause of the American Constitution and it must therefore be construed as having the same effect. It was also argued that the power to impose tax on inter-State sales did not vest with the State. That after the enforcement of the Constitution, no law of a State could impose a tax on inter-State sales and hence section 22 of the Madras Act impugned in the said case which came into force after the Constitution was enforced and sought to impose such a tax, was bad in law.

74. The aforesaid contentions were considered in light of the Government of India Act, 1935 under which there was no entry corresponding to Entry 42 of List I of the Constitution but there was Entry 48 in List II which corresponded to Entry 54 of List II of the Constitution. That under Entry 48 of List II of the Government of India Act, 1935 the State had power to pass a law imposing a tax on inter-State sales because the term of the Entry was wide enough to include both inter-State sales as well as intra-

State sales. However, after the Constitution came into force for the first time a new Entry 42 of List I was added and consequently, the States were deprived of the power to tax inter-State sales which had earlier been within their legislative competence under Entry 48 of List II, under the Government of India Act, 1935.

75. It was observed by this Court that while enacting Entry 42 of List I the Constitution makers could have included the power to tax on inter-State sales instead of leaving that to be inferred by construction of Entry 42 of List I in light of the Commerce Clause under the American Constitution. While saying so in paragraph 51, it was observed as follows :

> **"51.** In List I, Entries 1 to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law of Parliament. An examination of these two groups of Entries shows that while the main subject of legislation figures in the first group, a tax in relation thereto is separately mentioned in the second. Thus, Entry 22 in List I is "Railways", and Entry 89 is "Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights". If Entry 22 is to be construed as involving taxes to be imposed, then Entry 89 would be superfluous. Entry 41 mentions "Trade and commerce with foreign countries; import and export across customs frontiers". If these expressions are to be interpreted as including duties to be levied in respect of that trade and commerce, then Entry 83 which is "Duties of customs including export duties" would be wholly redundant. Entries 43 and 44 relate to incorporation, regulation and winding up of corporations. Entry 85 provides separately for corporation tax. Turning to List II, Entries 1 to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes. Entry 18, for

> example, is "Land" and Entry 45 is "Land revenue". Entry 23 is "Regulation of mines" and Entry 50 is "Taxes on mineral rights". The above analysis — and it is not exhaustive of the Entries in the Lists — leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248, clauses (1) and (2) and of Entry 97 in List I of the Constitution. Construing Entry 42 in the light of the above scheme, it is difficult to resist the conclusion that the power of Parliament to legislate on inter-State trade and commerce under Entry 42 does not include a power to impose a tax on sales in the course of such trade and commerce."

On the above analysis, it was categorically inferred that taxation was not intended to be comprised in the main subject in which it might, on extended construction, be regarded as included but is to be treated as a distinct matter for the purpose of legislative competence. But while saying so, in the said case, reliance was placed on Article 286 of the Constitution and on the point, as to, whether, tax on inter-State sales was included within Entry 42 in List I, it was held in the negative, particularly, having regard to Article 286 of the Constitution. Consequently, it was opined that the State had power under Entry 54 of List II to impose a tax on inter-State sales but it would be subject to restrictions included under Article 286(2) of the Constitution. The aforesaid conclusion was summed up in paragraph 55 in the following words :

> **"55.** To sum up: (*1*) Entry 54 is successor to Entry 48 in the Government of India Act, and it would be legitimate to construe it as including tax on inter State sales, unless there is anything repugnant to it in the Constitution, and there is none such. (*2*) Under the scheme of the entries in the Lists, taxation is regarded as a distinct matter and is separately set out. (*3*) Article 286(2) proceeds on the basis that it is the States that have the power to enact laws imposing tax on inter-State sales. It is a fair inference to draw from these considerations that under Entry 54 in List II the States are competent to enact laws imposing tax on inter-State sales."

76. It was also observed that the said conclusion was a construction of the statutory provisions having a bearing in the said case, without reference to the Sixth Amendment to the Constitution which had proceeded on the view that the States had the power to tax inter-State sales under Entry 54 of List II. Therefore, the Constitution was amended to vest the power to tax inter-State sales with the Centre.

Kesoram Industries Ltd.

77. In this case, the controversy centered around Entries 52, 54 and 97 of List I and Entries 23, 49, 50 and 66 of List II and also the extended purport of the residuary power of legislation vested in the Union of India. The judgment dealt with the imposition of levies on coal, tea, brick-earth and minor minerals. While dealing with the aforesaid Entries of List I and List II, reliance was placed on ***Hoechst Pharmaceuticals Ltd.*** (supra) on the interpretation of various Entries in the three Lists. The amplitude of legislative

power under a general Entry *vis-à-vis* taxation Entry was discussed in paragraph 31 which is reproduced as under:

> **"31.** Article 245 of the Constitution is the fountain source of legislative power. It provides — subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the legislature of a State may make laws for the whole or any part of the State. The legislative field between Parliament and the legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule, called the "Union List". Subject to the said power of Parliament, the legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the "Concurrent List". Subject to the abovesaid two, the legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the "State List". Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarised and restated by a Bench of three learned Judges of this Court on a review of the available decision in *Hoechst Pharmaceuticals Ltd.* v. *State of Bihar* [(1983) 4 SCC 45 : 1983 SCC (Tax) 248] . They are:
>
> (*1*) The various entries in the three lists are not "powers" of legislation but "fields" of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. *There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States*.
>
> (*2*) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and

List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(*3*) *Taxation is considered to be a distinct matter for purposes of legislative competence*. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. *The power to tax cannot be deduced from a general legislative entry as an ancillary power*.

(*4*) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest-possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere *simplex enumeratio* of broad categories. *A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters*.

(*5*) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(*6*) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of

> pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three lists, List I has priority over Lists III and II and List III has priority over List II. However, still, *the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.*
>
> (emphasis supplied)

After restating the above principle, it was observed by this Court that legislation in the field of tax and economic activities need special consideration and are to be viewed with larger flexibility rather than measuring the propositions by an abstract symmetry. It was further observed that where a power is with the Union to regulate and control, such power of the Union cannot result in depriving the States of their power to levy tax or fee within its legislative competence without trenching upon the field of regulation and control. Thus, there is a distinction between power to regulate and control and power to tax, the two being distinct.

78. While examining the scheme underlying the Seventh Schedule of the Constitution, reliance was placed on ***M.P.V. Sundararamier*** (supra) and it was observed as under:-

> "74(3). Taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of

> Article 248 clauses (1) and (2) and of Entry 97 in List I of the Constitution. Under the scheme of the entries in the lists, taxation is regarded as a distinct matter and is separately set out."

79. Further, the entries in List I and List II must be construed if possible, so as to avoid conflict. If there appears to be a conflict between Entries of List I and List II, what has to be decided is whether there is any real conflict. If there is none, the question of application of the non - obstante clause 'subject to' does not arise. If there is a conflict, the correct approach to the question is to see, whether, it is possible to effect a reconciliation between the two entries so as to avoid a conflict and overlapping. It was reiterated that in the event of a dispute arising it should be determined by applying the doctrine of pith and substance in order to find out whether between two Entries or legislative fields assigned to two different legislatures, the particular subject of the legislation falls within the ambit of the one or the other. Where there is a clear and irreconcilable conflict of jurisdiction between the Union and a State Legislature, it is the law of the Union that must prevail.

80. Reliance was placed on the words of Sabyasachi Mukharji, J. (as His Lordship then was), speaking for six out of the seven Judges constituting the Bench in ***Synthetics and Chemicals Ltd.*** (supra). It was held that under the constitutional scheme of division of powers in the Seventh Schedule, there are separate

entries pertaining to taxation and other laws. A tax cannot be levied under a general entry. It was observed that the above principles continued to hold the field and have been followed in cases after cases.

81. Delving further on the subject, it was observed by this Court that the power of regulation and control is separate and distinct from the power of taxation. This was illustrated with reference to several judgments of this Court, particularly, ***Hingir - Rampur Coal Co. Ltd. vs. State of Orissa*** **– [*AIR 1961 SC 459]*** wherein this Court dealt with Entry 54 of List I and Entry 23 of List II. Reference was also made to the ***State of Orissa vs. M.A. Tulloch*** **– [*AIR 1964 SC 1284]***.

82. It was further observed with reference to ***Harbhajan Singh Dhillon*** *(supra)*, that Entry 97 of List I conferred the residuary powers on the Parliament. Article 248 of the Constitution which speaks of residuary powers of legislation confers exclusive power on Parliament to make any law with reference to any matter **not enumerated in the Concurrent List or the State List**. But at the same time, it provides that such a residuary power shall include a power of making any law imposing a tax **not mentioned in either of those Lists**. It is thus clear that if any power to tax is clearly mentioned in List II, the same would not be available to

be exercised by the Parliament based on the assumption of residuary power.

83. In fact, the judgment in ***Harbhajan Singh Dhillon*** (supra) was by a majority of 4 : 3 to the effect, that the power to legislate in respect of a matter does not carry with it a power to impose a tax under our constitutional scheme. Thus, there is nothing like an implied power to tax. The source of power which does not specifically speak of taxation cannot be so interpretated by expanding its width as to include therein the power to tax, by implication or by necessary inference. Reliance was also placed on Cooley on Taxation to the following effect :

> "There is no such thing as taxation by implication. The burden is always upon the taxing authority to point to the act of assembly which authorizes the imposition of the tax claimed."

Thus, the power to tax is not an incidental power. Although legislative power includes incidental and subsidiary power under a particular Entry dealing with a particular subject, the power to impose a tax is not such a power which could be implied under our Constitution. Therefore, it was held that the power to legislate in respect of inter-State trade and commerce (Entry 42 List I) did not carry with it, the power to tax the sale of goods which are subject of inter-State trade and commerce, before the insertion of

Entry 92A in List I and such power belonged to the States under Entry 54 in List II subject to Article 286 of the Constitution.

84. Delving further on the distinction between the power to regulate and control and the power to tax, it was observed by this Court that there is a significant distinction between the two primary purposes of legislation. The primary purpose of taxation is to collect revenue. Power to tax may be exercised for the purpose of regulating an industry, commerce or any other activity. The purpose of levying such tax is the exercise of sovereign power for the purpose of effectuating regulation although incidentally, the levy may contribute to the revenue. Taking a leaf from Cooley on his work on taxation, it was observed that the distinction between a demand of money under the police power and one made under the power to tax, is not so much one of form as of substance.

85. The aforesaid principle was alluded to in ***Synthetics and Chemicals Ltd.*** (supra) by holding that regulation is a necessary concomitant of the police power of the State which is actually an American principle but in India it means the 'sovereign' power. However, it was categorically observed that the power to regulate, develop or control would not include within its ken a power to levy tax or fee except when it is only regulatory. Power to tax or levy for augmenting revenue shall continue to be exercised by

Legislature with whom it vests, for instance, the State Legislature, in spite of regulation or control having been assumed by another Legislature i.e. the Union. In this case, the question before the seven-Judge Bench was the power of the State to legislate on industrial alcohol as a subject. Entry 8 in List II and Entry 33 in List III came up for consideration.

86. The aforesaid discussion could be summed up in a nutshell by culling out the following principles stated in ***Kesoram Industries Ltd.*** (supra):

> *(1)* In the scheme of the lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.
>
> *(2)* Power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping *in fact* but there would be no overlapping *in law*. The subject-matter of two taxes by reference to the two lists is different. Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the *subject* of a tax and the *measure* of a tax.
>
> *(3)* The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure

of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by the legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax.

(4) The entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:
One — Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping?
Two — In which entry the impugned legislation falls by finding out the pith and substance of the legislation?
and
Three — Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

(5) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity.

(6) The heads of taxation are clearly enumerated in Entries 83 to 92-B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248(2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II.

We shall now briefly discuss the Central Act of 1998 and the impugned Acts of the States of Karnataka and Kerala which have

been made under Entry 40 of List I and Entry 62 of List II respectively.

Acts under consideration :

The Lotteries (Regulation) Act, 1998:

87. In view of Entry 40 of List I, the Parliament has enacted the Lotteries Act, 1998. The said Act is intended to regulate lotteries and to provide for matters connected therewith and incidental thereto. Section 3 of the said Act prohibits a State Government from organising, conducting or promoting any lottery except subject to the conditions provided under Section 4 of the Act. Section 4 prescribes the conditions under which a State Government may organise, conduct or promote a lottery. There are ten conditions prescribed under Section 4 of the Act. Section 4 is extracted as under for felicity of reference:

> "4. Conditions subject to which lotteries may be organised, etc.—A State Government may organise, conduct or promote a lottery, subject to the following conditions, namely:—
>
> (a) prizes shall not be offered on any pre-announced number or on the basis of a single digit;
>
> (b) the State Government shall print the lottery tickets bearing the imprint and logo of the State in such manner that the authenticity of the lottery ticket is ensured;
>
> (c) the State Government shall sell the tickets either itself or through distributors or selling agents;

(d) the proceeds of the sale of lottery tickets shall be credited into the public account of the State;

(e) the State Government itself shall conduct the draws of all the lotteries;

(f) the prize money unclaimed within such time as may be prescribed by the State Government or not otherwise distributed, shall become the property of that Government;

(g) the place of draw shall be located within the State concerned;

(h) no lottery shall have more than one draw in a week;

(i) the draws of all kinds of lotteries shall be conducted between such period of the day as may be prescribed by the State Government;

(j) the number of bumper draws of a lottery shall not be more than six in a calendar year;

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

88. The Central Government may also prescribe any other condition. Section 5 deals with prohibition of sale of ticket in a State which means that a State Government may, within the State, prohibit the sale of tickets of a lottery organised, conducted or promoted by every other State. The Central Government can also by an order published in the Official Gazette, prohibit lottery organised, conducted or promoted in contravention of the provisions of Section 4 of the said Act or where tickets are sold in a contravention of the provisions of Section 5 thereof. Penalty clause is in Section 7. Section 10 of the said Act enables the Central Government to give directions to State Governments as to

carrying into execution in the State, of any of the provisions of the said Act or of any rule or order made thereunder. The Central Government has the power to make rules under the said Act in terms of Section 11. Section 12 of the said Act enables the State Government to make rules to carry out the provisions of the said Act.

89. A schematic reading of the said Lotteries Regulation Act clearly indicates that the Parliament has enacted the same having regard to Entry 40 of List I of the Seventh Schedule of the Constitution. The 1998 Act deals exclusively with conduct of lotteries by a State Government subject to terms and conditions prescribed in Section 4 of the 1998 Act. The said Act does not deal with conduct of lotteries by entities other than Government of India or Government of State. Hence, regulation of the organisation, conduct and promotion of any lottery by the Government of India or State Government is made by the Parliament under the provisions of the 1998 Act. The said Act has no provision regarding taxation.

The Karnataka Tax on Lotteries Act, 2004

90. The Karnataka Tax on Lotteries Act, 2004 is an enactment to levy tax on lottery scheme as per Section 6 of the said Act. The tax is levied at the following rates namely: (a) Rupees one lakh and

fifty thousand for every bumper draw; and (b) Rupees one lakh in respect of any other draw.

91. The said tax is to be paid by every promoter. The Karnataka Act, 2004 defines the expression 'lottery' in Sub-Section 4 of Section 2 to mean a scheme, in whatever form and whatever name called for distribution of prizes by lot or chance to those persons participating in the chance of a prize by purchasing tickets organised by the Government of India or the Government of a State or a Union Territory or any other country having bilateral agreement or treaty with the Government of India. The definition of the expression 'lottery' would indicate that the object and purpose is of levying the tax on a lottery scheme is only when the lottery scheme is organised by the Government of India or the Government of a State or a Union Territory or any other country having bilateral agreement or treaty with the Government of India. Thus, this Act does not levy any tax on lotteries conducted by any private entities. Sub-Section 5 of Section 2 defines a 'promoter' to be the Government of India or a Government of a State or a Union Territory or any country organising, conducting or promoting a lottery and includes any person appointed for selling lottery tickets in the State on its behalf by such Government or country, where such Government or country is not directly selling lottery tickets in the country or a State. The Karnataka Act, 2004 enables

payment of tax in advance by the registered promoter. Section 8 of the Act deals with registration of promoters and sellers.

92. The Karnataka Act, 2004 is a comprehensive legislation on levy and collection of tax on lotteries (gambling). In fact, the preamble of the Act itself states that the Act is to provide for levy and collection of tax on lottery (gambling). Thus, in the Karnataka Act, 2004, the Legislature has clearly indicated that the expression lottery means gambling.

93. The Act seeks to provide for all matters incidental and ancillary to the levy of taxation, including provisions for filing return, assessment thereof and schedule for payment of tax in advance. Additionally, the said Act also provides for a machinery to effect recoveries of tax and/or penalties from the assessee. Chapter VI of the Act provides for the right of an assessee to prefer an appeal; and the powers of the Commissioner and Joint Commissioner to initiate revisional proceedings in relation to any assessment made or pending under the Act.

94. Section 20 of the Act authorizes certain officers of the State Government to conduct inspection of documents and searches, and effect seizure of accounts or documents pertinent to the assessment under the Act.

95. Chapter VII of the Karnataka Act, 2004 prescribes specific penalties for contravention of various conditions of the Act such as penalty for failure on the part of a promoter to register, keep records, file statement of returns etc.

96. The Karnataka Tax on Lotteries Rules, 2003 (hereinafter referred to as 'Karnataka Lottery Rules, 2003') were made pursuant to Section 37 of the Karnataka Tax on Lotteries, Ordinance, 2003, which preceded the Karnataka Act, 2004.

Kerala Tax on Paper Lotteries Act, 2005

97. The Kerala Act, 2005 is an enactment which provides for the levy and collection of tax on the conduct of paper lotteries within the State of Kerala, at such rates as specified in Section 6 of the Act. The Act provides for the following two rates, applicable based on the nature of the draw: (a) Ten lakh rupees for every bumper draw; (b) Two lakh fifty thousand rupees in respect of any other draw.

98. The said tax is to be paid by every 'promoter.' The terms 'promoter' and 'lottery' have been defined in identical terms as provided under the Karnataka Act of 2004. The Kerala Tax on Paper Lotteries Act, 2005 does not seek to tax the conduct of online lotteries, but only paper lotteries conducted within the State of Kerala. The preamble of the said Act states that it is an

Act to provide for the levy and collection of tax on the conduct of paper lotteries in the State of Kerala.

99. Section 7 of the said Act requires promoters to get registered under the Act on payment of a fee and deposit of security. However, the Act does not require registration of persons who ordinarily sell lottery tickets in retail. 'Promoter' has been defined to include the Government of India or a Government of a State or a Union Territory or any country organising, conducting or promoting a lottery, within the State of Kerala, or any person or entity appointed by the said Government or Country in this behalf. Therefore, the Act only provides for taxation of lotteries conducted within the State of Kerala, by or on behalf of the Government of India, the Government of any State or of a foreign Country and not for taxation on lotteries organised by private entities. Section 11 of the Kerala Act, 2005 provides for payment of tax on every draw, in advance.

100. The Kerala Act, 2005 is a comprehensive legislation and also provides for all matters incidental to the levy and collection of tax on paper lotteries such as, the procedures for assessment of tax due, the right of the assessee to prefer appeals, powers of the tax authorities to conduct search and make seizure, penal provisions to be resorted to for default in payment of tax prescribed under

the said Act. The legislation also empowers the State Government to enact Rules to give effect to any of the provisions of the Act.

Parameters of Taxation :

101. A legislative enactment which provides for the imposition of a tax must specify the following parameters of taxation:

i) The taxable event which forms the basis of levy, also referred to as 'subject' of a tax;
ii) The measure of the tax;
iii) The rate/s of taxation;
iv) The incidence of the tax,

102. The said parameters are each distinct and must not be conflated with the others. The components of tax, as stated above have been characterized in ***Govind Saran Ganga Saran*** (Supra). In the said case, it was also laid down that a legislative scheme which seeks to impose a tax, ought to define each of the aforestated components with certainty and precision. The observations of Chief Justice Pathak may be extracted as under:

> "6. The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law . Any uncertainty or vagueness in the legislative scheme defining

> any of those components of the levy will be fatal to its validity."

103. The above parameters may be identified in the impugned Acts under consideration, as follows:

(i) In the context of the tax sought to be imposed by the impugned Acts, the basis of levy is the conduct of lotteries within the State of Karnataka or Kerala. In other words, the ***subject of taxation*** is the ***conduct of lottery schemes***, by the Government of India or the Government of other States, within the State of Kerala or Karnataka. While it has rightly been stated by the learned counsel appearing on behalf of the Respondents that the conduct of lotteries involves a host of events such as formulation and notification of scheme of lotteries, printing, transportation and sale of lottery tickets etc., all these events constituting the conduct of the lotteries are ultimately for the participation of persons, within the State of Karnataka or Kerala. Therefore, the subject of tax is the conduct of lottery schemes, within the State of Karnataka or Kerala, which is enabled by the propensity of persons to participate in the lottery schemes.

(ii) The ***measure of taxation*** in the instant case is the ***'draw.'*** The impugned legislations contemplate two kinds of draws, namely bumper draw and draw other than a bumper draw.

(iii) The ***rate of tax***, is a dependent variable and is to be determined based on the measure. In the instant case, the rate of tax under the Karnataka Act, 2005 is Rupees One Lakh and fifty thousand in respect of a bumper draw and Rupees one lakh in respect of any other draw. Similarly, in the Kerala Act, 2005, the rate of tax is Rupees ten lakhs in respect of a bumper draw and Rupees two lakhs and fifty thousand in respect of any other draw.

(iv) The ***incidence of the tax is on the promoters of the lotteries***, i.e. on the Government of India or a Government of a State or a Union Territory or any Country organizing, conducting or promoting a lottery, within the State of Karnataka or Kerala, or any person or entity appointed by the said Government or Country in this behalf. The impugned Acts require registration of promoters and all provisions requiring filing of the returns of draws and payment of tax, are to operate in relation to promoters. Therefore, the incidence of the tax, falls on the promoters of the lotteries.

104. The expression 'betting and gambling' finds a mention in Entry 34 of List II of the Seventh Schedule of the Constitution and taxes on, *inter alia*, betting and gambling are leviable having regard to Entry 62 of List II of the Seventh Schedule. Thus, the

activity of betting and gambling and taxes on betting and gambling are subjects falling within List II of the Seventh Schedule i.e. they are State subjects. If conduct of lotteries is held to come within the scope of the expression 'betting and gambling' then the regulation and control of the said activity as well as the taxation on lotteries are squarely within the contours of the legislative powers of the State. However, only lotteries organised by the Government of India or the Government of a State, even though, they come within the scope of the expression 'betting and gambling' have been carved out of the Entry 34 of List II dealing with betting and gambling inasmuch as Entry 40 of List I (Union List) deals with lotteries organised by the Government of India or the Government of a State. This implies that conduct of lotteries by the Government of India or the Government of a State, even though, is betting and gambling within the meaning of Entry 34 and Entry 62 of List II, nevertheless, those Entries are denuded inasmuch as the State Legislature has no legislative powers to pass any law on the subject lotteries organised by the Government of India or the Government of a State. If such is the simplistic interpretation to be given, the matter would rest. However, that is not so.

Meaning of 'betting and gambling' and 'lotteries' :

105. Having perused the impugned Acts and identified the parameters of taxation in the context of the said Acts, we shall now discuss the meanings of betting and gambling and, in particular, lottery as found in Entries 34 and 62 of List II and Entry 40 of List I.

A. Dictionary meaning :

(i) Black's Law Dictionary defines 'gambling' to mean:

> "The act of risking something valuable, especially money for a chance to win a prize."

(ii) Similarly, in *Advanced Law Lexicon*, P. Ramanatha Aiyar (6th Edition) at *page 612* 'betting and gambling' has been described as follows:

> "Putting a stake on something of value, particularly money with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring."

(iii) In *Words and Phrases* (Permanent Edition) Vol. 25-A at *page 439* a 'lottery' has been defined to mean 'a species of gambling.'

At page 444, it has been stated as follows:

> "The term 'lottery' as popularly and generally used referring to a gambling scheme in which chances are sold or disposed of for value and the sums thus paid are hazarded in the hope of winning a much larger sum, a scheme for the

> distribution for the distribution of prizes by chance."

(iv) In *Advanced Law Lexicon*, P. Ramanatha Aiyar (1997 Edition) 'Lottery' has been defined as follows:

> "Scheme for disposal or distribution of property by chance. The term 'lottery' has no technical meaning in the law distinct from its popular signification."

(v) Similarly, in Black's Law Dictionary (6th Edn.) at *p. 947* the meaning of 'lottery' has been pithily given as under:

> "A chance for a prize for a price."

(vi) The Concise Oxford English Dictionary [Oxford University Press, 11 Edn., 2004] at *p. 844*, defines the term "lottery" as follows:

> "Lottery a means of raising money by selling numbered tickets and giving prizes to the holders of numbers drawn at random – something whose success is governed by chance."

(vii) The Webster's New American College Dictionary (1981) defines as:

> "A method of selling numbered tickets and awarding prizes to the holders of certain numbers drawn by lot."

106. From the above Dictionary meanings what emerges is that 'lottery' is one of the many gambling schemes. That 'gambling' is the genus of which a species is 'lottery'. It is evident that 'lotteries' and 'gambling' activities, to be termed as such, must inherently

have an element of 'chance' in the manner in which the result thereof is determined. That the species of 'lottery' may be placed in the genus of 'betting and gambling' and more specifically under the ambit of 'gambling' because of the 'gambling spirit' which is a necessary element of 'lottery'. The expression 'to take a chance' is itself synonymous to a gamble. Therefore, it may be concluded that lottery is one such activity which requires a participant to take a chance or to gamble. Any form of contest for a prize that does not fall within the definition of either betting, gaming or a lottery is defined as a 'prize competition' which is also subject to legal control.

B. Some Recent Writings :

(i) According to the House of Lords Select Committee Report on 'the Social and Economic Impact of the Gambling Industry' (Report of Session 2019-21), gambling is a general expression which can include different types of gambling viz., betting, gaming and lotteries.

Betting is defined as making or accepting a bet on:

(i) the outcome of a race, competition or other event or process;
(ii) the likelihood of anything occurring or not occurring; or
(iii) whether anything is or is not true.

Gaming is defined as 'playing a game of chance for a prize'. A game of chance includes:

(i) A game that involves both an element of chance and an element of skill;
(ii) A game that involves an element of chance that can be eliminated by superlative skill; and
(iii) A game that is presented as involving an element of chance, but
(iv) Does not include a sport.

The Report however states that the expression 'gaming' may not include video gaming and social gaming as such but is used in a statutory sense viz., section 6 of Gambling Act, 2005.

Lotteries is defined as a type of gambling that has three essential elements :

(i) Payment is required to participate;
(ii) One or more prizes are awarded; and
(iii) Those prizes are awarded by chance.

In England, the Gambling Act, 2005 has been enforced as a comprehensive legislation with effect from 1st September, 2007 to include betting, gaming and lotteries. While the Gambling Act, 2005 defines each of the forms of gambling, the underlying concept 'game' and 'bet' are not defined.

(ii) Kent R. Grote and Victor A. Matheson (Department of Economics and Business, Lake Forest College and Department of Economics, College of the Holy Cross, Worcester respectively) in their Article 'The Economics of Lotteries: A Survey of the Literature', published in August, 2011, have stated that lotteries represent one of the oldest and most common forms of gambling

around the world. That lotteries involve the sale by an organising body, typically the government but also occasionally private businesses or charities, of a ticket, giving the possessor, a potential monetary reward. Lotteries differ from casinos in that lottery ticket sales generally do not take place at a location specifically set aside for gambling, and modern lotteries are usually operated by governments instead of private firms. It is further observed that lotteries are of particular interest to scholars for a variety of reasons. *First*, they represent an important source of government revenue in many States and countries, so they are of interest to public finance economists. *Second*, lotteries provide researchers interested in micro-economic theory and consumer behavior with a type of experimental lab that allows economists to explore these topics.

107. According to these learned authors, lotteries have a revenue potential and the revenue mechanism, is explicitly stated, the goal of lottery organisers and there are ways in which variations in product variety, lottery structure and payout rates could be adjusted to increase revenue. If a State finds that its residents are purchasing lottery tickets from other States that have adopted lotteries, this may increase the likelihood of that State to introduce its own lotteries.

108. The relevant judgments cited at the Bar on lottery scheme and its essential features shall be considered as under:

(a) In ***RMD Chamarbaugwala*** (supra), this Court examined the validity of the Bombay Lotteries and Prize Competitions Control Act, 1948, which sought to tax the promoters of prize competitions. In that context, this Court discussed whether prize competitions as defined in the legislation impugned therein were in the nature of gambling activities. This Court examined the nature of the prize competitions and made observations as to which of them ought to be included under the category of 'activities of gambling nature'. It was held that prize competitions which require participants to guess the solution prepared beforehand or which determine the solution by lot were of gambling nature. In a more general vein, it was highlighted that gambling activities, in their very nature include any competition wherein success does not depend to a substantial extent on skill of the participant, but on an element of chance. As regards those competitions in which prizes are offered for forecasts of the results either of a future event or an event that has occurred in the past for which the result is unknown, this Court held that the said category of competitions were also of 'gambling' nature. This Court concluded that the activity being conducted by the respondent-

promoter therein was a lottery and such activity could be regarded as gambling inasmuch as it was not a competition in which skill, knowledge and judgment were in real and effective play.

(b) In ***RMDC vs. State of Mysore*** (supra), the challenge was to the constitutionality of the Mysore Lotteries and Prize Competitions Control and Tax Act, 1951 ('Mysore Act' for short) passed by the Mysore Legislature which came into force from 21st June, 1951 and the Rules made thereunder, which came into force on 1st February, 1952. Earlier to that, the Bombay High Court had observed that the amendment made to the Bombay Lotteries and Prize Competition Control and Tax Act, 1948 ('Bombay Act' for short) was unconstitutional and that the taxes imposed under the provisions of the Bombay Act were hit by Article 301 of the Constitution. The result of that judgment was that though the prize competitions could be controlled by the State within their respective borders, their ramifications beyond those borders could only be dealt with by any action under Article 252(1) of the Constitution. It was for that reason that the States of Andhra Pradesh, Bombay, Madras, Uttar Pradesh, Hyderabad, Madhya Bharat, Pepsu and Saurashtra passed resolutions under Article 252(1) of the Constitution authorizing

Parliament to legislate for the control and regulation of prize competitions and in pursuance thereof, the Parliament passed the Prize Competitions Act, 1955 (Act 42 of 1955) (Central Act) which came into force on 1st April, 1956. On 24th February, 1956, the Mysore Legislature passed a resolution adopting the said Central Act. Petitions were filed under Article 32 of the Constitution before this Court challenging the validity of the Central Act but the same were dismissed *vide* ***R.M.D.C. vs. Union of India*** (supra).

Thereafter, certain amendments were made to the Mysore Act, as originally passed in 1951. The Mysore Amending Act was challenged in the High Court of Mysore by a petition filed under Article 226 which was dismissed and against that judgment and order, the appeal was brought before this Court pursuant to a certificate issued by the High Court under Article 132(1) of the Constitution. The challenge to the constitutionality of the Mysore Amending Act was, *inter alia,* on the ground that the Mysore Legislature, by adopting the Central Act, was no longer competent to pass any law in regard to prize competitions because the whole matter including the power of taxation was surrendered in favour of the Parliament.

While considering the resolutions passed by various States, the question that arose for consideration of this Court was whether the resolutions as passed and particularly the words "*control and regulation of prize puzzle competitions and all other matters ancillary thereto*" had the effect of surrendering the whole subject of prize competitions to the Parliament i.e., every matter and power connected therewith including the power to tax. This Court held that the resolutions passed by the States *vis-à-vis* Entry 34 of List II as per Article 252 of the Constitution, did not take away the power of the State to impose tax under Entry 62 of List II and the said power could not have been said to have been surrendered. That by passing the resolutions, the States did not surrender their power of taxation and neither was Clause (2) of Article 252 of the Constitution violated by the amendment of the Mysore Act. That the tax imposed under the Mysore Act was in exercise of the powers which the legislature possessed of imposing tax under Entry 62 of List II.

In ***RMDC vs. State of Mysore*** (supra), after referring to ***R.M.D. Chamarbaugwala*** (supra), it was categorically observed as follows:-

> "The fact that regulatory provisions have been enacted to control gambling by issuing licences and by imposing taxes does not in any way alter

> the nature of gambling which is inherently vicious and pernicious."

Considering Entries 34 and 62 of List II, it was observed that the subject of 'betting gambling' given in Entry 34 of List II and the taxes on 'betting gambling' as given in Entry 62 of List II have to be read separately as separate powers and therefore when control and regulation of prize competitions was surrendered to Parliament by the resolutions passed by the States, the power to tax under Entry 62 of List II, which is a separate head, cannot be said to have been surrendered. The observations of Das, C.J. in ***R.M.D. Chamarbaugwala*** (supra) were reiterated as under:-

> "For the reasons stated above, we have come to the conclusion that the impugned law is a law with respect to betting and gambling under Entry 34 and the impugned taxing section is a law with respect to tax on betting and gambling under Entry 62 and that it was within the legislative competence of the State legislature to have enacted it. There is sufficient territorial nexus to entitle the State legislature to collect the tax from the petitioners who carry on the prize competitions through the medium of a newspaper printed and published outside the State of Bombay."

(c) In ***H. Anraj*** (supra), the petitioner therein questioned the ban sought to be imposed by the Government of Maharashtra on sale within the State of Maharashtra of tickets of lotteries conducted by the Government of other States. While considering the said question, it was observed that Entry 40 of

List I deals with lotteries organised by the Government of India or the Government of State while Entry 34 of List II deals with 'betting and gambling'. That the expression 'betting and gambling' includes and has always been understood to have included conduct of lotteries. But, the subject, 'Lotteries organised by the Government of India or the Government of State' has been taken out from the legislative field comprised in the expression 'betting and gambling' and is reserved to be dealt with by the Parliament. Since the subject was within the exclusive legislative competence of Parliament in view of Article 246(1) and (3), no legislature of a State can make laws touching lotteries organised by the Government of India or the Government of a State. In our view, in the aforesaid case, the scope of Entry 62 of List II in the context of Entry 34 of List II and Entry 40 of List I did not come up for consideration.

(d) In ***H. Anraj vs. Government of Tamil Nadu*** *[(1986) 1 SCC 414]* (For short, "***Anraj II***"), the amendment introduced to the Tamil Nadu General Sales Tax Act, 1959, with effect from 28th January, 1984, whereby lottery tickets were subjected to sales tax, was assailed before this Court primarily on the ground that the Tamil Nadu State Legislature lacked legislative competence to enact such amendment. This Court considered

the question as to whether sales tax could be levied by a State Legislature on the sale of lottery tickets within its territory, based on the power vested with it under Entry 54 of List II which at the time pertained to 'taxes on the sale or purchase of goods other than newspapers.'

In that background, this Court undertook an analysis of the nature of lottery tickets, with a view to determine whether they may be construed to be 'goods' as defined under the Sale of Goods Act, the sale of which 'goods' may be subjected to sales tax. This Court concluded that lottery tickets were 'goods' inasmuch as they carried with them the entitlement to participate in a draw. That when lottery tickets were sold, a beneficial interest in movable property of incorporeal or intangible character, was being transferred. It was held that when a lottery ticket is purchased, it carried with it a right to participate in a draw, and therefore, sales tax may be imposed on the same, in a similar manner as is imposed when any other 'dealer's merchandise' which is bought and sold in the market, is transferred.

(e) In ***M/s Suman Enterprises and Others*** (supra) an executive order dated 6th October, 1989, was issued by the State of Tamil Nadu prohibiting the sale of lottery tickets of other States. The said Government order categorized lotteries as (a) Lotteries

organized by the Government of India; (b) Lotteries organized by the Government of Tamil Nadu; (c) Lotteries organized by the other State Governments; (d) Private lotteries authorized by Government of Tamil Nadu; and (e) Private lotteries authorized by other Governments but not authorized by this Government. The Government order stated that sale of lottery tickets of Government of Tamil Nadu and lotteries organized by the Government of India or other State Governments alone would be permitted within the said State. This Court observed that a lottery 'organised' by a State would require certain basic and essential concomitants to be satisfied as members of the public when investing their money in such a lottery proceed on a trust and on certain assumptions as to the genuineness, *bona fides*, safety, security, the rectitude of administration etc. associated with governmental functioning. As to the meaning of the said organized lottery and the requirements thereof are concerned, it was observed as under:-

> "The first of those requirements is that the tickets which bear the imprint and logo of the State must be printed by or directly at the instance of the State Government so as to ensure their authenticity and genuineness and further to ensure that any possibility of duplication of the tickets and sale of fake tickets is provided against and rendered impossible. Secondly, the State itself must sell the tickets though, if it thinks necessary or proper so to do, through a sole distributor or selling agent or several agents or distributors under terms and conditions regulated by the agreement reached between the

> parties. The sale proceeds of the tickets either sold in retail or wholesale shall be credited to the funds of the Government. Thirdly, the draws for selecting the prize-winning tickets must be conducted by the State itself, irrespective of the size of the prize money. Fourthly, if any prize money is unclaimed or is otherwise not distributed by way of prize, it must revert to and become the property of the State Government. These, prima facie, appear to us to be the minimal characteristics of a lottery which can claim to be 'organised' by the State."

The aforesaid were said to be a minimal criteria which rendered a lottery to be eligible to be called 'organised' by a State. Thus, a distinction was made by this Court between the said organized lottery and a lottery which is authorised by the State. Further it was observed that the Government order of Tamil Nadu impugned therein was construed to apply to lotteries organized by the States in terms of the Entry 40 of List I, while Entry 34 of List II dealt with 'betting and gambling'.

(f) The nature and character of the lotteries was again deliberated upon in ***B.R. Enterprises*** (supra) wherein it was held that lotteries are a form of gambling. However, it was contended that State lottery, if it is gambling, would lose its character as such. While considering the said issue, reliance was placed by this Court on ***R.M.D. Chamarbaugwala*** (supra)**,** to hold that gambling activities are in their very nature and essence, *res extra commercium.* That, even if lotteries were permitted under the regulating power of the State, it could not be given status

of 'Trade and Commerce' as understood in common parlance. The ingredients of a contract of lottery tickets were considered and reference was made to ***Anraj II*** (supra), wherein it had been held that sale of lottery tickets was transfer of 'Goods' and hence liable for sales tax, by observing thus:-

> "**49.** ...."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 moveable property. Lottery tickets, not as physical articles, but as slips of paper or memoranda evidence not one but both these beneficial interests in moveable property which are 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.
>
> ***
>
> The right to participate in the draw under a lottery ticket remains a valuable right till the draw takes place and it is for this reason that licensed agents or wholesalers or dealers of such tickets are enabled to effect sales thereof till the draw actually takes place and as such till then the lottery tickets constitute their stock-in-trade and therefore a merchandise and goods, capable of being bought or sold in the market."

However, it was also noted that in ***Anraj II*** (supra) neither was there any issue nor any contest as to whether the sale of such lottery tickets would be 'Trade and Commerce'. The said decision proceeded as if it was 'Trade and Commerce' within the meaning of Articles 301 to 304 of the Constitution in Chapter XIII thereof. Hence, the nature of the transaction

involved in the sale of lottery tickets was examined and after referring to various dictionaries and other authorities, it was observed that there are three ingredients in the sale of lottery tickets, namely, (i) prize, (ii) chance, and (iii) consideration. So, when a person purchases a lottery ticket, he purchases it for receiving a prize, which is by chance and the consideration is the price of the ticket. The holder of such a ticket knows that the consideration which he has paid may be for receiving nothing. However, there may be a few who are lucky to receive the prize which is just by chance.

While noting that Entry 62 of List II refers to taxes on 'betting and gambling' which inherently includes gambling, the question whether State lotteries (gambling) could still qualify to be 'Trade and Commerce' within the meaning of Chapter XIII of the Constitution was considered. Noting that, there had been a distinction made under the Government of India Act, 1935 between State lotteries and other forms of lotteries which have been placed in different Lists and the same pattern had been followed under the Constitution, this Court made a distinction between 'gambling' and 'trade' and observed that gambling inherently involved an element of chance, with no skill, while trade involved skills, with no chance. That even though the State may conduct lotteries, the element of chance

remains, with no skill involved and even the organisation and conduct of the lotteries by the State Government are within the boundaries of gambling. That the only purpose of having stringent measures *vis-à-vis* lotteries being conducted by the State was to inculcate faith in the participants of such lottery being conducted fairly with no possibility of fraud or misappropriation and deceit and assure the hopeful recipients of high prizes that all is fair and safe. That the object was to assure the participants that the proceeds from the sale of lottery tickets are credited to the public accounts of the State and would not be in the hands of any individual group or association and thus to bring about a transparency in the organisation of the lottery by the State, subject to the regulation. Even then, the activity of conduct of the lottery would remain in the realm of gambling. With respect to the nature of lotteries conducted by a State *vis-à-vis* lotteries conducted by any individual group or association, this Court further observed as follows:-

> "In this regard, there is no difference between lotteries under Entry 34 List II and a lottery organised by the State under Entry 40 List I. When character of both the State organised lotteries and other lotteries remains the same, by merely placing the apparel of the State with authority of law, would not make any difference; it remains gambling as element of chance persists with no element of skill. Even other lotteries under Entry 34 List II could only be run under the authority of

> the State or the law of the State. The only difference is in one case, authority is that of State and in the other, Parliament."

This Court further held that even a lottery, though not organised by the State, but authorized by the State, has a sanction in law. That gambling may be taxed and may be authorized for specified purpose, but it would not attain the status of trade like other trades and become *res commercium*. As regards the applicability of the ***R.M.D. Chamarbaugwala*** (supra) case to State lotteries this Court observed as follows:-

> ".....no gambling could be *commercium*, hence in our considered opinion the principle of ***RMDC*** case would equally be applicable even to the State organised lottery. In no uncertain terms the said decision recorded that the Constitution makers could never have conceived to give protection to gambling either under Article 19(1)(g) or it as a trade under Article 301 of the Constitution."

Ultimately, in paragraph 73 of the said judgment, it was observed that sale of lottery tickets organised by the State could not be construed to be 'trade and commerce' and even if it could be so construed, it cannot be raised to the status of 'trade and commerce' as understood in common parlance or 'trade and commerce' as used in Article 301. Thus, it was concluded that lotteries organised by the State are also in the nature of gambling as per the principles laid down in ***RMDC***

vs. State of Mysore (supra). Therefore, the said principles would be equally applicable to State lotteries.

(g) In ***Sunrise Associates vs. Government of NCT of Delhi - [(2000) 10 SCC 420]***, a decision rendered by the High Court of Delhi, following the ratio laid down in ***Anraj II***, was challenged before this Court on the principal ground that the judgment in ***Anraj II*** required reconsideration. This Court noted that ***Anraj II*** proceeded on the view that purchase of a lottery ticket carried with it the right to participate in a draw. It however, had not taken into account that the transaction of sale of lottery tickets involved two elements which were inextricably linked to each other, namely, (i) the right to participate in a draw; and (ii) the right to win the prize, dependent on chance. It was held in light of the second of the two elements, that the sale of a lottery ticket may, in fact, be a transfer of a chose in action and not transfer of a good. Having regard to the said ambiguity as to the nature of right being transferred when a lottery ticket is sold, the matter was referred to a Bench of five Judges, who clarified the law on the point in ***Sunrise Associates vs. Government of NCT of Delhi - [(2006) 5 SCC 603]***

(h) In ***Sunrise Associates vs. Government of NCT of Delhi - [(2006) 5 SCC 603]***, which is a judgment of a Constitution

Bench of this Court authored by Ruma Pal, J., the question, whether, sales tax could be levied by a State on the sale of lottery tickets as considered in ***H. Anraj II*** (supra) was reconsidered. This Court came to the conclusion about the transfer of lottery tickets in the following manner:-

> **"14.** The Court in *H. Anraj* [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] 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*, the latter *in futuro* depending on the contingency."

Ultimately, in paragraphs 41 and 44, the Constitution Bench observed as under :-

> **"41.** A lottery ticket has no value in itself. It is a mere piece of paper. Its value lies in the fact that it represents a chance or a right to a conditional benefit of winning a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this right. The Court in *H. Anraj* [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] , as we have seen, held that a lottery ticket is a slip

> of paper or memoranda evidencing the transfer of certain rights. We agree.
>
> **42.** .....
>
> **43 ...**..
>
> **44.** The question is, what is this right which the ticket represents? There can be no doubt that on purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize money which is not in the purchaser's possession. The right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of "goods" under the Sale of Goods Act and the sales tax statutes. This was also accepted in *H. Anraj* [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] when the Court said that to the extent that the sale of a lottery ticket involved a transfer of the right to claim a prize depending on chance, it was an assignment of an actionable claim. Significantly in *B.R. Enterprises* v. *State of U.P.* [(1999) 9 SCC 700] construing *H. Anraj* [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] the Court said: (SCC p. 746, para 52)
>
> > "*52*. So, we find three ingredients in the sale of lottery tickets, namely, (*i*) prize, (*ii*) chance, and (*iii*) consideration. So, when one purchases a lottery ticket, he purchases for a prize, which is by chance and the consideration is the price of the ticket."

Thus, the Constitution Bench held that the lottery ticket would represent an actionable claim and hence is excluded from the definition of 'Goods' under the Sale of Goods Act and the sales tax statutes.

It was further observed that the distinction drawn in ***H. Anraj II*** (supra) between the chance to win and the right to

participate in the draw was unwarranted because 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 inseparable part of the chance to win and not a different right, and therefore, the separation between the two was not right. In other words, a draw without a chance to win is meaningless; and one cannot claim a prize without participating in a draw. In fact, the transfer of the chance to win assumes participation in the draw. The consideration is paid for the chance to win after participating in the draw and not merely for the right to participate. The right to participate being an inseparable part of the chance to win, is therefore part of an actionable claim. It was also observed that the right to participate and the chance to win are both rights *in futuro*. It was thus emphasized that there is no sale of goods within the meaning of sales tax statutes when the right to participate in a draw is transferred by sale of a lottery ticket and that the object of right to participate would be to win a prize. Hence, the right to participate in a lottery is an actionable claim or what is called as chose in action. In view of the above discussion, it was held that ***H. Anraj II*** (supra) was incorrectly decided by holding that a sale of lottery ticket involved a sale of goods. It was

emphasised that there was no sale of goods within the meaning of Sales Tax Acts of the different States but at the highest a transfer of actionable claim. Consequently, all the decisions which held otherwise were overruled, though prospectively, with effect from the date of the judgment in ***Sunrise Associates vs. Government of NCT of Delhi – [(2006) 5 SCC 603]***.

(i) Skill ***Loto Solutions Pvt. Ltd*** (supra) is a recent judgment of a three–Judge Bench of this Court in which the petition filed by an authorized agent for sale and distribution of lotteries organised by the State of Punjab, had impugned the definition of 'goods' under Section 2(52) of Central Goods and Service Tax Act, 2017 (for short, 'CGST Act') to the extent that actionable claims were included under 'goods'. Consequently, notifications issued pertaining to levy of tax on lotteries were also challenged. The petitioner therein had sought a declaration that the levy of tax on lottery was discretionary and violative of Article 14, 19(1)(g), 301 and 304 of the Constitution of India. The following questions of law were taken up for consideration in the said Writ Petition:-

> "12. ...
>
> (I) Whether the writ petition is not maintainable under Article 32 of the Constitution of India since the writ petition relates to lottery, which is *res*

> *extra commercium* and the petitioner cannot claim protection under Article 19(1)(g)?
>
> (II) Whether the inclusion of actionable claim in the definition of goods as given in Section 2(52) of Central Goods and Services Tax Act, 2017 is contrary to the legal meaning of goods and unconstitutional?
>
> (III) Whether the Constitution Bench judgment of this Court in *Sunrise Associates* (supra) in paragraphs 33, 40, 43 and 48 of the judgment has laid down as the proposition of law that lottery is an actionable claim or the observations made in the judgment were only an *obiter dicta* and not declaration of law?
>
> (IV) Whether exclusion of lottery, betting and gambling from Item No. 6 Schedule III of Central Goods and Services Tax Act, 2017 is hostile discrimination and violative of Article 14 of the Constitution of India?
>
> (V) Whether while determining the face value of the lottery tickets for levy of GST, prize money is to be excluded for purposes of levy of GST?"

After noting that the CGST Act, 2017, being an Act of Parliament in exercise of power of Parliament as conferred under Article 246A of the Constitution, this Court considered a catena of judgments of this Court touching upon the activity of organising and conducting lotteries, levy of taxes on lotteries, etc. and answered Question I by holding that the Writ Petition filed under Article 32 of the Constitution was maintainable. Question II and III were also answered by holding that the inclusion of actionable claim in the definition

'Goods' as given in Section 2(52) of the CGST Act, 2017 is not contrary to the legal meaning of 'goods' and is neither illegal nor unconstitutional. It was further held that in ***Sunrise Associates,*** the Constitution Bench had laid down that lottery is an actionable claim and the same was not an *obiter dicta*. With regard to question IV as to whether there was any hostile discrimination in the exclusion of lottery, betting and gambling from Item No. 6 Schedule III of CGST Act, 2017, it was held that there was no violation of the equality clause. The relevant observations of this Court are extracted as under:

> **"69.** In a later decision, *Union of India* v. *Martin Lottery Agencies Limited*, (2009) 12 SCC 209, this Court had occasion to consider levy of service tax on the lottery tickets. This Court had held that law as it stands today recognises lottery to be gambling, which is res extra commercium. In paragraph 17, following has been laid down:—
>
> > **"17.** We fail to persuade ourselves to agree with the aforementioned submission. The law, as it stands today (although it is possible that this Court in future may take a different view), recognises lottery to be gambling. Gambling is res extra commercium as has been held by this Court in *State of Bombay* v. *R.M.D. Chamarbaugwala* [AIR 1957 SC 699] and *B.R. Enterprises* v. *State of U.P.* [(1999) 9 SCC 700]"
>
> **70.** Lottery, betting and gambling are well known concepts and have been in practice in this country since before independence and were regulated and taxed by different legislations. When Act, 2017 defines the goods to include actionable claims and included only three categories of actionable claims, i.e., lottery, betting and gambling for purposes of levy of GST, it cannot be said that there was no rationale for including these three actionable claims for tax purposes. Regulation including taxation in one or other form on the activities namely lottery, betting

> and gambling has been in existence since last several decades. When the parliament has included above three for purpose of imposing GST and not taxed other actionable claims, it cannot be said that there is no rationale or reason for taxing above three and leaving others.
>
> **71.** It is a duty of the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The Constitution Bench in *State of Bombay* v. *R.M.D. Chamarbaugwala* (supra) has clearly stated that Constitution makers who set up an ideal welfare State have never intended to elevate betting and gambling on the level of country's trade or business or commerce. In this country, the aforesaid were never accorded recognition of trade, business or commerce and were always regulated and taxing the lottery, gambling and betting was with the objective as noted by the Constitution Bench in the case of *State of Bombay* v. *R.M.D. Chamarbaugwala* (supra), we, thus, do not accept the submission of the petitioner that there is any hostile discrimination in taxing the lottery, betting and gambling and not taxing other actionable claims. The rationale to tax the aforesaid is easily comprehensible as noted above. Hence, we do not find any violation of Article 14 in Item No. 6 of Schedule III of the Act, 2017. "

It is clear from the paragraphs extracted above that this Court has held that for the purpose of levy of taxation, the actionable claims arising out of participation in a lottery or on placing a bet or via gambling in any other form, may be placed in a class distinct from the rest of the actionable claims and be subjected to taxation accordingly. Such acknowledgment by this Court establishes a corelation between 'lotteries' and 'betting and gambling' and places them in the same category/class.

In answering Question V, it was held that having regard to the statutory provisions of the CGST Act, 2017, the value of taxable supply is a matter of statutory regulation and when the value is to be the transaction value which is to be determined as per Section 15, it is not permissible to compute the value of taxable supply by excluding the prize money which has been contemplated in the statutory scheme. When prize paid by the distributor/agent is not to be excluded from the value of taxable supply, the prize money should be included for computing the taxable value of supply. Thus, while determining the taxable value of supply, the prize money is not to be excluded for the purpose of levy of goods and service tax. In view of the above answers, the writ petition was dismissed.

(j) In ***Reader's Digest Association ltd. v. Williams – [(1976) 1 W.L.R. 1109]***, it was said:

> "A lottery is the distribution of prizes by chance where the person taking part in the operation, or a substantial number of them, make a payment or consideration in return for obtaining their chance of a prize. There are really three points one must look for in deciding whether a lottery has been established: *first of all*, the distribution of prizes, *secondly*, the fact this was to be done by means of a chance and *thirdly*, that there must be some actual contribution made by the participants in return for their obtaining a chance to take part in the lottery. The above laid down principle shows that there should be three elements to establish a lottery such as; prize, chance and consideration."

It may be noted that in the aforesaid case too, the passage reproduced below is included.

> "A lottery is the distribution of prizes by chance where the person taking part in the operation, or a substantial number of them, make a payment or consideration in return for obtaining their chance of a prize."

109. What emerges from the discussion of the decisions of this Court referred to above is that 'lotteries' are a species within the genus of 'gambling.' That one of the essential features of a lottery is its inherent gambling nature, which persists irrespective of whether the lottery scheme is conducted by the Government of India, Government of a State or by a private entity. 'Gambling' activities include a whole gamut of activities, including, but not limited to 'lotteries.'

110. It is also settled that the sale of a lottery ticket involves two elements, namely, (i) the right to participate in a draw; and (ii) the right to win the prize, dependent on chance. Therefore, sale of a lottery ticket is in the nature of a transfer of an actionable claim or a chose in action.

Discussion :

111. Having regard to the aforesaid discussion, we now answer the points for consideration. While doing so, the following

approach is being adopted with regard to the interpretation of the Entries of the Lists of the Seventh Schedule of the Constitution:

1. The Entries in the different Lists should be read together without giving a narrow meaning to any of them. The powers of the Union and the State Legislatures are expressed in precise and definite terms. Hence, there can be no broader interpretation given to one Entry than to the other.

   Even where an Entry is worded in wide terms, it cannot be so interpreted as to negate or override another Entry or make another Entry meaningless. In case of an apparent conflict between different Entries, it is the duty of the Court to reconcile them in the first instance.

2. In case of an apparent overlapping between two Entries, the doctrine of pith and substance has to be applied to find out the true nature of a legislation and the Entry within which it would fall.

3. Where one Entry is made 'subject to' another Entry, all that it means is that out of the scope of the former Entry, a field of legislation covered by the latter Entry has been reserved to be specially dealt with by the appropriate Legislature.

4. When one item is general and another specific, the latter will exclude the former on a subject of legislation. If, however, they cannot be fairly reconciled, the power enumerated in List II must give way to List I.

5. On a close perusal of the Entries in the three Lists of the Seventh Schedule of the Constitution, it is discerned that the Constitution has divided the topics of legislation into the following three broad categories: (i) Entries enabling laws to be made; (ii) Entries enabling taxes to be imposed; and (iii) Entries enabling fees and stamp duties to be collected. Thus, the entries on levy of taxes are specifically mentioned. Therefore, *per se*, there cannot be a conflict of taxation power of Union and the State. Thus, in substance the taxing power can be derived only from a specific taxing Entry in an appropriate List in the Seventh Schedule. Such a power has to be determined by the nature of the tax and not the measure or machinery set up by the statute.

112. At the same time, Article 265 of the Constitution which states that no tax shall be levied or collected except by authority of law,

ought to be borne in mind. In the instant cases, authority of law would imply the competence of the State Legislatures of Karnataka and Kerala in enacting the impugned laws.

113. In view of the detailed discussion made above, we find that the dictum of this Court in ***M.P.V. Sundararamier*** analysing the entries in Lists I and II dealing with various subjects of legislation and entries concerning taxation being separate and distinct must be borne in mind while interpreting the impugned Acts. That is the constitutional scheme. In this regard, we reiterate what has been observed in ***Hoechst Pharmaceuticals Ltd.***, to the effect that taxation is considered to be a distinct matter for purposes of legislative competence and the power to tax cannot be deduced from the general legislative Entry as an ancillary power. This is because, as already stated, the general subjects of legislation are dealt with in one group of Entries and the power of taxation in a separate group. Also, a power to legislate as to the principal matter specifically mentioned in the Entry shall also include within its expanse legislation touching only upon incidental and ancillary matters. The power to levy tax cannot be considered to be an incidental and ancillary matter while interpreting an entry in the Lists concerning legislative competence of the Parliament or Legislature of any State to enact laws on the subjects mentioned in the Entry. It is reiterated that taxation is not intended to be

comprised in the main subject of an entry in the Lists but being a distinct matter for the purpose of legislative competence must be relatable to the specific entry dealing with taxation.

114. As a sequitur, it is observed that Entry 97 in List I which is the residuary entry relatable to Article 248 of the Constitution cannot be invoked or pressed into service when a specific entry empowering the Parliament or the Legislature of a State to pass laws regarding the taxation on any subject is specifically enumerated either in List I or List II.

115. It would also be useful to mention that since the legislative competence to pass a law relating to taxation being specific and distinct in List I or List II, such an entry is not found in List III. In other words, both the Parliament as well as the Legislature of a State cannot have the competence to levy tax on a particular subject and hence, there is no specific entry regarding taxation in List III or the Concurrent List. In fact, Entry 47 of List III refers only to power to impose 'fees in respect of any of the matters in the List but not including fees taken in any court'. The distinction between the power to levy fees and the power to levy a tax is well known and it would not be necessary to go into that aspect of the matter in the present cases except to highlight that there is no Entry for taxation in the Concurrent List. Therefore, while interpreting a taxation Entry in List I or List II, all efforts must be

made to interpret it in such a way as to give content and meaning to the same having regard to the Constitutional scheme under which the distribution of legislative powers have been envisaged in the Seventh Schedule and bearing in mind and the object and intent behind it.

116. Therefore, before approaching Entry 97 of List I which is a residuary Entry in the Union List (List I), it would be necessary to interpret the relevant taxation Entry in the State List and it is only in the absence of there being legislative competence in the relevant taxation Entry in the State List could such a power be traced to Entry 97 of List I in the residuary list provided such a power is not also traceable to any Entry in the Union List. This is because in List I itself the entries concerning taxation are separate and distinct. Such Entries are from Entries 82 to 92B and Entry 96 of List I deals with fees in respect of any of the matters in the List but not including fees taken in any court. Therefore, even in respect of any subject in any Entry in List I, the power to tax cannot be implied or read under Entry 97 of the said List which is only a residuary entry, if the same is enumerated in List II in which case it would come within the legislative competence of the State Legislature.

117. In the above backdrop, we shall now consider Entry 40 of List I and Entries 34 and 62 of List II to assess whether there is

any apparent conflict/overlapping between the same. We have already discussed in detail the concept of 'betting and gambling' as well as 'lotteries'. It is not in dispute that a scheme of lottery is a form of gambling. As rightly contended by Sri C. Aryama Sundaram, learned Senior Counsel appearing for the State of Nagaland, the expression 'betting and gambling' is a genus while the expression 'lottery' is a species of betting and gambling. We have also alluded to the same in detail above and we have referred to the judgments of this Court in the said context. Thus, the term 'lotteries' being a species of the activity of 'betting and gambling' is carved out of Entry 34 of List II and placed in Entry 40 of List I only to the extent of lotteries organised by the Government of India or the Government of a State. That means lotteries organised by private parties or entities in a State or lotteries authorised by government of a State continue to remain within the scope and ambit of Entry 34 of List II dealing with 'betting and gambling'. The inference is that in so far as lotteries organised by the Government of India or the Government of any State is concerned, in order to have uniformity of laws throughout the country governing such lotteries the framers of the Constitution have intentionally included the said activity in Entry 40 of List I. Consequently, the Parliament has legislative competence to pass laws on lotteries organised by the Government of India or the

Government of any State. This means the Parliament can pass laws to regulate organisation of lotteries by the Government of India or the Government of a State uniformly throughout the country, as indubitably the conduct of such lotteries by the sovereign State is a source of revenue for the Government of India. Therefore, in order to enhance the faith of the people in the organisation and conduct of such lotteries throughout the territories of India by the Government of India or the Government of any State, said regulation by the Parliament is enabled by placing the subject in Entry 40 of List I. Consequently, the 1998 Act has been passed by the Parliament which is regulatory in nature, as has been discussed above. If, for the purpose and object of regulation of lotteries organised by the Government of India or the Government of any State, any fee is to be levied it is as per Entry 96 of List I.

118. But the question is, whether, while interpreting Entry 40 of List I alongside Entries 34 and 62 of List II, the power to tax lotteries organised by the Government of India or the Government of a State is also taken away from Entry 62 of List II and is to be read within the ambit of Entry 40 of List I and therefore, the States of Karnataka and Kerala in the instant cases had no legislative competence to enact the impugned Acts. We have already stated that only lotteries organised by the Government of India or the

Government of a State is carved out of the subject, 'betting and gambling' in Entry 34 of List II and is placed in Entry 40 of List I and Entry 62 of List II, *inter alia*, speaks of tax on 'betting and gambling'. By that, we do not think by that the State Legislatures have been denuded of their power to levy tax under Entry 62 of List II on lotteries organised by Government of India or Government of a State. We say so for the following reasons:

(a) Entry 62 of List II is a specific taxation entry on luxuries, including taxes on entertainments, amusements, betting and gambling. The expression 'betting and gambling' would have to be read *ejusdem generis* with entertainments and amusements. The tax is thus on the activity of 'betting and gambling' as it is on an activity.

(b) The expression 'betting and gambling' is also found in Entry 34 of List II. We have discussed at length above the content of the said expression and as to what it encompasses. The activity of 'betting and gambling' includes, *inter alia*, lotteries. Lotteries can be conducted by the Government of India or the Government of States or authorised by a State or be conducted by private entities in a State. Thus, a lottery conducted by any of the above entities, Government or private is an activity falling within the nomenclature of 'betting and gambling' which is the subject in Entry 34

List II. But what has been carved out of Entry 34 of List II is only lotteries conducted by the Government of India or the Government of any State. Therefore, all other types of lotteries continue to remain within the scope and ambit of 'betting and gambling' as an activity in Entry 34 of List II.

(c) Hence under Entry 62 of List II, the specific power to tax an activity which is 'betting and gambling' is reserved with the State legislature and cannot be read within the scope and ambit of Entry 40 of List I which is inherently restricted in its scope. We say so for the following reasons:

(i) *First,* when a specific entry regarding taxation is provided in List II empowering the State Legislature to levy tax on a subject, namely, 'betting and gambling' amongst other similar activities, the same cannot be read by implication in an entry of List I namely Entry 40 of List I. This is because a taxation entry is separate and distinct from an entry dealing on a particular subject. This principle has been adequately explained by this Court in several judgments such as ***M.P.V. Sundararamier*** and followed in ***Hoechst Pharmaceuticals, Kesoram*** discussed above.

(ii) *Second,* a taxation entry or legislative power to levy a tax on 'betting and gambling' in the instant case, cannot be

split between the Parliament and the State Legislature when the said power is expressly enumerated in Entry 62 of List II. This is the constitutional scheme under the three Lists. This is as per the constitutional scheme. This is also evident on a perusal of the Entries of List III (Concurrent List) which empowers both the Union as well as State Legislature to enact laws on subjects mentioned therein and the powers to levy a tax is conspicuous by its absence.

(iii) Third, the object and purpose of Entry 62 of List II is to tax the activity of 'betting and gambling', whether it is conducted by a private entity or a State authorised entity or an instrumentality or agency or for that matter by the Government of India or the Government of any State. This is because irrespective of who organises a lottery scheme, it is ultimately a species of gambling. It is nobody's case that participation in a lottery scheme is not gambling. The said activity i.e. lottery scheme can be conducted throughout the territory of India provided a particular State grants permission to organise and conduct the said activity in that State. Thus, organisation and conducting of lottery can be a pan India activity of gambling and when a particular State

permits a lottery scheme conducted by the Government of India or the Government of any State in that State, a tax is leviable on the same, which is a tax on gambling. Thus Entry 62 of List II empowers the State Legislatures to impose tax on 'gambling' irrespective of who or which entity is conducting it including the Government of India or Government of any State.

(iv) *Fourth,* 'betting and gambling' is a subject enumerated in Entry 34 of List II and is a State subject. Therefore, the permission for conducting any betting and gambling activities within a State, including conduct of a lottery scheme under the said Entry, gives competence to the State Legislatures to also tax the said activity irrespective of who conducts it. This is because what is being taxed is a gambling activity which is squarely covered under Entry 34 of List II and not on lottery *per se* conducted by Government of India or Government of a State.

Therefore, the State Legislature has the competence to tax lottery scheme which is gambling being conducted not only by the Government of India or the Government of any State or by any other agency or

instrumentality of a particular State but also by a private entity within the State as gambling.

(v) *Fifth,* the contention of respondents-States that the subject, 'lotteries organised by the Government of India or the Government of a State' being placed in Entry 40 of List I would also empower only the Parliament to impose a tax on the same by way of implication under the said Entry itself is not a correct interpretation of the Entries in the Lists.

(vi) *Sixth,* Entry 97 of List I can be invoked only when any matter is not enumerated in List II or List III including any tax not mentioned in the said Lists. There is no specific Entry for levy of tax on betting and gambling in List I. It is only in Entry 62 of List II. Thus, Entry 62 of List II gives legislative competence to a State Legislature to levy a tax on 'betting and gambling'. This would also include a tax on organisation and conduct of lotteries, whether by the Central Government or Government of any State or authorised by a State or by any private entity within the State when permission has been given by a State Government to conduct such an activity of gambling. Thus, Entries 34 and 62 of List II which deal with 'betting and gambling' have been interpreted

identically and the said expression is given an identical meaning. Thus, lotteries organised by the Government of India or the Government of a State is only excluded from Entry 34 of List II which deals with 'betting and gambling' only, for the purpose of regulation by the Parliament and not for levy of tax.

(vii) *Seventh,* when the State Government has the legislative competence to levy tax on 'betting and gambling' as a specific taxation entry is provided to levy tax on the said activity under Entry 62 of List II the said entry must be interpreted comprehensively and not in a restricted or narrow manner by excluding taxation on gambling on lottery conducted by Government of India or any Government of a State from the purview of the said Entry and read into Entry 40 of List I by implication.

(viii) *Eighth,* such a power to levy taxes cannot be read into Entry 40 of List I by implication or into Entry 97 of List I as a residuary power. Such interpretation, if endorsed, it would do violence to the manner of interpretation of Entries in the Lists and prove to be contrary to the Articles of the Constitution and judgments of this Court cited above.

(ix) *Ninth*, if the State Government does not permit a particular species of betting and gambling activity in the State including the organisation and conduct of lotteries by the Government of India or the Government of any State then obviously it cannot tax such an activity. But if it permits any species of betting and gambling activity within the State in terms of Entry 34 of List II then the State has legislative competence to tax such an activity of betting and gambling including lotteries irrespective of who conducts it as per Entry 64 of List II.

(x) *Tenth*, Entry 40 of List I is meant only for the regulation of lotteries organised by the Government of India or the Government of a State. The said Entry cannot be expanded to cover the power to levy taxes on lotteries by the Parliament when as such a power is envisaged in Entry 62 of List II. The Parliament, therefore, cannot tax a gambling activity, namely, organisation of lotteries conducted by the Government of India or for Government of a State on the strength of Entry 40 of List I. It may however regulate the said activity. Any impost strictly for the purpose of regulation of lotteries is permissible so long as it is not a tax on gambling

which is only within the ambit of only Entry 62 of List II.

In other words, in order to have uniformity in the regulation of lotteries organised by the Government of India or the Government of a State throughout the territory of India, Entry 40 is found in List I and the Parliament is vested with the power to regulate the same.

(xi) *Eleventh,* any betting and gambling activity conducted by a private entity in a State or is authorized by a State Government can be regulated only by the State Legislature. This is because of Entry 34 in of List II which deals with betting and gambling which also includes lotteries and the same does not fall within Entry 40 of List I.

(xii) *Twelfth*, when a Government of a State permits organisation or conduct of lotteries either by the Government of India or the Government of any State thereby enabling participation in the scheme of lottery by those persons who have purchased the lottery tickets in the State, the territorial nexus is established as lottery, being species of betting and gambling, is permitted to be conducted within the State which has

> sought to impose taxation on the conduct of lotteries. Such nexus persists even when the lotteries promoted within the taxing State are conducted by the Government of India or the Government of any other State. Therefore, we do not find any merit in the contention regarding the impugned laws being invalid on account of extra territorial operation.

119. In conclusion we hold that the tax sought to be imposed by the State Legislatures of Karnataka and Kerala by way of the impugned Acts, is traceable to the power conferred on the State Legislatures under Entry 62 of List II. The said entry contemplates imposition of taxes, *inter alia*, on the entire genus of 'betting and gambling'. having concluded that 'lottery' of every kind, whether organized by the Government of India or the Government of a State or by a private entity is included within the genus of 'gambling', we find no reason to hold that State organized lotteries are excluded from the ambit of 'betting and gambling' as appearing in Entry 62 of List II. We are not inclined to accept the view that 'lotteries organized by the Government of India or the Government of a State' are to be excluded from the expression 'betting and gambling' as appearing in Entry 62 of List II which deals with taxes on gambling activities, simply because such category of lotteries is excluded from the regulatory field relatable

to betting and gambling under Entry 34 of List II and included in Entry 40 of List I. Exclusion of a legislative field from a term appearing in a general Entry, does not necessarily mean that such field ought to be excluded from the taxation Entry. This means that the term 'betting and gambling' in Entry 62 of List II is being construed in the same way as in Entry 34 of List II. The expression is accorded the same meaning and interpretation in both the Entries, i.e., that gambling includes lotteries. However, 'lotteries organized by the Government of India or the Government of a State' have been carved out of Entry 34 of List II and been placed with the Union. Entry 34 of List II is denuded to this limited extent. Such transposition of power does not mean that the term 'betting and gambling' has a different meaning in each of the aforesaid Entries. It only implies that for regulatory purposes, having regard to the need for uniform legislation throughout the territory of India, the Parliament has been conferred with exclusive jurisdiction to regulate the conduct of lotteries, throughout the territory of India.

120. In the instant case, the tax imposed is on the 'gambling' nature of lotteries, which field is covered in its entirety under Entry 62 of List II and the power to impose tax under this Entry extends in relation to lottery of every kind, with no distinction as to the entity organizing the same.

121. Thus, in the context of lotteries, the organisation and conduct of a lottery scheme being a pan India activity, when any State Government permits the Government of India or any other State Government to organise the lottery scheme in that State, Entry 62 of List II would enable the Legislature of that State to levy taxes on the same.

122. Hence, in our view, the Legislatures of the State of Karnataka and Kerala were fully competent to enact the impugned Acts and levy taxes on the activity of 'betting and gambling' being organised and conducted in the said respective States, including lotteries conducted by the Government of India or the Government of any State.

123. The Division Benches of the High Courts was not right in holding that the State Legislatures had no power to levy tax on lotteries conducted by the Government of India or the Government of any State or Union territory in the State of Karnataka as such a power could be read in Entry 40 or Entry 97 of List I and only the Parliament could levy such a tax. Since we have held that the States of Karnataka and Kerala had the legislative competence to enact the impugned Acts, the question of refund of tax collected under the same does not arise.

Summary of Conclusions :

124. In view of the aforesaid discussion, we come to the following summary of conclusions: -

(i) That the subject 'betting and gambling' in Entry 34 of List II is a State subject.

(ii) From the judgments of this Court, it is now clear that 'lotteries' is a species of gambling activity and hence lotteries is within the ambit of 'betting and gambling' as appearing in Entry 34 List II.

(iii) The expression 'betting and gambling' is relatable to an activity which is in the nature of 'betting and gambling'. Thus, all kinds and types of 'betting and gambling' fall within the subject of Entry 34 of List II. The expression 'betting and gambling' is thus a genus it includes several types or species of activities such as horse racing, wheeling and other local variations/forms of 'betting and gambling' activity. The subject 'lotteries organised by the Government of India or the Government of a State' in Entry 40 of List I is a Union subject. It is only lotteries organised by the Government of India or the Government of State in terms of Entry 40 of List I which are excluded from Entry 34 of List II. In other words, if lotteries are

conducted by private parties or by instrumentalities or agencies authorized, by Government of India or the Government of State, it would come within the scope and ambit of Entry 34 of List II.

(iv) Thus, the State legislatures are denuded of their powers under Entry 34 of List II only to the extent of lotteries organised by the Government of India or the Government of a State, in terms of Entry 40 of List I. In other words, except what is excluded in terms of Entry 40 of List I, all other activities which are in the nature of 'betting and gambling' would come within the scope and ambit of Entry 34 of List II. Thus, 'betting and gambling' is a State subject except to the extent of it being denuded of its powers insofar as Entry 40 of List I is concerned.

(v) Entry 62 of List II is a specific taxation Entry on 'luxuries, including taxes on entertainments, amusements, betting and gambling'. The power to tax is on all activities which are in the nature of 'betting and gambling,' including lotteries. Since, there is no dispute that lotteries, irrespective of whether it is conducted or it is organised by the Government of India or the Government of State or is authorized by the State

or is conducted by an agency or instrumentality of State Government or a Central Government or any private player, is 'betting and gambling', the State Legislatures have the power to tax lotteries under Entry 62 of List II. This is because the taxation contemplated under the said Entry is on 'betting and gambling' activities which also includes lotteries, irrespective of the entity conducting the same. Hence, the legislations impugned are valid as the Karnataka and Kerala State Legislatures possessed legislative competence to enact such Acts.

(vi) Thus, the scope and ambit of lotteries organised by Government of India or Government of State under Entry 40 of List I is only in the realm of regulation of such lotteries. The said Entry does not take within its contours the power to impose taxation on lotteries conducted by the Government of India or the Government of State.

(vii) We also hold that lottery schemes by the Government of other States are organised/conducted in the State of Karnataka or Kerala and there are express provisions under the impugned Acts for registration of the agents or promoters of the Governments of respective States

for conducting the lottery schemes in the State of Karnataka and the State of Kerala. This itself indicates sufficient territorial nexus between the respondents–States who are organising the lottery and the States of Karnataka and Kerala.

(viii) In view of the aforesaid conclusions, we find that Division Benches of the High Courts of Kerala and Karnataka were not right in holding that the respective State Legislatures had no legislative competence to impose tax on the lotteries conducted by other States in their State (in the State of Karnataka and Kerala respectively).

125. In the result, the appeals filed by the State of Karnataka and State of Kerala and others are allowed by setting aside the impugned judgments passed by the Division Benches of the High Courts of Karnataka and Kerala.

Parties to bear their respective costs.

.....J.
[M.R. SHAH]

.....J.
[B.V. NAGARATHNA]

NEW DELHI;
23rd MARCH, 2022.