



IN THE HIGH COURT OF SIKKIM

WRIT PETITION (C) NO.23 OF 2005

1. M/s. Shree Jalaram Lottery Agency,
258, Princess Street,
Wadia Building,
Mumbai - 400 002,
represented by J. U. Ganatra,
Managing Partner of the said Agency.
2. M/s. Shree Jalaram Lottery Enterprises,
represented by its Manager Shri Anup Sadhwani,
aged about 34 years old,
S/O (L) Parmanand Sadhawani,
having its office at Hotel Hungry Jack,
Gangtok, Sikkim. Petitioners.

VERSUS

1. The State of Sikkim,
through the Commissioner of Sales Tax,
Government of Sikkim,
Gangtok - 737 101.
2. The Commissioner/Secretary,
Finance Department,
Government of Sikkim,
Tashiling Secretariat,
Gangtok - 737 101,
East Sikkim.
3. Legal Remembrancer-cum-Secretary,
Law Department,
Government of Sikkim,
Tashiling Secretariat,
Gangtok - 737 101,
East Sikkim. Respondents.

For the Petitioners : Mr. H.S. Paonam, Advocate, Mr. N. Jotendro Singh assisted by Mr. J. K. Prasad Jaiswal, Advocates.

For the Respondents : Mr. S. P. Wangdi, Advocate General assisted by Mr. J. B. Pradhan and Mr. Karma Thinlay Government Advocates.

W. J. Ganatra



*PRESENT : THE HON'BLE SHRI JUSTICE N. S. SINGH, CHIEF JUSTICE (ACTING).
THE HON'BLE SHRI JUSTICE A. P. SUBBA, JUDGE.*

Date of Judgment : 26th September, 2005.

JUDGMENT


N. S. SINGH, C.J. (ACTG.).

In this writ petition, the petitioners herein sought for the following reliefs : -

- "i) issue a rule nisi and call for the records;
- ii) issue a writ of certiorari and/or any other appropriate writ/other/direction quashing and setting aside the impugned ordinance being Ordinance No.1 of 2005 under Notification No.1/LD/P/2005 dated 4/4/2005 which was published in the Extra ordinary Gazette Notification No.152 as illegal;
- iii) award cost of the petition against the respondent;
- iv) and/or to pass such further another order or orders as this Hon'ble Court may deem fit and proper";

by contending, inter alia, that the impugned Ordinance being No.1 of 2005 dated 4.4.2005 issued by the State-respondents is illegal and ultra-vires of the provision of the main Act namely, Sikkim Sales Tax Act, 1983 (for short, Act of 1983) inasmuch as the introduction of amended Section 5A to the Act of 1983 amounts to levy of taxes on the draws of lotteries and not on the sale of lottery tickets, thereby shifting the incidence of taxes of the lottery tickets to the draw which is against the basic principle to taxation and the Constitution of India apart from causing discrimination to the petitioners who are running draws for the two digit scheme of the Government of Meghalaya against other agencies involved in lotteries agencies and as such it is quite arbitrary, capricious, unconstitutional

N. S. Singh




rendering the same as unsustainable. It is also the case of the petitioners that the impugned Ordinance has also sought to impose tax on two digit lotteries of Meghalaya outside the State of Sikkim irrespective of whether actual sales takes place in or outside State of Sikkim thus violating the mandatory provisions of Article 186(1)(a) and 301 read with Article 304 of the Constitution of India.

2. Resisting the case of the petitioners, the State-respondents in their counter affidavit contended that the impugned Ordinance was enacted with an objective of levying compounded rate of tax on sale of lottery tickets. In other words, compounded rate of tax is proposed to be imposed on the basis of average turnover of sales worked out at each draw as prescribed in the schedule to Sec. 5A of the impugned ordinance. It is therefore contended that the compound rate of sales tax is imposed not on the basis of each draw but on the average sale turnover of the sale of lottery tickets as an optional mode of payment of sales tax to an assessee. In other words, when the draw takes place it is deemed that sale has concluded and accordingly after each draw compound rate of tax is levied on the actual sale turn over of the lottery tickets. It was thus contended that giving such option to a dealer does not shift the incidence of sales tax from the sale of lottery tickets to the draw of the lottery.

3. Mr. N. Jotendro Singh, learned counsel appearing for the petitioners and Mr. S. P. Wangi, the learned Advocate General for the respondents were heard.


4. Mr. N. Jotendro Singh, learned counsel appearing for the petitioners contended that the impugned Ordinance as well as the proposed amendment of the Act are against the principle of law laid down by the Apex Court rendered in the case between H. Anraj v. Government


Handwritten signature



of Tamil Nadu reported in AIR 1986 SC 63. The learned counsel also highlighted the decision of the High Court of Bombay rendered in W.P.(C) No. 129 of 2001 wherein such and similar amended provisions of law introduced in the Bombay Sales Tax Act, 1959 by Maharashtra Government were struck down by the Hon'ble High Court of Bombay as seen in the document marked as Annexure-A/4 to the writ petition. It was submitted by the learned counsel that the law laid down by the Apex Court in H. Anraj v. Government of Tamil Nadu reported in AIR 1986 SC 63 which was considered as good law may no longer be holding the filed now as the Apex Court having appreciated the need to consider the principle laid down in the above case have referred the matter to the Constitutional Bench. Hence, as the question as to whether lottery ticket will be deemed as sale of goods for the purpose of levying tax is presently under reconsideration before the Apex Court as at proceedings at Annexures A/7 and A/8 and apart from it the impugned ordinance which is almost identical to the subject now pending before the Apex Court may not be given effect to as the same would be quite inconsistent and against the judicial propriety.

5. Mr. S. P. Wangdi, learned Advocate General contended that giving such option to dealer does not shift the incidence of sales tax from sale of lottery tickets to the draw of lottery tickets as contended in the writ petition. It is also submitted by the learned Advocate General that the petitioner Nos.1 and 2 not being dealers as defined under the Act of 1983 and Rules thereof do not have locus standi to file the writ petition and therefore, under the said ordinance the State respondents have every right to impose such tax.






6. According to us the contention raised by the Advocate General is totally misconceived. We are of the view that the submission of Mr. Wangdi learned Advocate General on the basis of the impugned ordinance dated 04.04.05 that the related tax should be imposed upon the writ petitioners is based on non-commonsense inasmuch as the related Rule namely, Sikkim Sales Tax (Amendment) Rules, 2005 published under a related Notification dated 12.07.2005 has not yet been published in the State Official Gazette though the same is mandatory in order to bring rules in operation under the law. At this stage we hereby recall decisions of the Apex Court rendered in B.K. Srinivasan and anr. Vs. State of Karnataka reported in AIR 1987 SC 1059, wherein the Apex Court held thus: -

"15. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute are not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient. See Narayana Reddy v. State of Andhra Pradesh, 1969 (1) Andh. WR 77."

Another decision of the Apex Court, which was rendered in as early as 1951 in the case between Harla V. The State of Rajasthan reported in AIR (38) 1951 SC 467, it is held that "Natural justice requires that before a law

N. S. Chie



can become operative it must be promulgated or published". In the case in hand, it was not done so.

7. Apart from that, Sikkim has its own Act called Sikkim Interpretation and General Clauses Act, 1977 (Act No. 6 of 1977) wherein Section 38 of it specifically lays down in the following order: -

*"Commencement
of Rules*

38. Every Rules made under any Sikkim Law shall be published in the Official Gazette and shall, in the absence of an express provision to the contrary either in the rule or in the law under which it is made, come into force on the day on which it is published in the Official Gazette."

The above provision of law shows that it is mandatory to publish every Rules made under any Sikkim Law in Official Gazette. However, without making any publication in the Official Gazette, the State-respondents compelled the petitioners to pay taxes as discussed above, under the impugned Rule and Ordinance which according to us, it is too much and it is against the law of the Land.

8. It may be noted that same and similar issue has already been brought to the notice of the Hon'ble Supreme Court in a case between M/s Sunrise Associates vs. Govt. of N.C.T. of Delhi & Ors. (Civil Appeal No. 4552/1998 on 13.10.99) and the Hon'ble Supreme Court made the following order: -

"These appeals arise upon a decision rendered by a Division Bench of the High Court at Delhi. Following the judgment of this Court in H. Anraj Vs. Government of Tamil Nadu (1986 (1) SCC 414), it was held that the entire High Court declined to follow the view taken by the Karnataka High Court in Nirmal Agency vs. Sales Tax Officer, XIV Circle, Bangalore (86 STC 45) that the entire consideration was not liable to sale tax but only that portion thereof which related to the right of the purchaser of the ticket to participate in the lottery draw was so liable.

N. J. Chellu



The judgment of H. Anraj held that only the transfer of the right to participate in the lottery draw, which took place on the sale of a lottery ticket, amounted to a transfer of goods; to the extent that the sale involved the transfer of the right to claim the prize, depending on chance, it was an assignment of an actionable claim.

The argument on behalf of the applicants before us is that there is no sale of goods when the ticket of a lottery organised by a State is sold; at best, there is a transfer of chose in action. Alternatively, that the two rights of the purchaser, as found in H. Anraj, are inextricably linked so that no tax can be levied upon the latter element, namely, the right to participate in the lottery draw. In other words, the principal argument on behalf of the appellants is that the judgment in H. Anraj requires reconsideration.

We are inclined to agree that the judgment in H. Anraj requires reconsideration for the reason that, prima facie, the only right of the purchaser of a lottery ticket is to take the chance of winning the prize. There seems to us to be no good reason to split the transaction of the sale of a lottery ticket into the acquisition of (i) the right to participate in the lottery draw and (ii) the right to win the prize, dependent on chance.

In the case of *Vikas Sales Corporation & Anr. vs. Commissioner of Commercial Taxes & Anr.* (1996 (4) SCC 433), a bench of three learned Judges agreed with the decision in H. Anraj. It is, therefore, necessary that these appeals should be heard by a Constitution Bench.

The papers and proceeds shall be placed before the Hon'ble the Chief Justice for appropriate directions."

9. This fact is not controverted by the State-respondents and on the basis of the decision of the Apex Court and after proper application of our mind in the matter we have passed an ad-interim order on 15.07.2005 and the relevant portion of the order is quoted below: -

"No sales tax shall be levied or recovered in terms of the amended provisions of Section 5-A of the Sales Tax Act of 1983 under the impugned ordinance No. 1 of 2005 as in Annexure A/6 to the writ petition from the petitioners until further orders of this Court. It is made clear that this ad-interim order is absolutely temporary in


u. g. Qiu



nature for the petitioners in the present case only and it is an interim arrangement."

10. When the case was heard finally and reserved for judgment on 20.09.2005, the State-respondents published a related notifications dated 20.09.2005 and 21.09.2005 pertaining to amending Act, namely, the Sikkim Sales Tax (Amendment) Act, 2005 and Rules called the Sikkim Sales Tax (Amendment) Rules, 2005, as seen in the related Additional Affidavit filed by the State-respondents as in Annexures R-5 and R-6 to it. We are astounded to note that the State-respondents published the two related notifications dated 20.09.2005 and 21.09.2005 as seen in documents marked Annexures R-5 and R-6 to the Additional Affidavit of the State-respondents, in the Government Gazette when the matter is subjudice before this Court.

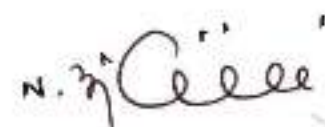
11. Be that as it may, liberty is granted to the petitioners to approach the appropriate authority for questioning the validity of the Act and Rules as seen in the Annexures R-5 and R-6 to the Additional Affidavit, if so advised. However, it is made clear that, the impugned ordinance is bad in law and accordingly it is hereby quashed thus allowing the writ petition. Further, it is made clear that the amended provision of Section 5-A as seen in the document marked as Annexure R-5 i.e. notification dated 20.09.2005 [the Sikkim Sales Tax (Amendment) Act, 2005] and rules thereof [the Sikkim Sales Tax (Amendment) Rules, 2005] as seen in the document marked as Annexure R-6 dated 21.09.2005 shall not be given effect to in case of the present writ petitioners in respect of their concerned lottery business but, it is further made clear that the observations made by this Court in the forgoing paragraphs shall be

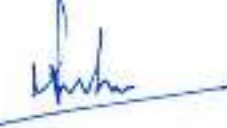


subject to the outcome of the decision of the Apex Court to be rendered in the connected case in Civil Appeal No. 4552/1998.

12. In the result, the writ petition is allowed with a cost of Rs.10,000/- (Rupees ten thousand) which shall be paid by State-respondents herein within a period of one week from today and such cost shall be treated as part of the fund of the Sikkim Bar Association as well as the Sikkim State Legal Services Authority with equal shares i.e. Rs.5,000/- (Rupees five thousand) only each for which the State-respondents shall deposit the same with the Registry of this Court within the stipulated period as mentioned above and after such deposit, the authority of Sikkim Bar Association as well as the Sikkim State Legal Services Authority are at liberty to withdraw the same from the Registry of this Court.

I agree.


(N. S. SINGH)
CHIEF JUSTICE (ACTING)
26.09.2005


(A.P. SUBBA)
JUDGE
26.09.2005