H. ANRAJ AND OTHERS ETC.

v.

STATE OF MAHARASHTRA

January 23, 1984

[O. CHINNAPPA REDDY, E. S. VENKATARAMIAH AND R. B. MISRA, JJ]

Constitution of India 1950

Articles 73 *and* 298—*Government of State—Whether could organise lotteries—Whether competent to ban sale of tickets of lotteries conducted by other State Governments.*

Entry 40 *List I VIII Schedule, Entry* 34 *List II VIII Schedule & Articles* 246(1) *and* (3).

State Legislature whether competent to enact a law touching lotteries organised by the Government of India or a State Government.

Lotteries Sale of tickets of lotteries conducted by other State Governments—State Government—Whether competent to ban within its own State.

By a press release, the Government of Maharashtra declared that the sale of lottery tickets of States other than the State of Maharashtra was unlawful and warned the public that no lottery ticket of other States should be sold within the State.

The petitioners who were agents for the sale of tickets for lotteries conducted by various State Governments other than the State of Maharashtra contended in their writ petitions, that the aforesaid ban that was sought to be imposed had no legal authority. Under the Constitution lotteries organised by the Government of India or the Government of a State was a subject which was within the exclusive legislative competence of Parliament and that it was not open to the Government of any State purporting to Act in exercise of its executive power to impose such a ban. On behalf of the State Government-respondent it was contended that the Union Government's executive power was co-extensive with the power to make laws, that the President in exercise of his power under Article 258(1) had entrusted to the State Government the executive power of the Union through a Presidential Order dated April 2, 1969 in respect of lotteries run by the State, and therefore it was competent for the State Government to impose the ban.

Allowing the writ petitions,

HELD : 1. The Government of Maharashtra cannot purport to ban the

sale of lottery tickets of other State by virtue of the entrustment of power under Article 258(1) of the Constitution. [447 D] A

2. Entry 40 of List I of the VIIIth Schedule to the Constitution is "Lotteries organised by the Government of India or the Government of a State". Entry 34 of List II of VIIIth Schedule is, "Betting and gambling". Since the subject 'Lotteries organised by the Government of India or the Government of a State' has been taken out from the legislative field comprised by the expression "Betting and gambling" and reserved to be dealt with by Parliament, within its exclusive legislative competence it must follow, in view of Article 246(1) and (3) that no legislature of a State, can make a law touching lotteries organised by the Government of India or the Government of a State. [444 D-E] B

3. Article 73 extends the executive power of the Union to the matters with respect to which Parliament has power to make laws. But the executive power of the Union, by the very opening words of Art. 73 is "subject to the provisions of the Constitution". It therefore follows that the executive power of the Union with respect to lotteries organised by the Government of a State has necessarily to be exercised subject to the provisions of the Constitution, including Art. 298, which expressly extends the executive power of the State to the carrying on of any trade or business subject only to legislation by Parliament if the trade or business is not one with respect to which the State Legislature may make laws. [447G-H; 440A-B C D

4. Reading and considering Articles 73 and 298 together, it is clear that the executive power of a State in the matter of carrying on any trade on business with respect to which the State legislature may not make laws is subject to legislation by Parliament but is not subject to the executive power of the Union. The Government of a State is not required to obtain the permission of the Union Government in order to organise its lotteries, in the absence of Parliamentary legislation. Even assuming that such permission is necessary, a condition imposed by such permission that lottery tickets of one State may not be sold in another State cannot be enforced by the other State. The other State has no power to make any laws in regard to lotteries organised by the first State. Its executive power, by virtue of Article 298, extends to logtteries oranised by itself but not to lotteries organised by the other State. [448C-E] E

5. If a State acts in breach of the condition imposed by the President while entrusting power under Article 258 it is open to the President to revoke the permission or to take such further or other action as may be consitutionally permissible but it cannot possibly enable the Government of the other State to do anything about it except to complain perhaps to the Union Government. [448 E-F] F

In the instant case the source of power for the ban is claimed to be the entrustment of power by the President under Act 258(1) through the Presidential Order Dated April 2, 1969. But the terms of the entrustment do not justify the claim The entrustment of power is only 'in respect of lotteries organised by that Government'. The expression 'that Government' in the context of the entrustment of power to the Government of Maharashtra can only mean the Government of Maharashtra and no other. [447 B-C] G

L.B. Paradise Lottery Centre v. *State*, AIR 1975 AP 50 *Shri Indravadan Chaman Lal Thacker* v. *State of Gujarat*, S.C.A. 1309/70 approved. H

A *Komal Agency* v. *State*, AIR 1971 Bombay 332 and *H.G. Jain* v. *State of Tamilnadu*, AIR 1973 Madras 402; over-ruled.

ORIGINAL JURISDICTION : Writ Petition Nos. 2333 or 2336 of 1983.

(Under Article 32 of the Constitution of India).

B

Advocates for the Petitioners :

L.M. Singhvi, *A.M. Singhvi*, *Vimal Dave*, and *Krishan Kumar*.

C *T.S. Krishnamurthy Iyer*, *Naresh Kumar Sharma* and *Vineet Kumar*.

Dr. Y.S. Chitale, (Not present) *Mrs. Sadhana Ramchandran* and *Raju Ramchandran* and *Harjinder Singh* (Not present)

Advocates for the Responents :

D

A.V. Rangam and *Mrs. Sarla Chandra* for the State of Tamilnadu.

N.H. Gurusahani, *Ashwani Kumar*, *N. N. Keshwani* and *M. N. Shroff* and *A.S. Namhiar* Not Present.

E The Judgment of the Court was delivered by

CHINNAPPA REDDY, J. The several petitioners in these writ petitions are agents for the sale of tickets for the lotteries conducted by the Governments of various States other than Maharashtra. They question the ban sought to be imposed by the Government of Maharashtra on the sale within the State of Maharashtra of tickets of lotteries conducted by the Government of other States. They, generally, seek a writ in the nature of a Mandamus directing the State of Maharashtra to forbear from interferring with the sale or distribution of lottery tickets in respect of the lotteries organised by the Governments of States other than Maharashtra.

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There is no express notification or order of the Government of Maharashtra imposing a ban on the sale of lottery tickets of other States in the State of Maharashtra. The ban is sought to be spelt out from a Press release of the Director of Publicity, Sachivalaya, Bombay dated September 24, 1969 and a communication dated August 24, 1981 addressed by the Government of Maharashtra,

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Finance Department, to some of the petitioners individually. The Press release is as follows : A

SALE OF LOTTERY TICKETS
OF OTHER STATES UNLAWFUL

Warning to Public B

On September 16, the Minister for Finance in a Press conference, followed by a press note, made it clear to agents who are selling lottery tickets that the sale of lottery tickets of other States in this State is unlawful. The Government of India, in giving permission for conducting State lotteries C had made a condition that the lottery tickets should not be sold in another State, without the express consent of that State. No such permission has been given in Maharashtra for the sale of outside State lottery tickets. Despite the warning given by the Minister, unauthorised sales of lottery tickets of outside States continues, and the Government D is therefore taking steps to stop these obviously unlawful practices by seizing all stocks of tickets of other States' lotteries. The public are warned that no tickets other that the Maharashtra State Lottery tickets can be sold within the Maharashtra State". E

The communications addressed to the petitioners are in the following terms :

Sir,

I am directed to refer to your letter No. DA/PL/81/622, F dated 22.6.1981 on the above mentioned subject and to state that there is ban on the sale of other State Lottery tickets in State of Maharashtra. It is, therefore, regretted that your request to permit you to sell your State Lottery tickets in this State cannot be accepted.

G

Yours faithfully,
Sd/-
State Lottery Officer,
Finance Department. H

The basic submission on behalf of the petitioners is that there

A is no legal authority for the imposition of the ban. It is argued that under the Constitution, 'Lotteries organised by the Government of India or the Government of a State' is a subject which is within the exclusive legislative competence of Parliament and that it is not open to the Government of any State purporting to act in exercise of its executive power to impose such a ban as that sought to be imposed B by the Government of Maharashtra. On the other hand, it is sought to be argued on behalf of the Government of Maharashtra that the Union Government's executive power is co-extensive with the power of Parliament to make laws, that the President in exercise of his power under Art. 258(i) has entrusted to the Government of Maharashtra the executive power of the Union in respect of lotteries run by the C State and therefore, it was competent for the Government of Maharashtra to impose the ban.

Entry 40 of List I of the VIIth Schedule to the Constitution is "Lotteries organised by the Government of India or the Government of a State". Entry 34 of List II of VIIth Schedule is, "Betting and D gambling". There is no dispute before us that the expression "Betting and gambling" includes and has always been understood to have included the conduct of lotteries. Quite obviously, the subject 'Lotteries organised by the Government of India or the Government of a State' has been taken out from the legislative field comprised by the expression "Betting and gambling" and is reserved to be dealt E with by Parliament. Since the subject 'Lotteries organised by the Government of India or the Government of a State' has been made a subject within the exclusive legislative competence of Parliament, it must follow, in view of Art. 246(1) and (3), that no legislature of a State can make a law touching lotteries organised by the Government of India or the Government of a State. This much is beyond con- F troversy and the Maharashtra legislature has acknowledged the position, as indeed it must, in Sec. 32 of the Bombay Lotteries (Control and Tax) and Prize Competitions (Tax) Act, 1958. It is an Act to control and tax lotteries and to tax prize competitions in the State of Maharashtra. Section 32(b) expressly provides that nothing in the Act shall apply to "a lottery organised by the Central Government G or a State Government". This, as we said, is but a recognition of the prevailing situation under the Constitution. The Constitutional postion cannot be alterd by an act of the State legislature.

It appears that the Government of Maharashtra and various H other State Governments requested the Union Government to authorise them to conduct lotteries for the purpose of 'finding funds

for financing their development plants'. Such authorisation was, of course, strictly, not necessary in the absence of a law made by Parliament pursuant to Entry 40 of List I of the VIIth Schedule to the Constitution. Article 298 of the Constitution extends the executive power of the Union and each State to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose, with the stipulation that if the trade, business or purpose is not one with respect to which Parliament may make laws, the said executive power of Parliament shall be subject in each State to legislation by the State and if the trade, business or purpose is not one with respect to which the State legislature may make laws, the said executive power of the State shall be subject to legislation by Parliament. Thus, while the Government of a State is free to carry on any trade or business in respect of which it may not have the power to make laws the power to carry on such trade or business shall be subject to legislation by Parliament. Therefore, the Government of a State has the right to conduct lotteries subject to legislation by Parliament. Since there is at present no legislation by Parliament on the subject of lotteries organised by the Government of India or the Government of a State, the Government of every State has the unrestricted right to organise lotteries of its own. We will consider the effect of the impact of Art. 73, Art. 258(1) and Entry 40 of List I read with Art. 246 on this right a little later.

To continue the expose of facts, in response to the request of the several State Governments, the Ministry of Home Affairs, Government of India, addressed a communication dated July 1, 1968 to the Chief Secretaries to the Government of all States. It was stated in the letter that though the Central Government was opposed to the idea of lotteries being conducted by Governments, they had decided to authorise the State Governments to conduct lotteries in view of the representations of some of the State Governments that it would help them 'to mobilise savings and to find funds for financing their development plans'. However, it was added :

> "At the same time, it is also felt that suitable steps should be taken to safeg uard the interests of such State Governments, who, as a matter of policy, do not desire to start State Lotteries or permit sale of tickets of lotteries organised in other States, within their jurisdiction. In order to avoid objections from such States, it has been decided that the Central Government's permission for conducting State Lotteries is available on the condition that tickets to such a lottery will

A not be sold in another State without the express consent of the State Government concerned. I am to add that in order to achieve this object an amendment of Section 294-A IPC is being undertaken to make sale of tickets, without the consent of the State Government concerned, a penal offence".

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We may mention here that the proposal to amend Section 294-A IPC to achieve the object of preventing the sale of lottery tickets of one State being sold in States which are opposed to the conduct of lotteries as a matter of policy has remained a static proposal and no such amendment has so far been attempted to be made.

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The communication dated July 1, 1968 from the Government of India was followed by Presidential Order under Art. 258(1) of the Constitution. The Presidential Order relating to the State of Maharashtra with which we are concerned, is as follows :—

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No. 29/29/63-P.IV
Government of India
Ministry of Home Affairs
New Delhi, the 2nd April, 1969.

ORDER

E Whereas the Government of Maharashtra propose to organise a State lottery;

And whereas the Central Government has no objection to it ;

F Now, therefore, the President is pleased to permit the Government of Maharashtra to conduct a State lottery, subject to the condition that the tickets of the lottery shall not be sold in another State without the permission of the Government of that State.

G The President is further pleased to entrust to the Government of Maharashtra under clause (1) of Article 258 of the Constitution the executive power of the Union in respect of lotteries organised by that Government.

Sd/-
H (D.D. JOSHI)
Deputy Secretary to the Government of India.

It was after this entrustment of executive power of the Union to the Government of Maharashtra 'in respect of lotteries organised by that Government' that the Government of Maharashtra proceeded to issue the Press release and thereafter the individual communications, earlier referred to, making it known that the sale of lottery tickets of other States was banned in the State of Maharashtra. A B

The source of power for the ban is claimed to be the entrustment of power by the President under Art. 258(1) of the Constitution. But the terms of the entrustment do not justify the claim. The entrustment of power, as is seen, is only 'in respect of lotteries organised by that Government'. The expression 'that Government' in the context of the entrustment of power to the Government of Maharashtra can only mean the Government of Maharashtra and no other. Nor can it ever be that such executive power as the Union Government may possess in respect of the trading, business or, for that matter, any other activity of the Government of one State may be entrusted to the Government of another State. That would be destructive of the very scheme and structure of our Constitution. The Government of Maharashtra cannot therefore purport to ban the sale of lottery tickets of other States by virtue of the entrustment of power under Article 258(1) of the Constitution. C D

It is then said that the permission granted to each State to conduct its lotteries is expressly subject to the condition that the tickets of the lottery shall not be sold in another State without the permission of the Government of that State. We have already pointed out that Article 298 of the Constitution extends the executive power of every State to the carrying on of any trade or business even if such trade or business is one with respect of which Parliament alone has the exclusive power to make laws, subject to the stipulation that such executive power of the State shall be subject to Parliamentary legislation. It is true that in view of Entry 40 of List I of the VIIth Schedule to the Constitution Parliament has exclusive power to make laws with respect to "Lotteries organised by the Government of India or the Government of a State", that Article 73 of the Constitution extends the executive power of of the union to the matters with respect to which Parliament has power to make laws and, therefore, the executive power of the Union must extends to the subject "Lotteries organised by the Government of India or the Government of a State". But the executive power of the union, by the very opening words of Article 73, is "subject to the provisions of this Constitution". It follows that the executive power of the Union with respect to lotteries E F G

A organised by the Government of a State has necessarily to be exercised subject to the provisions of the Constitution, including Article 298, which expressly extends the executive power of the State to the carrying on of any trade or business subject only to legislation by Parliament if the trade or business is not one with respect to which the State legislature may make laws. It is to be noted that Article 298 does not open with the words 'subject to the provisions of the Constitution', as does Article 73. Reading and considering Articles 73 and 298 together, as they should indeed be read and considered, it is clear that the executive power of a State in the matter of carrying on any trade or business with respect to which the State legislature may not make laws is subject to legislation by Parliament but is not subject to the executive power of the union. That is why we mentioned earlier that the Government of a State is not required to obtain the permission of the Union Government in order to organise its lotteries, in the absence of Parliamentary legislation. Even assuming that such permission is necessary, we do not see how a condition imposed by such permission that lottery tickets of one State may not be sold in another State may be enforced by the other State. The other State has no power to make laws in regard to the lotteries by the first State. Its executive power, by virtue of Article 298, extends to lotteries organised by itself but not to lotteries organised by the other State. If a State acts in breach of the condition imposed by the President while entrusting power under Article 258, it is open to the President to revoke the permission or to take such further or other action as may be constitutionally permissible but it cannot possibly enable the Government of the other State to do a thing about it except to complain, perhaps, to the Union Government. The Government of India is quite obviously alive to the position that there is no way of enforcing the stipulation that lottery tickets of one State shall not be sold in another except by Parliament making a law in that behalf. The awareness is revealed by the last sentence in the letter dated July 1, 1968 which says,

> "I am to add that in order to achieve this object an amendment of Section 294-A IPC is being undertaken to make sale of tickets, without the consent of the State Government concerned, a penal offence".

The proposed amendment is yet to see the light of day.

A submission which appears to have found favour with the

High Court of Bombay in *Kamal Agency* v. *State*[1] and the High Court of Madras in *H.G. Jain* v. *State of Tamil Nadu*[2] was that in Entry 40 of List I and the respective local Acts, a lottery organised by a State must be construed to refer to a lottery lawfully organised by a State and that if a lottery is not lawfully organised by a State it would not fall within Entry 40 of List I but would fall under the head 'gambling' under Entry 34 of List II and the State legislature would then be empowered to legislate in respect of the same. Where the State Legislature could thus legislate, it was said, the State Government could take executive action in respect of lotteries organised by another State if they were unlawful. The Gujarat and Andhra Pradesh High Courts have dissented from this view. In Special Civil Application No. 1309 of 1970 Bhagwati, C.J. presiding over a Division Bench of the Gujarat High Court and in *L.B. Paradise Lottery Centre* v. *State*[3] one of us sitting singly in the Andhra Pradesh High Court have explained that there is no justification for first reading the word 'lawfully' into Entry 40 of List I and then proceeding to interpret the expression 'Lottery lawfully organised' as meaning a lottery organised persuant to the entrustment of executive power of the Union under Article 258 of the Constitution. It was observed "legislative power cannot be fed into Entry 34, by feeding the word 'lawful' into Entry 40 of List I and thus artificially restricting the scope of Entry 40". It was pointed out that if the Government of a State organised a lottery without the entrustment of executive power as contemplated by Article 258 or in disregard or defiance of any condition that may have been imposed while entrusting executive power under Article 258 it would never be a matter for the legislature of one State to take upon itself the power to declare unlawful the lottery run by the Government of another State; and even less so could the Government of a State declare unlawful a lottery run by the Government of another State and thereafter ban the sale of the tickets of the lotteries organised by that State. In the Madras case it was also observed that the entrustment order carried with it all powers which the State Government might take to realise the maximum collection. We cannot subscribe to this view. That would really amount to the entrustment of vital legislative powers to the State Government which would be constitutionally impermissible. We do not think it necessary to refer in any further detail to the decisions of the Gujarat, Andhra Pradesh, Bombay and Madras decisions

(1) AIR 1971, 332.
(2) AIR 1973 Madras 402.
(3) AIR 1975 A. P 50.

A except to say that we generally agree with the reasoning in the Gujarat and Andhra Pradesh decisions and disagree with the reasoning in the Bombay and Madras decisions. In the result we allow the Write petitions and direct the State of Maharashtra to forbear from giving effect to the ban on the sale or distribution of tickets of lotteries organised by other States. There is no order regarding to costs.

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N.V.K. *Appeal allowed.*