

**W.P. No. 18424 (W) of 2017
IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side**

**Teesta Distributors & Ors.
Vs.
Union of India & Ors.**

For the Petitioners : Mr. Joydeep Kar, Sr. Advocate
Mr. Ayan Banerjee, Advocate
Ms. Debarshee Dhamali, Advocate

For Union of India : Mr. Kaushik Chanda Ld. A.S.G.
Mr. T.M. Siddiqui, Advocate
Mr. Avra Mazumder, Advocate
Mr. Somnath Ganguly, Advocate
Mr. Bhaskar Prosad Banerjee, Advocate
Mr. Rajashree Veneet Kundalia, Advocate
Mr. Nripendra Nath Mondal, Advocate

For the Respondent No. 2 : Mr. Biswajit Deb, Ld. A.A.G.
Mr. Sandip Kumar, Advocate
Mr. Sayeed Khan, Advocate

For the Respondent No. 4 : Mr. Sandip Kr. De

For the Respondent No. 5 : Mr. Indraneel Chowdhury, Advocate
Mr. Arijit Bhowmick, Advocate
Mr. Angan Baruah, Advocate

For the Respondent No. 6 : Mr. Ayanabha Raha, Advocate

Hearing concluded on : September 7, 2018

Judgment on : October 10, 2018

DEBANGSU BASAK, J.:-

The petitioners have sought a declaration that, lotteries are exempt from tax under Sl. No. 6 of Schedule III read with Section 72 of

the Central Goods and Service Tax Act, 2017 and Sl. No. 6 of Schedule III read with Section 72 of the State Goods and Service Tax Act, 2017.

Learned Senior Advocate appearing for the petitioner has submitted that, a lottery cannot come within the definition of 'goods'. Referring to **1986 Volume 1 Supreme Court 63 (H. Anraj v. Government of Tamil Nadu)** he has submitted that, the initial view of the Supreme Court was that, lottery tickets to the extent they comprise the entitlement to participate in the draw, are goods. Such view was reversed in **2005 Volume 5 Supreme Court Cases page 603 (Sunrise Associates v. Government of NCT of Delhi)**. Both, the Central Goods and Services Tax Act, 2017 (CGST) and the State Goods and Services Tax Act, 2017 (SGST) define 'goods'. Such definition includes actionable claim and excludes money and securities. He has referred to Section 7 read with Schedule III Entry 6 of CGST Act, 2017 in support of his contention. He has referred to the definition of 'goods' in Article 366(12) of the Constitution. He has submitted that, 'goods' as defined therein has to have the characteristics of material, commodities and articles. Referring to Article 366 (29A) of the Constitution, he has submitted that, the definition of 'tax' on the sale or purchase of 'goods' is an inclusive definition. However, there has to

be a transfer of property. Therefore, according to him, 'goods' as defined in the Constitution has to be something which can be transferred for cash, deferred payment or other valuable consideration. According to him, it should be possible to transfer at least the beneficial interest in the movable property for it to be 'goods'. It has to be something which is actually transferable either in the physical form or at least a beneficial interest therein. Referring to Lotteries (Regulation) Act, 1998, he has submitted that, lottery has been defined to mean a scheme, in whatever form and by whatever name called for distribution of prizes by lot or chance to those persons participating in the chances of a prize, by purchasing tickets. According to him, ticket holder has a right to participate in the chance of getting a prize. The ticket holder, has a contingent interest in the prize money, which he may or may not get in the future, but does not get to possess any benefit for such payment in return. The sale of lottery ticket is, therefore, a sale of chance. Consideration is paid for the chance to win. The sale of lottery ticket therefore does not entail transfer of any 'goods' or even beneficial interest in a movable property. Therefore, the person who sells the lottery ticket is not selling any 'goods' nor is the purchaser buying any 'goods'. Viewed

from such perspective, lottery cannot come within the definition of 'goods' under the CGST Act, 2017 or any of the SGST Acts.

Learned Senior Advocate appearing for the petitioner has referred to the preamble of CGST Act, 2017 and submitted that, the CGST Act, 2017 came into being to make provision for levy and collection of tax on **inter-state** supply of goods or services or both by the Central Government and the matters connected therewith or incidental thereto. According to him, for levy of tax, the subject of tax has to be 'goods'. He has also referred to the preamble to the Integrated Goods and Services Tax Act, 2017. Since lottery is neither 'goods' nor 'service', no levy under the Integrated Goods and Services Tax Act, 2017 can be made.

Learned Senior Advocate appearing for the petitioner has submitted that, when CGST, 2017 and IGST, 2017 propose to tax a lottery, it goes beyond the constitutional definition of 'goods'. He has relied upon **2017 Volume 12 Supreme Court Cases page 1 (Jindal Stainless Ltd. v. State of Haryana)** and has submitted that, the power of taxation controlled by Article 265 of the Constitution forbids levy or recovery or any tax except by authority of law. Since lottery is

not 'goods' within the meaning of the Constitution, neither Central nor the State Governments can enact any law for the purpose of levying sales tax on the lottery. A lottery is not a commodity in the market which can be bought against consideration, and on payment of the consideration, the property passes to the purchaser. Referring to the provisions of the Act of 1998, he has submitted that, such Act came into being in exercise of powers under List I Entry 40 of the Seventh Schedule of the Constitution. According to him, treating lottery to be a 'goods' would do violence to the provisions of the Act of 1998. The State and the Central legislature therefore have exceeded the Constitutional mandate in bringing lottery within the scope and ambit of the SGST, CGST and IGST.

Without prejudice to such contentions, learned Senior Advocate appearing for the petitioner has submitted that, sale of lottery ticket is a trade under Article 301 to 304 of the Constitution. He has referred to the preamble to the GST Act and has submitted that, the Act is for levy and collection of intra and inter-state supply of goods or services or both. Under the GST Act, sale of lottery tickets are taken as both intra and inter-state supply of goods and services. Sale of lottery ticket is treated as a trade or commerce under Article 246A (2) and 269A of

the Constitution of India. He has submitted that, differential rates of tax cannot be fixed for lottery tickets imported from other States and lottery tickets produced in the States. The discrimination in rates varies between 12 and 28 per cent. It is per se unsustainable and is required to be struck down. All lottery tickets organized by the States have to be treated at par. The same percentage of tax is required to be levied. Otherwise it would violate the constitutional mandate. He has relied upon ***Jindal Stainless Ltd. (supra)*** in support of such contentions.

Learned Additional Advocate General appearing for the State of West Bengal, the Respondent No. 3 herein, has submitted that, Goods and Service Tax Act, 2017 was enacted in order to simplify the regime of indirect taxation by bringing it under one umbrella. It has come into being by virtue of Constitutional Amendments, Central and State Legislations. He has drawn the attention of the Court to Articles 269A, 279A and 286 of the Constitution of India. He has also draws the attention of the Court to the deletion of entries in the Union and the State list and the incorporation of entries in the Union and the State list. He has submitted that, the Central Goods and Services Tax Act, 2017 came into effect on July 1, 2017. Section 2(52) of the CGST

defines 'goods'. Section 2(1) of the CGST defines 'actionable claim'. He has referred to Section 3 of the Transfer of Property Act, 1882 which defines 'actionable claim'. He has also referred to Article 366(12) of the Constitution which defines 'goods' to include all material commodities and articles. According to him, lotteries are 'goods'. He has referred to **2005 Volume 1 Supreme Court Cases page 308 (TATA Consultancy Services v. State of A.P.)** and has submitted that, the term 'goods' used in Article 366(12) of the Constitution of India is very wide and includes all types of movable properties whether those properties are tangible or intangible. The definition of 'goods' under Article 366(12) of the Constitution of India is an inclusive one. Relying upon **2006 Volume 5 Supreme Court Cases page 603 (Sunrise Associates v. Government of NCT of Delhi)** and **1986 Volume 1 Supreme Court Cases page 414 (H. Anraj v. Government of Tamil Nadu)**, he has submitted that, lottery is an 'actionable claim' and therefore 'goods'. In **Sunrise Associates (supra)**, according to him, since, the State laws excluded 'actionable claim' from the definition of 'goods' explicitly, the Supreme Court held that, lottery would not be subjected to Sales Tax. According to him, **Sunrise Associates (supra)** should be construed to mean that, lotteries are 'actionable claim' and

are included in the definition of 'goods'. However, since the Sales Tax laws excluded 'actionable claim' from its purview, lotteries were also held to be excluded. According to him, CGST and SGST, have included actionable claims within the definition of 'goods', having regard to the ratio laid down in ***Sunrise Associates (supra)***. The inclusion of 'actionable claim' in the definition of 'goods' is legislative recognition of judicial pronouncement. Therefore, it cannot be argued that, the Union Parliament or the State Legislature did not have competence to include 'actionable claim' in the definition of 'goods'.

Learned Additional Advocate General appearing for the State of West Bengal has submitted that, the Union Parliament and the State Legislature have the competence to levy tax on any item including lottery. The State is not required to tax everything in order to tax something. In support of such contention he has relied upon **1970 Volume 1 Supreme Court Cases page 189 (The Twyford Tea Company v. State of Kerala)**. The State is allowed to pick and choose districts, objects, persons, methods and rates of taxation, if the State, does so reasonably. The Legislature enjoys a very wide latitude in classification for taxation. He has relied upon **1989 Volume 3 Supreme Court Cases page 634 (Federation of Hotel and**

Restaurants Association v. Union of India) and ***2012 Volume 1 Supreme Court Cases page 67 (Union of India v. Nitdip Textile Processor)*** in support of such contention.

Relying upon ***2017 Volume 7 Supreme Court Cases page 59 (Binoy Viswam v. Union of India)*** learned Additional Advocate General appearing for the State of West Bengal has submitted that, a legislation or a provision contained in statute can be invalidated if, it is not within the competence of the legislature which passed the law, or it is contravention of any of the fundamental rights stipulated in Part III of the Constitution of India or any other right or provision of the Constitution of India. A statute cannot be declared unconstitutional solely on the ground that, it is unreasonable or arbitrary. He has pointed out that, the legislative competence to enact CGST Act and SGST Act and subjecting lottery to CGST and SGST have not been questioned.

Learned Additional Advocate General appearing for the State of West Bengal has submitted that, the business of lottery partakes the character of betting and gambling. There exists no constitutional right to carry on the business of lottery. Therefore, there is no question of

violation of fundamental rights. Since the business of lottery is not constitutionally protected activity, the reasonableness of physical restrictions cannot be subject matter of judicial review under Article 226 of the Constitution of India. Consequences and effects of legislations are not the same under legislative subject matter.

Learned Additional Advocate General appearing for the State of West Bengal has submitted that, CGST Act and SGST Act have not discriminated between lotteries run by the State Government and the lotteries authorised by the State. The Central and State Governments have issued relevant notifications imposing different rates of taxes for lottery run by the State Government and lottery authorised by the State Government in another State. In case of lottery run by the State Government it is in aggregate 12 per cent, with 6 per cent each been levied under the CGST and SGST. The lottery authorised by the State Government in another State attracts in aggregate 28 per cent, with 14 per cent each under the CGST and SGST. The notifications have been issued pursuant to the recommendations made by the GST Council in its 17th meeting. The rates are not discriminatory and are intended to preserve economic uniformity and the interest of the constituent States. According to him, the tax component is included in

the price of the ticket. The end customer which purchased the ticket is not saddled with any additional tax burden.

Learned Additional Advocate General appearing for the State of West Bengal has submitted that, the State of Sikkim, Mizoram, Nagaland and Arunachal Pradesh, cannot be allowed to take a stand that, the rates introduced are discriminatory. He has relied upon **AIR 1962 Calcutta 338 (The State v. Keshab Chandra)** in support of his contentions.

Learned Additional Solicitor General appearing for the Union of India has submitted that, the 101st Amendment to the Constitution introduced Article 279A to the Constitution. It deals with Goods and Services Tax Council. He has referred to Article 279A (4) of the Constitution. He has submitted that imposition of GST on lottery was discussed at length during the 17th GST Council meeting held on June 18, 2017. The States who are parties to the present writ petition were present in such Council meeting. The GST Council approved and resolved that, sale of lottery ticket will attract GST. The rates were also agreed upon. Therefore, the States should not be permitted to contend

contrary to the resolution adopted by the GST Council in its meeting held on June 18, 2017.

Learned Additional Solicitor General appearing for the Union of India has submitted that, the Union Government promulgated the CGST Act, 2017 and the respective State Governments enacted the SGST Act to tax intra-state supply of goods or services or both. The Union Government formulated the IGST Act, 2017 to tax the inter-state supply of goods and services or both. Subsequently, notifications have been issued under those acts notifying the tax rates of different goods and services as recommended by the Council. He has submitted that, since lottery tickets are sold at the price printed on them as inclusive price, that is, inclusive of all taxes, the value or supply of lottery under Section 15(5) of the GST Act has been deemed to be 100/112 and 100/128 of the face value of ticket or of the price as notified in the Official Gazette by the organizing State, whichever is higher, for lottery run by State Governments and lottery authorised by State Governments respectively. According to him, the tax incidence is to be borne by recipient of goods and services. Tax of 12/28 per cent on a lottery ticket having a face value of Rs. 2 will translate into a tax component of 21 paisa/44 paisa which a consumer would pay for a

chance to win at the bumper prize. According to him, this is a miniscule impact on the price of ticket.

Learned Additional Solicitor General, has relied upon ***All India Reporter 1964 Supreme Court page 925 (Khyerbari Tea Co. Ltd. and Anr. v. State of Assam and Ors.)*** and submitted that, in tax matters, the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation, if it does so reasonably. He has submitted that, the categorization of sale of lotteries as lotteries organized by States and the lotteries authorised by the State has been approved by the Supreme Court in ***1984 Volume 3 Supreme Court Cases page 704 (J.K. Bharati v. State of Maharashtra and Ors.)***. Therefore, it is open for the Government to treat lottery run by the State Governments and the lottery authorised by the State Governments, for any justifiable and valid reason, to be the same. He has drawn the attention of the Court to Schedule III of Section 7 of the CGST Act, 2017 and Rule 31A of the CGST Rules 2017. He has submitted that, the lottery is included along with activities being gambling, betting and horse racing in Schedule III so as to create a category of case of activity where people indulge in not reaping fruits of their labours. The activities of betting and gambling,

such as, by way of horse racing or gambling, attract GST at the rate of 28 per cent. It was within the competence of GST Council to impose 28 per cent rate for lotteries authorised by State Governments. However, taking into account the views expressed by the north-east States and the other States in the 17th meeting, the formula of 12%/28% was promulgated. According to him, lottery is an 'actionable claim' as held in ***Sunrise Associates (supra)***. 'Actionable claims' are included in the definition of 'goods' as defined in Section 2(52) of the CGST Act, 2017. Therefore, lottery is leviable to GST. He has submitted that, the respondent no. 1 adopts the contentions of the State of West Bengal with regard to the contentions relating to Articles 301 to 304 of the Constitution of India.

Learned Senior Advocate appearing for the respondent no. 5, the State of Nagaland, has submitted that, the State of Nagaland in the 17th GST meeting held on June 18, 2017 objected against imposition of high rates of GST on lottery. Nagaland has very limited sources of revenue. It does not have a lottery market of its own. It is largely dependent on bigger markets in other States of West Bengal, Maharashtra, Punjab and others. The proposal of Government of Nagaland of 5 per cent GST was supported by many States in such

meeting. However, the criteria of State run lotteries and State authorised lotteries were conceived of and introduced in such meeting on the basis of which differential rates were recommended. He has drawn the attention of the Court to **J.K. Bharati (supra)** and **1994 Volume 4 Supreme Court Cases page 217 (State of Haryana v. Suman Enterprises and Ors.)** in which the concept of lottery run by the State and lottery authorised by the State were discussed. According to him, both such judgments were rendered during the period when the Lotteries (Regulation) Act, 1998 was not enacted. With the Lotteries (Regulation) Act, 1998 coming into effect, the States were conferred with the power to authorise private parties to organize lotteries. Consequently, there is only one kind of lottery, that is, lotteries organized/run by the State. Therefore, in such context, the rates of GST are unequal and discriminatory.

Learned Senior Advocate appearing for the State of Nagaland has submitted that, Article 279A (6) mandates a uniform/harmonious tax structure. 'Lottery' is defined in Section 2(b) of the Lotteries (Regulation) Act, 1998. The same does not permit any classification as sought to be made by the GST Council. **H. Anraj (supra)** has held that a discriminatory tax on lottery would be violative of Articles 301 and

304. To some extent, **H. Anraj (supra)** holds the field. He has pointed out that, out of 29 States and 7 Union Territories in India, only 10 States organize lotteries. Out of the States organizing lotteries, only Hill States of North-East are affected. Therefore, the Hill States were outnumbered and outvoted in the GST Council. The Hill States were therefore obliged to apply the rates as decided by the GST Council.

Learned Advocate General of the State of Mizoram appearing for the respondent no. 2, has submitted that, the classification of 12/28 percent of tax for lotteries has no functional basis. He has referred to Section 3 of the Lotteries (Regulation) Act, 1998. He has relied upon Rule 2(1)(f) of the GST Rules. He has submitted that, the State of Mizoram supports the petitioner to the extent of differential rate of GST introduced on sale of lotteries. According to him, the tax should be uniform.

In reply learned Senior Advocate appearing for the petitioners has submitted that, in **TATA Consultancy Services (supra)**, the Court did not go into the issue as to, whether the definition of 'goods' would include tangible or intangible properties or not. It was concerned with intellectual property being sold in floppies, discs,

CD/Roms and in other modes. According to him, the ratio laid down therein does not support the contentions of the State of West Bengal. A lottery ticket does not partake the character of movable property at any stage. Unlike floppies and disk, it is not a commodity in the market which can be bought against consideration and on payment of consideration the property passes to the purchaser. Referring to ***Suman Enterprises (supra)*** learned Advocate for the petitioner has contended that, although it has held that, there was no fundamental right to carry on trade of lottery tickets, it has also noticed the ingredients in the sale of lottery tickets. According to him, the activity of holding lottery by a State under the Lottery (Regulation) Act, 1998 would come under Article 298 of the Constitution. If a State exercises powers under Section 5 of the Act of 1998 then, such State must also stop its own business of lottery in order to stop other States from selling lotteries within its territorial jurisdiction. According to him, lottery cannot be 'goods' but is to be treated as business of contract. He has contended that, even if it is assumed that, sale of lottery ticket does not come within the meaning of Article 301 to 304, the same makes no difference as it is an activity covered under Article 298 of the Constitution, and is uniformly applicable to all States. The GST

Act accepts lottery as 'actionable claim' but treats it as goods along with other goods which comes under Article 301 to 304. GST Act does not make any distinction between an 'actionable claim' being treated as 'goods' and other 'goods' coming under the same definition. According to him, the contention that, lottery though an 'actionable claim' coming under the definition of 'goods' but should be treated not as inter-state trade or commerce under Part XIII is unacceptable and has no basis.

Referring to the minutes of the 17th GST Council meeting held on June 18, 2017, learned Senior Advocate for the petitioner has submitted that, the GST Council took notice of **J.K. Bharati (supra)**. Such judgment was rendered in a situation prevailing prior to the coming into effect of the Lotteries (Regulation) Act, 1998. With the coming into effect of the Act of 1998, there is only one type of lottery. Consequently, GST Council does not have any power or authority to bifurcate lotteries, based on entries in the seventh schedule, when the legislature has fixed the type of lottery to be one. Discrimination in the rates of levy between State organized lotteries merely because they are crossing the borders has no rational nexus and is highly discriminatory and violative of Article 14 of the Constitution of India

as also Articles 301 to 304 of the Constitution. Consequently, he submits that, the reliefs as prayed for in the writ petition should be granted.

The following issues have arisen for consideration:-

- i) Is lottery a 'goods' or an 'actionable claim'?
- ii) Can lottery be taxed under Central Goods and Services Tax Act, 2017 and West Bengal Goods and Services Tax Act, 2017?
- iii) If so, is differential levy of tax permissible?
- iv) To what reliefs, if any, are the parties entitled to?

The petitioners claim that, they sell paper lotteries of the respondent no. 2 and respondent no. 4 to 6 within the State of West Bengal. Apart from the respondent no. 2 and 4 to 6, there are other States which organizes lotteries. Lotteries are regulated by the Lotteries (Regulation) Act, 1998. Lottery is defined in Section 2(b) of the Act of 1998 as follows:-

“lottery means a scheme, in whatever form and by whatever name called, for distribution of prizes by lot or chance to those persons participating in the chance of a prize by purchasing tickets;

'Goods' is defined in Article 366(12) of the Constitution of India as follows:-

'Goods' includes all materials, commodities and articles;

Sale of Goods Act, 1930 defines 'goods' in Section 2(7) as follows:-

'goods' means every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;"

'Actionable claim' is defined in Section 3 of the Transfer of Property Act, 1882 to mean -

"a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognised as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."

The definition of 'goods' in the Constitution is an inclusive definition. It has a very wide sweep. All materials, commodities and articles are included in the definition. The definition, to my reading, is not limited to tangible materials, commodities and articles. An intangible product such as a software would come within the definition of 'goods' appearing in Article 366(12) of the Constitution of India.

Whether lottery tickets can be 'goods' was considered in **H. Anraj (supra)**. Such issue was considered in the backdrop of the larger issue as to whether, Sales Tax can be levied by a State Legislature on the sale of lottery tickets in the concerned State. **H. Anraj (supra)** was rendered on October 4, 1985. The Lotteries (Regulation) Act, 1998 came into effect much later. **H. Anraj (supra)** had considered the issue as to whether a lottery ticket can be 'goods' or not in the context of the Tamilnadu General Sales Tax Act, 1959 and Bengal Finance (Sales Tax) Act, 1941. It has held that, lottery tickets to the extent that they comprise the entitlement to participate in the draw are 'goods' falling within the definition of 'goods' as given in Tamilnadu General Sales Tax Act, 1954 and Bengal Finance (Sales Tax) Act, 1941. Independent of the two state Acts under consideration therein, it has held that, a trade of a lottery ticket confers on the purchaser two rights. In this regard it would be appropriate to refer to paragraph 27 thereof, which is as follows:-

“27. *It cannot be disputed that in every raffle scheme based on the sale of lottery tickets, similar to the schemes sponsored by each of the two States in this case, every participant is required to purchase a lottery ticket by paying a price therefor (the face value of the ticket) and such purchase entitles him not merely to receive or claim a prize in the draw, if successful but before that also to participate in such draw.*

In other words, 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 movable property, the former 'in praesenti', the latter 'in futuro' depending on a contingency. Lottery tickets, not as physical articles, but as slips of paper or memoranda evidence not one but both these beneficial interests in movable property which are obviously 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. Counsel for the dealers sought to contend that the concept of a lottery cannot be subdivided in two parts, namely, a right to participate and a right to receive the prize but the two together constitute one single right. It is not possible to accept this contention for the simple reason that the two entitlements which arise on the purchase of a lottery ticket are of a different character, inasmuch as the right to participate arises in praesenti, that is to say it is a choate or perfected right in the purchaser on the strength of which he can enforce the holding of the draw, while the other is inchoate right which is to materialise in future as and when the draw takes place depending upon his being successful in such draw. Moreover, on the date of the purchase of the ticket, the entitlement to participate in the draw can be said to have been delivered unto the possession of the purchaser who would be enjoying it from the time he has purchased the ticket and as such it would be a chose in possession while the other would be an actionable claim or a chose in action as has been held in Jones v. Carter and King v. Connare on which counsel for the dealers relied. It is thus clear that a transfer of the right to participate in the draw which takes place on the sale of a lottery ticket would be a transfer of beneficial interest in movable property to the purchaser and therefore, amounts to transfer of goods and to that extent it is no transfer of an actionable claim; to the extent that it involves a transfer of the right to claim a prize depending on a chance it will be an assignment of an actionable claim."

H. Anraj (supra) has held that, lottery tickets are 'goods' for the purpose of Article 366(29-A)(a) of the Constitution of India and the Tamilnadu General Sales Tax Act 1959 and Bengal Finance (Sales Tax) Act, 1941. It has held that, only the transfer of 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'. **H. Anraj (supra)** has pleaded the transaction of sale of lottery ticket into the acquisition of firstly the right to participate in the lottery draw and secondly the right to win the prize, depending on chance. The Supreme Court has reconsidered **H. Anraj (supra)** in **Sunrise Associates (supra)**. **Sunrise Associates (supra)** has held that, the distinction drawn in **H. Anraj (supra)** between the chance to win and the right to participate in the draw was unwarranted. It has held that, a lottery is in essential a chance for a prize, the sale of a lottery ticket can only be a sale of that chance. It has held that, there was no distinction between the two rights. The right to participate being an inseparable part of the chance to win, is therefore part of an 'actionable claim'. It goes on to hold that, the sale of a lottery ticket does not necessarily involve the sale of

goods. It is nothing other than a contract of carriage. The actual ticket is merely evidence of the right to transfer. A contract is not a property but only a promise supported by consideration, upon breach of which either a claim for specific performance or damages would lie. Like railway tickets, a ticket to see a cinema or a pawnbroker's ticket are memoranda or contracts between the vendors of the ticket and the purchasers. Tickets are themselves normally evidence of and in some cases the contract between the buyer of the ticket and its seller. Therefore, a lottery ticket can be held to be goods if at all only because it evidences the transfer of a right. It has examined the question as to what right a lottery ticket represents. It has held 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 'actionable claim' and, would therefore be excluded from the definition of goods under the Sale of Goods Act and the sales tax statute. It has held that, lotteries being actionable claims are generally speaking "goods" or moveable property.

On the strength of ***Sunrise Associates (supra)*** therefore, the first issue has to be answered by holding that, a lottery is an

‘actionable claim’ and goods or moveable property. The first issue is answered accordingly.

The Constitution (One hundred and first Amendment) Act, 2016 introduced the Goods and Services Tax regime in India. It sought to replace all indirect taxes levied on goods and services by the Union as well as the State Governments. It came to be a comprehensive indirect tax levy on manufacture, sale or consumption of goods and services. The Act of 2016 inserted Article 246A, 269A and 279A to the Constitution of India. It amended the provisions of Article 286 of the Constitution. It deleted Entry 92 and 92C of List I of the Seventh Schedule and inserted Entry 84 of List I and Entry 54 of the List II of the Seventh Schedule. In tune with the constitutional amendments incorporated, Central Goods and Services Tax Act, 2017, Integrated Goods and Services Tax Act, 2017 and the respective State Goods and Services Tax Act, 2017 were enacted.

Article 246A of the Constitution of India makes special provision with respect to Goods and Services Tax. It empowers the Parliament and the Legislature of every State subject to Article 246A(2) and notwithstanding anything contained in Articles 246 and 254, to make

laws with respect to Goods and Services Tax imposed by the Union or the State. Article 246A(2) recognises the exclusive power of the Parliament to make laws with respect to Goods and Services Tax where the supply of goods, or of services, or both takes place in course of inter-state trade or commerce. Article 269A deals with levy and collection of Goods and Services Tax in course of inter-state trade or commerce. Essentially, Article 269A recognises the Government of India to collect Goods and Services Tax on supplies in the course of inter-state trade or commerce. It allows the apportionment of the tax levied and collected between the Union and the States as may be provided by Parliament by law. It recognises the authority of the Parliament by law to formulate the principles for determining the place of supply and when a supply of goods or of services or both takes place in the course of inter-state trade or commerce. Article 279A deals with Goods and Services Tax Council. It envisages the Constitution of a Goods and Services Tax Council. It enumerates the powers and functions of such Council, the decision making process therein and the establishment of a mechanism to adjudicate any disputes.

Part XIII of the Constitution of India deals with Trade, Commerce and Intercourse within the territory of India. Article 301 lays down that, subject to other provisions of Part XIII, Trade, Commerce and Intercourse throughout the territory of India shall be free. Article 302 empowers the Parliament, by law, to impose restrictions in the freedom of Trade, Commerce or Intercourse between States or within any part of the territory of India as may be required in public interest. Article 304 empowers the State Legislature to impose restrictions on Trade, Commerce and Intercourse among States on the parameters enumerated therein and subject to Article 303. Article 303 imposes restrictions on the Legislative power of the Union and the States with regard to Trade and Commerce. Therefore, Trade, Commerce and Intercourse throughout the territory of India are not absolutely free. They are subject to reasonable restrictions as may be imposed by a State Legislature or by the Parliament in public interest. Article 303(2) allows the Parliament to make non-discriminatory laws if it is necessary to deal with scarcity of goods in any part of India.

Relevant provisions of the Central Goods and Services Tax Act, 2017 are as follows:-

“2. Definitions

In this Act, unless the context otherwise requires,—

(1) “actionable claim” shall have the same meaning as assigned to it in section 3 of the Transfer of Property Act, 1882 (4 of 1882);

2(52). *“goods” means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;*

2(98). *“reverse charge” means the liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both under sub-section (3) or sub-section (4) of section 9, or under sub-section (3) or subsection (4) of section 5 of the Integrated Goods and Services Tax Act;*

7. Scope of supply

(1) For the purposes of this Act, the expression “supply” includes—

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(b) import of services for a consideration whether or not in the course or furtherance of business;

(c) the activities specified in Schedule I, made or agreed to be made without a consideration; and

(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.

(2) Notwithstanding anything contained in sub-section (1),—

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which

they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-sections (1) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods.

9. Levy and collection

(1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

(2) The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The central tax in respect of the supply of taxable goods or services or both by a supplier, who is not registered, to a registered person shall be paid by such person on reverse charge basis as the recipient and all the provisions of this Act shall apply

to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax.

Similar provisions appear in the West Bengal Goods and Services Tax Act, 2017. It regulates the levy and collection of tax on intra-State supply of goods or services or both in the State of West Bengal.

Legislature enjoys a very wide latitude in classification for taxation is the view expressed in ***Federation of Hotel and Restaurants Association (supra)*** as well as ***Nitdip Textile Processor (supra)***. The State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it is done

reasonably is the view expressed in ***The Twyford Tea Company (supra)***. It has not been substantiated that, either the Central or the State Legislatures have exceeded their jurisdiction in promulgating any of the Acts governing goods and services.

Binoy Viswam (supra) has held that, a legislation or a provision contained in a statute can be invalidated on two grounds, namely, it is not within the competence of the legislature which passed the law and/or it is in contravention of any of the fundamental rights stipulated in Part III of the Constitution or any other right/provision of the Constitution of India. It goes on to say that, a statute cannot be declared unconstitutional on the ground that, it is arbitrary or unreasonable. In the facts of the present case, it has not been substantiated that, the State Legislature promulgating the West Bengal Goods and Services Tax Act, 2017 did not have the competence to pass the law or that it violates any fundamental rights of the petitioner or any other right of the petitioner or any provision of the Constitution. The definition of 'goods' in Article 366(12) of the Constitution allows the Legislatures to classify lottery as 'goods' and charge tax thereon.

The Integrated Goods and Services Tax Act, 2017 makes provisions for levy and collection of tax on inter-state Supply of Goods or Services or both by the Central Government. It defines Import of Goods in Section 2(10) and Import of Services in Section 2(11) of the Act of 2017. By Import of Goods, it means Import of Goods from a place outside India. By Import of Services, it means the supply of any service where the supplier of services located outside in India, the recipient of services located in India and the place of supply of service is in India.

Schedule III under Section 7 of the CGST Act, 2017 deals with activities or transactions which shall be treated neither as a supply of goods nor as a supply of services. Entry 6 of Schedule III of CGST Act, 2017 takes out 'actionable claims' other than lottery, betting and gambling from the scope of such Act. Consequently, since lotteries are generally speaking 'goods' and come within the definition of 'actionable claims', and since, lotteries are kept out of the purview of 'actionable claims' which do not attract the CGST Act, 2017, lottery can therefore be charged to tax under the CGST Act, 2017. On the parity of the

same reasoning, lottery is chargeable to tax under WB GST Act, 2017 also.

Jindal Stainless Ltd. (supra) has held that, the power of taxation is controlled under Article 265 of the Constitution and that, no tax can be levied, except by authority of law. CGST Act, 2017 and WB GST Act, 2017 cannot be held to be unconstitutional. Lotteries come within the scope and ambit of CGST Act, 2017 and WB GST Act, 2017. Therefore, lottery can be taxed under the CGST Act, 2017 and WB GST Act, 2017. The second issue is answered accordingly.

The second issue is answered by holding that, lottery can be taxed under the Central Goods and Services Tax Act as well as the West Bengal Goods and Services Tax Act, 2017.

The rates imposed by the GST Council are decisions which a Writ Court is slow to examine. The rationale for imposing differential rates appear from the minutes of the 17th meeting of the GST Council. The rationale for the differential rate or the rates by themselves have not been substantiated to be breach of any provision of the Constitution.

Keshab Chandra (supra) has held that, the State Government cannot challenge its own notification as unconstitutional as, it has the

wherewithal to set the wrong, right. In the present case, the States of Sikkim, Mizoram, Nagaland and Arunachal Pradesh have supported the writ petitioner on the score that the rates of taxes are discriminatory. Such States were present in the GST Council Meetings. The resolution was carried by requisite majority. Article 279A contemplates establishment of a mechanism to adjudicate any dispute between one or more States or between the Government of India and any State or States on one side and one or more States on the other side or between two or more States. However it should not be construed that, the decisions or the resolutions of the Goods and Services Tax Council is immune from judicial review or that they are not justiciable. In a given case, where, a resolution adopted in the Goods and Services Tax Council Meeting is substantiated to be breaching any fundamental right or any provision of the Constitution of India, the same can be adjudicated upon by a Writ Court.

The Goods and Services Tax Council established under Article 279A of the Constitution of India at its 17th meeting deliberated extensively with regard to the rate of tax to be imposed on lotteries. Differential rate of tax was introduced in the 17th Goods and Services Tax Council Meeting held on June 18, 2017. The States before the

Court were present in such meeting. It was after extensive deliberations that, the GST Council had approved the rates as presently obtaining in respect of lottery. It is within the domain of such Council to decide the rate of tax. In such circumstances, the third issue is answered by holding that differential levy of tax is permissible.

So far as the fourth issue is concerned, no relief can be granted to the petitioners, in the facts of the present case.

WP No. 18424 of 2017 is dismissed. No order as to costs.

Urgent certified website copies of this judgment and order, if applied for, be made available to the parties upon compliance of the requisite formalities.

[DEBANGSU BASAK, J.]