IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 02ND DAY OF JUNE, 2021

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BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.11168/2018 (T – RES)

C/W

WRIT PETITION No.11167/2018 (T – RES)

IN WRIT PETITION No.11168/2018

BETWEEN

BANGALORE TURF CLUB LIMITED
GSTIN 29AABCB6217G1ZT
RACE COURSE ROAD,
BENGALURU - 560 001.

REPRESENTED BY ITS SECRETARY
AND CFO SRI PRADEEP KUMAR,
AGED ABOUT 41 YEARS,
S/O SRI GUNDERAO KULKARNI,
RESIDING AT FF6, SURYA PARK VIEW APARTMENTS,
17TH CROSS, IDEAL HOMES TOWNSHIP,
RAJARAJESHWARI NAGAR,
BENGALURU - 560 098.

... PETITIONER

(BY SRI VIVEK REDDY K., SENIOR COUNSEL FOR
SRI ATUL K. ALUR, ADVOCATES (VIDEO
CONFERENCING))

AND

1. THE STATE OF KARNATAKA
REPRESENTED BY

THE PRINCIPAL SECRETARY
FINANCE DEPARTMENT,
GOVERNMENT OF KARNATAKA,
BENGALURU - 560 001.

2. THE UNION OF INDIA
REPRESENTED HEREIN
BY THE SECRETARY,
GOVERNMENT OF INDIA,
NEW DELHI - 110 006.

3. ASST. COMMISSIONER OF CENTRAL TAX
BENGALURU NORTH DIVISION,
CRESCENT ROAD,
BENGALURU - 560 001.

... RESPONDENTS

(BY SRI VIKRAM HUILGOL, AGA FOR R1 (VIDEO CONFERENCING);
SMT.M.R.VANAJA, CGSC FOR R2 AND R3 (VIDEO CONFERENCING))

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE PETITIONER, BASED ON THE LEGISLATIVE INTENT IS LIABLE TO PAY GST ONLY ON THE COMMISSION SET APART AND THEREFORE, DECLARE THAT THE CLARIFICATION / CIRCULAR DATED 04.01.2018 AT ANNEX-A ARE UNSUSTAINABLE AND BE QUASHED AND ETC.,

IN WRIT PETITION No.11167/2018

BETWEEN

MYSORE RACE CLUB LIMITED
GSTIN 29AABCM5167G1ZB
RACE COURSE ROAD,

MYSURU - 570 010
REPRESENTED BY ITS
SECRETARY SRI K.G. ANANTHARAJ URS
AGED ABOUT 66 YEARS,
SON OF LATE G.GOPALARAJ URS
RESIDING AT 190, NYAYA MARG,
SIDDHARTH NAGAR,
MYSURU - 570 011.

... PETITIONER

(BY SRI VIVEK REDDY K., SENIOR COUNSEL FOR
SRI ATUL K. ALUR, ADVOCATES (VIDEO
CONFERENCING))

AND

1. THE STATE OF KARNATAKA
REPRESENTED BY
THE PRINCIPAL SECRETARY
FINANCE DEPARTMENT
GOVERNMENT OF KARNATAKA
BENGALURU – 560 001.

2. THE UNION OF INDIA
REPRESENTED HEREIN
BY THE SECRETARY,
GOVERNMENT OF INDIA,
NEW DELHI - 110 006.

3. ASST. COMMISSIONER OF CENTRAL TAX
ITTIGEGUD, SIDDHARTHNAGAR DIVISION,
MYSURU – 570 010.

... RESPONDENTS

(BY SRI VIKRAM HUILGOL, AGA FOR R1 (VIDEO
CONFERENCING);
SMT.M.R.VANAJA, CGSC FOR R2 AND R3 (VIDEO
CONFERENCING))

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE PETITIONER, BASED ON THE LEGISLATIVE INTENT IS LIABLE TO PAY GST ONLY ON THE COMMISSION SET APART AND THEREFORE, DECLARE THAT THE CLARIFICATION / CIRCULAR NO.27/01/2018-GST DATED 4TH JANUARY 2018 ANNEXURE-A ARE UNSUSTAINABLE AND BE QUASHED AND ETC.,

THESE WRIT PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 26.02.2021, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING :-

ORDER

The petitioners in these writ petitions *inter alia* challenge the legislative intent of making the petitioners liable to pay Goods and Services Tax ('GST' for short) on the entire bet amount received by the totalisator and declare the amendments dated 25-01-2018 which inserted Rule 31A(3) to the CGST Rules as being ultra vires the CGST Act.

2. Adumbrated in brief, the factual background as projected by the petitioners are as follows:

The petitioners, are Companies incorporated under the Companies Act as a Public Limited Company are carrying on the business of a race club, which includes lay-out and preparing any land for running of horse races, steeplechases of races of any other kind and for any kind of athletic sports. The petitioners particularly conduct horse racing and facilitates betting by the punters. The petitioners by themselves do not bet, but only facilitates punters in their betting activity. It is the punter who places the bet either with a totalisator run by the petitioners or a book-maker licensed by the petitioners.

3. If a horse backed by the punter wins, the winning punter is required to surrender the receipt and receive the winning amount. It means, a losing punter's money is used to pay the price money of the winning punter. The price money is distributed by the petitioners to the winning punter and out of the amount

Commission is set apart to be taken by the petitioners. This is the broad modus of functioning of the petitioners as claimed by it.

4. Up to 30th June 2017 the petitioners claim to have discharged payment of service tax on the commission so retained and the betting tax under the provisions of the Mysore Betting Tax Act, 1932. On and from 1st July 2017, the Mysore Betting Tax and the Service Tax provisions stood repealed and the Goods and Services Tax laws were brought into force.

5. From the appointed day i.e., 01-07-2017 a combination of these taxes; Central Goods and Services Tax ('CGST' for short), Integrated Goods and Services Tax ('IGST') and State Goods and Services Tax ('SGST' for short) and Goods and Services Tax of Union Territory ('UTGST') were all brought into force. Till the onset of these taxes, the petitioners were treated as service

providers under Chapter-V of the Finance Act, and Service Tax was levied on the petitioners' commission alone. After the CGST regime began, an amendment was brought into Rule 31A by insertion of Rule 31A(3) to the CGST Rules. The amendment made GST payable by the petitioners on the amount of bet that gets into the totalisator. It is this amendment that is called in question by the petitioners in this writ petition on the ground that the Rule is made beyond the powers conferred under the CGST Act, which would render it to be ultra vires and has sought a consequential declaration that the CGST and KSGST be restricted only to the Commission that the petitioners get on holding the amount in the totalisator for a brief period.

6. Heard Sri.Vivek Reddy.K, learned Senior Counsel for Sri.Atul.K.Alur, learned counsel for petitioners and Sri.Vikram Huilgol, learned Addtional Government Advocate for respondent No.1 and

Smt.M.R.Vanaja, learned Central Government Standing Counsel for respondent Nos.2 and 3.

Submissions:

Petitioners:

7. The learned Senior Counsel Sri Vivek Reddy.K. appearing for the petitioners has vehemently argued and raised the following contentions:

(1) *Rule 31A (3) violates Article 246A read with Article 366 (12A) and exceeds the constitutional mandate given to the Parliament and Legislature to levy tax only on the supply of goods and services on the principle that if there is no supply there is no tax.*

(2) *Rule 31A (3) in effect imposes tax on the petitioners on the entire bet value without the petitioners supplying any **bet**, thus violating constitutional mandate of Article 246A.*

(3) *According to the learned counsel, every tax contains four components – taxable event,*

taxable person, rate and measure of tax. Without assessment on all this, imposition of tax is contrary to law.

(4) *The impugned Rule 31A(3) is ultravires Section 7 of the CGST Act since the supply of bets is not in the course or furtherance of petitioners' business and is made liable to pay tax. The impugned Rule exceeds the mandate under Section 7 by levying GST on the amount that is not received by the petitioners as consideration.*

Respondents:

8. On the other hand, the learned Additional Government Advocate Sri Vikram Huligol representing the respondents would submit that the Act itself has mandated levying of tax on an actionable claim; What is actionable claim is not defined under the Act, it is in the Rules; Betting is also an actionable claim in terms of the Rules; the petitioners cannot contend that for the first time under Rule 31A the petitioners were made

liable for payment of GST on the amount received through totalisator.

9. Since actionable claim is and was existing in the Act from the beginning the amendment has only clarified the role of the petitioners in the field of betting. Therefore, he would submit that the contention of the petitioners that Rule 31A is ultravires the Act and the amendment is to be rejected as a figment of imagination and cannot be construed to be legally sound and would submit that the writ petition is to be dismissed.

10. I have given my anxious consideration to the submissions made by the respective learned counsel appearing for the parties and have perused the material on record. In furtherance whereof, the following issues arise for my consideration:

Issues:

(1) *Whether Rule 31A(3) of the CGST Rules is ultravires the CGST Act?*

(2) *Whether the petitioners are liable to pay GST on the commission set apart or on the total amount collected in the totalisator?*

Since both the issues are intertwined, the same are taken up together and considered.

Discussion:

11. To consider the aforementioned points, it is germane to notice the position in law with regard to imposition of tax; activities of the petitioners; the Rule which has directed the petitioners to be liable to pay tax on the total amount received in the totalisator.

Position in Law:

12. Before I proceed to consider the challenge to the Rules afore-quoted, I deem it appropriate to consider the tax and its components. Part-XII of the Constitution deals with Finance, Property, Contracts and Suits. Article 265 of the Constitution mandates that

no tax shall be levied or collected except by authority of law. The oft-quoted components of tax are a taxable event, a taxable person, rate of tax and measure of tax. All four components are inter-twined, with nexus being the soul of these components. A taxable event is an event which triggers tax; a taxable person is the one who is obliged to pay the tax; the rate of tax is the rate at which tax is determined/calculated; measure of tax is the value to which the rate is applied for computing a particular tax liability. These components of tax have been interpreted by the Apex Court in the case of **GOVINDA SARAN**[1]**,** wherein it has held as follows:

> **"***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*

[1] **GOVINDA SARAN v. COMMISSIONER OF SALES TAX** (***1985 Supp. SCC 205)***

> *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."*

This is further followed by the Apex Court in the case of ***MATHURAM AGGARWAL*[2],** wherein it is held as follows:

> ***"12.*** *Another question that arises for consideration in this connection is whether sub-section (1) of Section 127-A and the proviso to sub-section (2)(b) should be construed together and the annual letting values of all the buildings owned by a person to be taken together for determining the amount to be paid as tax in respect of each building. In our considered view this position cannot be accepted. The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal*

[2] ***MATHURAM AGGARWAL v. STATE OF MADHYA PRADESH [(1998) 8 SCC 667]***.

> *statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature.* ***The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."***
>
> *(emphasis supplied)*

In the light of the aforesaid declaration of law for a tax to be valid it must have the afore-narrated four components. The Apex Court again in the case of ***STATE RAJASTHAN***[3] has held as follows:

> ***"6.*** *The State on the other hand took the stand that what is to be the measure of tax on a sale is within the domain of the State Legislature. Under the impugned provision, tax is levied on a completed sale within the meaning of Section 4 of the Sales Act. However, in what manner the charge is to be levied is a matter of detail which can be worked out by legislation. The fact that*

[3] ***STATE RAJASTHAN v. RAJASTHAN CHEMISTS ASSOCIATION [(2006) 6 SCC 773]***

maximum retail price is to be determined statutorily and the State Legislature has taken into account the fact that the actual consideration at the first point tax may be lesser than the maximum retail price that may be charged ultimately from the consumer at the last point sale as provided for abatement of MRP by reducing therefrom the sum at the prescribed rates of abatement for the purpose of levy of tax, provides sound basis for uniform liability in the State on such transaction. ***The levy of tax cannot be said to be wanting in nexus with the taxing event.*** *Therefore, the impugned provisions and the notifications cannot be said to be ultra vires any provision of the Constitution. It was however not disputed that but for taking MRP as a basis to provide measure of tax, no fictional price can be fixed as a measure of tax on the sale of goods. The High Court on analysing the provision in great detail came to hold as follows:*

"If Section 4-A is designed to bring a levy into existence which is divorced from the sale subject to tax under the Act, it falls foul with the legislative competence under Entry 54 of List II of Schedule VII so also notification *— Annexure 3 to the extent it is intended to levy tax on first point sale with reference to price which could be charged in respect of a subsequent sale which has not come into existence at the time liability to tax arose and is determined ex hypothesi. However, the perusal of the language of Section 4-A and the notification issued thereunder by itself does*

not show that it applies only in case of sales to be taxed at first point. In case the levy is on the last point and the maximum retail price is to be fixed and published under any statute, whether instead of determining the price actually charged in each case fixed formula is provided by the enactment which has correlation with determining price by keeping in view the provisions of Section 9 of the Sale of Goods Act whether the provision still falls beyond the scope of Entry 54 has not been the subject-matter of contention. In this case and therefore, we have not been called upon to decide. In the absence of any contention having been raised, it will be hazardous to comment upon the validity of the provisions of Section 4-A in isolation and the notification issued thereunder in its entirety.

In view thereof, we confine our conclusion and hold that to the extent that tax on first point sale of drugs, medicines or any formulation or for that matter any other commodities by a manufacturer/wholesaler/distributor to retailer where MRP is published on package, measure to which rate of tax is to be applied cannot be with reference to such published MRP, which is neither charged nor chargeable by the wholesaler from the retailer whether the tax is charged on sales or on purchase by the parties to sale under Section 4-A and the notification.

The additional tax collected with reference to the measure provided under

> *Section 4-A by the wholesalers to retailers at first point sale shall not be refunded to the dealers. In case the additional tax charged has not been transmitted to buyers, the excess tax paid may be adjusted against future liability under the Act of 1994 or any other dues to the Revenue under the Rajasthan Sales Tax Act."*
>
> *(emphasis supplied)*

The Apex Court in the aforesaid cases has clearly held that the measure to which the rate of tax is to be applied to a taxable person must have a nexus to the taxable event and not dehors it.

Goods and Services Tax:

13. Article 246A comes by way of 101st amendment to the Constitution with effect from 16-09-2016 under which Goods and Services Tax were brought into force. Article 246A reads as follows:

> *"**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,*
>
> *....*
>
> *Article 366(12A) reads as follows:-*
>
> *"****Article 366(12A)*** *"goods and services tax" means any tax* ***or supply of goods, or services or both*** *except taxes on the supply of alcoholic liquor for human consumption.".*

In terms of Article 366(12A) Goods and Services tax would be any tax on supply of goods and services or both except taxes on the supply of alcoholic liquor for human consumption.

14. The Government by Notification dated 28th June 2017 brought in certain services under the purview of CGST. Item No.34 of the said Notification reads as follows:-

Sl. No	*Chapter, Section or Heading*	*Description of Service*	*Rate (per cent)*	*Con-dition*
34	*Heading 9996 (Re-creational, cultural and sporting services)*	*(i) Services by way of admission or access to circus, Indian classical dance including folk dance, theatrical performance, drama.*	*9*	*-*
		(ii) Services by way of admission exhibition of cinematograph films where price of admission ticket is one hundred rupees or less	*9*	*-*
		(iii) Services by way of admission to entertainment events or access to amusement facilties including exhibition of cinematograph films, theme parks, water parks, joy rides, merry-go founds, go-carting, casinos, race-course, ballet, any sporting event such as Indian Premier League and the like	*14*	*-*
		(iv) Services provided by a race club by way of totalisator or a license to bookmaker in such club.	*14*	*-*
		(v) Gambling	*14*	
		(vi) Recreational, cultural	*9*	*-*

		and sporting services other than (i), (ii), (iii), (iv) and (v)		

After about a year of the promulgation of CGST Act, the Rules, Rule 31A was introduced by amendment to Rule 31 by a notification dated 23-01-2018, which reads as follows:-

> *"**31A:- Value of supply in case of lottery, betting, gambling and horse racing.**–(1) Notwithstanding anything contained in the provisions of this Chapter, the value in respect of supplies specified below shall be determined in the manner provided hereunder:*
>
> *(2)(a) The value of supply of lottery run by State Government shall be deemed to be 100/112 of the face value of ticket or of the price as notified in the official gazette by the organizing State, whichever is higher.*
>
> *(b) The value of supply of lottery authorized by State Government shall be deemed to be 100/128 of the face value of the ticket or of the price as notified in the official gazette by the organizing State, whichever is higher.*
>
> *Explanation: - For the purposes of this sub-rule, the expressions –*

(a) "lottery run by State Governments" means a lottery not allowed to be sold in any State other than the organizing State;

(b) "lottery authorized by State Government" means a lottery which is authorized to be sold in State(s) other than the organizing state also; and

(c) "Organising State" has the same meaning as assigned to it in clause (f) of sub-rule (1) of rule 2 of the Lotteries (Regulation) Rules, 2010.

(3) The value of supply of actionable claim in the form of chance to win in betting gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator".

(emphasis supplied)

In terms of the aforesaid amendment to the Rule, the Government of India made value of supply of actionable claim in the form of chance to win in betting gambling or horse racing in a race club to be 100 per cent of the face value of the bet or the amount paid in to totalisator. Therefore, by this amendment, the entire amount that is paid into the totalisator is made subject

to the CGST. It is this amendment which inserted 31A(3) that has triggered this *lis*.

15. As stated herein above Goods and Services Tax was brought into effect by amendment to Article 246A. Certain provisions of the Central Goods and Services Tax Act, 2017 which are germane for consideration of the *lis* are extracted hereunder for the purpose of ready reference:

> *"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);***
>
> *(17)* ***"business" includes–***
>
> *(h) services provided by a race club by way of totalisator or a licence to book maker in such club ; and*

Consideration as defined under the Act reads as follows:

(31) "consideration" in relation to the supply of goods or services or both includes–

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government.

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

Goods as defined under the Act reads as follows:

(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;

The Act defines a recipient which reads as follows:

(93) "recipient" of supply of goods or services or both, means-

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) where no consideration is payable for the supply of goods, the person to whom the goods are delivered or made available, or to whom possession or use of the goods is given or made available; and

(d) where no consideration is payable for the supply of a service, the person to whom the service is rendered,

and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall include an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;

Supplier is defined as follows:

(105) "supplier" in relation to any goods or services or both, shall mean

> *the person supplying the said goods or services or both and shall include an agent acting as such on behalf of such supplier in relation to the goods or services or both supplied;"*
>
> *(emphasis supplied)*

Section 2 of the Act defines various terms under the Act. Section 2(1) deals with an actionable claim. Actionable claim is not defined under the Act but is directed to hold the same meaning as assigned to it in Section 3 of the Transfer of Property Act, 1882. Section 2(17) defines what is business. Section 2(17)(h) defines activities of a race club including by way of totalisator or a license to a bookmaker or activities of a licensed book maker in such race club to be business. Section 2(31) deals with what is consideration which is any payment made whether in money or otherwise in respect of or in response to or for an inducement of goods or services or both. Section 2(52) deals with goods which would mean every kind of movable property other than money and

securities including actionable claim. Section 2(93) deals with recipient. A recipient is one who receives goods or services or both. Section 2(105) defines who is a supplier. A supplier in relation to any goods or services both to mean a person who is supplying the said goods or services or both. The spirit of the afore-quoted definitions is that there must be goods and there must be supply which would only become a taxable event. If there is no supply; there is no tax.

16. Chapter-III of the Act deals with levy and collection of tax. Section 7 defines what is supply and reads as follows:-

> ***"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

(1A) Where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either 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), (1A) 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."

(emphasis supplied)

In terms of the above Section, the expression 'supply' is inclusive of goods or services or both. Therefore, there should be supply of goods or services. Sub-section (3) of Section 7 clearly defines the transactions that are treated as goods. Sub-section (2) of Section 7 *(supra)* mandates that notwithstanding anything contained in sub-section (1) 'activities' or 'transactions' specified in Schedule-III would be neither treated as 'goods' or 'supply'. Schedule-III to Section 7 reads as follows:

SCHEDULE- III

"ACTIVITIES OR TRANSACTIONS WHICH SHALL BE TREATED NEITHER AS A SUPPLY OF GOODS NOR A SUPPLY OF SERVICES

1. Services by an employee to the employer in the course of or in relation to his employment.

2. Services by any court or Tribunal established under any law for the time being in force

3.(a) the functions performed by the Members of Parliament, Members of State Legislature, Members of Panchayats, Members of Municipalities and Members of other local authorities;

(b) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(c) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or a State Government or local authority and who is not deemed as an employee before the commencement of this clause.

4. Services of funeral, burial, crematorium or mortuary including transportation of the deceased.

5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

6. Actionable claims, other than lottery, betting and gambling.

7. Supply of goods from a place in the non-taxable territory to another place in the non-taxable territory without such goods entering into India.

8. (a) Supply warehoused goods to any person before clearance for home consumption;

(b) Supply of goods by the consignee to any other person, by endorsement of documents of title to the goods, after the goods have been dispatched from the port of origin located outside India but before clearance for home consumption.

Explanation-1.—For the purposes of paragraph 2, the term "court" includes District Court, High Court and Supreme Court.

Explanation-2. – For the purposes of paragraph 8, the expression "warehoused goods" shall have the same meaning as assigned to it in the Customs Act, 1962 (52 of 1962)."

(emphasis supplied)

Clause (6) of Schedule-III deals with actionable claim. The claim of items in Schedule III is treated neither as supply of good nor supply of services. The exception is exclusion of lottery, betting and gambling.

17. The charging section in the Act is Section 9, which reads as follows:

> *"**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."*
>
> *(emphasis supplied)*

The afore-quoted provisions are the broad structure of the Act which is necessary for a consideration of the case at hand.

18. The Government has framed Rules under the Act. The Rule that is called in question reads as follows:

> *"31A:- Value of supply in case of lottery, betting, gambling and horse racing.–(1) Notwithstanding anything contained in the provisions of this Chapter, the value in*

respect of supplies specified below shall be determined in the manner provided hereunder:

(3) The value of supply of actionable claim in the form of chance to win in betting gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator".

Rule 31A(3) which is under challenge, as quoted supra, states that value of supply of actionable claim in the form of a chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator. Therefore, it becomes necessary to consider the purpose of Rule 31A(3) *qua* the Act and the components of tax. Section 9 of the Act which deals with levy and collection indicating clearly that goods and services tax on all intra-State supply of goods and services on the value determined under Section 15 at a particular percentage

as may be notified by Government to be connected in such a manner as may be prescribed and is to be paid by the taxable person.

19. Section 9 has a fourfold requirement for any taxable person to pay tax. The tax is only on the supply of goods and services; on a value determined under Section 15 of the Act which deals with value of taxable supply; the rate not exceeding 20% which is a tax rate and to be paid by a taxable person who is the person obliged to pay tax. The nexus, therefore, between the measure of tax and the taxable event even under Rule 31A(3) can at best be supply of a totalisator service. Rule 31A(3) in the form that it is, perforates the nexus between the measure of tax and the taxable event as the fully paid value into the totalisator is directed to be assessed for payment of GST under the Act. Therefore it becomes necessary to consider Rule 31A(3) qua the activity of the petitioners and that becomes kernel of the entire issue.

20. The activity of the petitioners is required to be noticed to consider whether the petitioners are liable to pay tax on 100 per cent of the face value of the bet or only on the commission that it receives out of the amount received in the *totalisator*.

21. The Government has used the word 'totalisator'. Therefore, it becomes necessary to consider what is a 'totalisator'. The word 'totalisator' ordinarily means a system of betting on horse races in which the aggregate stake, less an administration charge and tax, is paid out to winners in proportion to their stakes. This software installed will have number of terminals handled by the staff of the petitioners. The totalisator keeps a record of the amount punted by the punter, automatically retains certain percentage towards commission of the petitioners and taxes thereon. It even depicts the amount collected in the totalisator which would be available for distribution among the

winner who placed his stake. A punter who wishes to bet pays certain amount of money through these terminals for backing a particular horse. A receipt is issued representing the monies put in by the punter on the horse that he has backed. There ends the work performed by the petitioners through the 'totalisator'.

22. 'Totalisator' has been interpreted by English Courts and the Apex Court to mean a fixed commission which is earned irrespective of the outcome of the race and cannot be seen to be indulging in a betting activity. The Court of Appeal of Queen's Bench Division in the case of ***TOTE INVESTORS***[4] held as follows:

> *"That definition has been approved many times, particularly in Ellesmere v. Wallace [(1929) 2 Ch.1]. I would not myself like to treat it as a rigid definition or interpret it as a statute, but it does bring out this feature: it is essential that each party may either win or lose. If one party can neither win nor lose, then it is not "gaming" or "wagering". This was accepted in the House of Lords in Attorney-General v.*

[4] ***TOTE INVESTORS LIMITED v. SMOKER (1967 All ER 242)***

Luncheon and Sports Club Limited [(1929) AC 400]. The actual decision turned on the special position of a club as a distributing agent. Nevertheless Lord Dunedin said [(1929) AC 400]:

> *"Inasmuch as on the determination of the event in question – to wit, whether a certain horse is first or is placed in a race, as the case may be – the club can neither win or lose, it follows that there is no bet with the only bookmaker alleged."*

Applying this to the present case, it seems clear that the Totalisator Bord can neither win nor lose. All they take out of the fund is their expenses. They are merely organizers who receive all the moneys in their hands and then pay out the total to those who have succeeded, less expenses. As they neither win nor lose, it follows that it is not a contract of "wagering". Nor is it a contract by way of "gaming". The cases show the word "gaming" adds nothing to the word "wagering". On the authorities I feel compelled to hold that a contract by a backer who puts money on the totalisator is not a contract by way of gaming or wagering"

(emphasis applied)

The Court of appeal clearly held that a contract by a backer who puts money into totalisator is not a contract by way of gaming or wagering.

23. The activities of a race club is delineated by the Apex Court in the case of ***Dr. K.R.LAKSHMANAN***[5] wherein, the Apex Court holds as follows:-

> *"17. We may at this stage notice the manner in which the Club operates and conducts the horse-races. Race meetings are held in the Club – racecourses at Madras and Ooty for which the bets are made inside the racecourse premises. Admission to the racecourse is by tickets (entrance fee) prescribed by the Club. Separate entrance fee is prescribed for the first enclosure and the second enclosure. About 1½ of the entrance fee represents the entertainment tax payable to the Commercial Tax Department of the State Government. The balance goes to the Club's account. Betting on the horses, participating in the races, may be made either at the Club's totalizators (the totes) by purchasing tickets of Rs.5 denomination or with the bookmakers (bookies) who are licensed by the Club and operate within the first enclosure. The totalizator is an*

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[5] ***Dr. K.R.LAKSHMANAN v. STATE OF T.N. AND ANOTHER [(1996) 2 SCC 226]***

electronically operated device which pools all the bets and after deducting betting tax and the Club charges, works out a dividend to be paid out as winnings to those who have backed the successful horses in the race. Bookmakers, on the other hand, operate on their own account by directly entering into contracts with the individual punters who come to them and place bets on horses on the odds specified by the bookmakers. The bookmakers issue to the punters printed betting cards on which are entered the bookmaker's name, the name of the horse backed, the amount of bet and the amount of prize money payable if the horse wins. The winning punters collect their money directly from the bookmaker concerned. The net result is that 75% of the tote collections of each race are distributed as prize money for winning tickets, 20% is paid as betting tax to the State Government and the remaining 5% is retained by the Club as commission. Similarly, the bookmakers collect from their punters, besides the bet amount specified in the betting card, 20% bet tax payable to the State Government and 5% payable to the Club as its commission. It is thus obvious that the Club is entitled to only 5% as commission from the tote collections and also from the total receipts of the bookmakers. According to the appellant the punters who bet at the totalizator or with the bookmakers have no direct contract with the Club."

The Apex Court in the aforesaid case further held that activities of the petitioner therein was not gambling but

was gaming and a game of skill in the following paragraphs:

> *"33. The expression 'gaming' in the two Acts has to be interpreted in the light of the law laid down by this Court in the two Chamarbaugwala cases, wherein it has been authoritatively held that a competition which substantially depends on skill is not gambling. Gaming is the act or practice of gambling on a game of chance. It is staking on chance where chance is the controlling factor. 'Gaming' in the two Acts would, therefore, mean wagering or betting on games of chance. It would not include games of skill like horse-racing. In any case, Section 49 of the Police Act and Section 11 of the Gaming act specifically save the games of mere skill from the penal provisions of the two Acts. We, therefore, hold that wagering or betting on horse-racing – a game of skill – does not come within the definition of 'gaming' under the two Acts.*
>
> *34. Mr. Parasaran has relied on the judgment of the House of Lords in Attorney General v. Luncheon and Sports Club Limited [1929 AC 400] and the judgment of the Court of Appeal in Tote Investors Limited v. Smoker [(1967) 3 All ER 242] in support of the contention that dehors Section 49 of the Police Act and Section 11 of the Gaming Act, there is no 'wagering' or 'betting' by a punter with the Club. According to him, a punter bets or wagers with the totalizator or the bookmaker and not with the Club. It is not necessary for*

us to go into this question. Even if there is wagering or betting with the Club it is on a game of mere skill and as such it would not be 'gaming' under the two Acts."

... ...

...

44. The main object for which the Club was established is to carry on the business of race-club, in particular the running of horse-races, steeplechases or races of any other kind and for any kind of athletic sports and for playing their own games of cricket, bowls, golf, lawn tennis, polo or any other kind of games or amusement, recreation, sport or entertainment etc. ***In the earlier part of this judgment, we have noticed the working of the Club which shows that apart from 5% commission from the totalizator and the bookmakers no part of the betting-money comes to the Club. The Club does not own or control any material resources of the community which are to be distributed in terms of Article 39(b) of the Constitution of India. There are two aspects of the functioning of the Club. One is the betting by the punters at the totalizator and with the bookies. The Club does not earn any income from the betting-money except 5% commission.*** *There is no question whatsoever of the Club owning or controlling the material resources of the community or in any manner contributing towards the operation of the economic system resulting in the concentration of wealth and means of production to the common detriment. The second aspect is the conduct of horse-races*

by the Club. Horse-racing is a game of skill, the horse which wings the race is given a prize by the Club. It is a simple game of horse-racing where the winning horses are given prizes. Neither the "material resources of the community" nor "to subserve the common good" has any relevance to the twin functioning of the Club. Similarly, the operation of the Club has no relation or effect on the 'operation of the economic system". There is no question whatsoever of attracting the Directive Principles contained in Article 39(b)and (c) of the Constitution. The declaration in Section 2 of the Act and the recital containing aims and objectives totally betray the scope and purpose of Article 39(b) and (c) of the Constitution. While Article 39(b) refers to "material resources of the community", the aims and objects of the Act refer to "the material resources of the Madras Race Club". It is difficult to understand what exactly is the material resources of the race-club which are sought to be distributed so as to sub-serve the common good within the meaning of the Directive Principles. Equally, the reference to Article 39(c) is wholly misplaced. While Article 39(c) relates to "the operation of the economic system – to the common detriment", the aims and objectives of the Act refer to "the economic system of the Madras Race Club". What is meant by the economic system of the Madras Race Club is not known. Even if it is assumed that betting by the punters at the totalizator and with the bookmakers is part of the economic system of the Madras Race Club, it has no relevance to the objectives specified in Article 39(b) and (c).

> *We are, therefore, of the view that reference to Article 39(b) and (c) in the aims and objects and in Section 2 of the Act is nothing but a mechanical reproduction of constitutional provisions in a totally inappropriate context. There is no nexus so far as the provisions of the 1986 Act are concerned with the objectives contained in Article 39(b) and (c) of the Constitution. We, therefore, hold that the protection under Article 31-C of the Constitution cannot be extended to the 1986 Act."*
>
> *(emphasis applied)*

Later, the Apex Court considering the activities of the petitioner in its judgment in the case of ***BANGALORE TURF CLUB LIMITED***[6] has held as follows:-

> *"45. Further, the said race clubs also provide the viewers with the facilities to indulge in betting activities, which may even be said to be an integral part of the sport.* ***The race clubs further even charge a fixed commission on the said betting. "Commission" in common parlance has duly been understood to mean a fixed charge payable to an agent or a broker for providing services for facilitating a transaction".***
>
> *(emphasis supplied)*

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[6] ***BANGALORE TURF CLUB LIMITED v. REGIONAL DIRECTOR, EMPLOYEES' STATE INSURANCE CORPORATION*** ***[(2014) 9 SCC 657]***

Therefore, the game of racing as held by the Apex Court following the law of Queen's Bench is that it is a game of skill. The Apex Court also observes in the case of ***Dr.K.R. Lakshmanan*** *(supra)* that the club earns nothing but a commission which at that point in time was 5%.

24. Section 7 of the Act deals with supply. All forms of supply of goods or services or both for a consideration in course of furtherance of business means a supply. A supplier under Section 2 (105) is in relation to any goods or services or both and shall mean that the person supplying goods or services or both. In terms of Section 7 the taxable event is supply i.e., supply of goods for consideration and in course of furtherance of business. All three events must concur for a taxable event to occur. This has to be read with Section 2(17) which deals with 'business'. Clause (h)

thereof includes activities of a race club by way of totalisator or a license to book maker in such club. The emphasis is on the course of business of a totalisator.

25. What is the function performed by the totalisator has been considered by the Apex Court in the judgments referred to supra. Therefore, a totalisator does not indulge in betting. In my opinion, betting is neither in the course of business nor in furtherance of business of a race club for the purposes of the Act. As stated hereinabove, petitioners hold the amount received in the totalisator for a brief period in its fiduciary capacity. Once the race is over the money is distributed to the winners of the stake. It is for a certain period between input of money by the participants and the output of money to the winners of stake during the race the petitioners hold that money in its fiduciary capacity for which the consideration that the petitioners receive is the commission. Rule 31A(3) completely wipes

out the distinction between the bookmakers and a totalisator by making the petitioners liable to pay tax on 100% of the bet value. It is the bookmakers who indulge in betting and receiving consideration depending on the outcome of the race, irrespective of the result. In contrast, the race club provides totalisator service and receives commission for providing such service. Therefore, there is no supply of goods/bets by the petitioners as defined under the Act.

26. Section 2(31) defines what is 'consideration', which reads as follows:

> *"consideration" in relation to the supply of goods or services or both includes–*
>
> *(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;*

> *(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:*
>
> *Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;*

Here again, consideration received is for the supply of goods or service or both. The consideration that the petitioners receive for supply of service of the totalisator is only the commission. Therefore, the consideration component of supply is also not specified by the impugned Rule which directs payment of tax on the whole bet amount. The commission is only the consideration received by the race club on the transaction. The commission so received by the petitioners is not in respect of or in response to an inducement of supply of betting transaction. Betting

transaction is carried out by the book maker who receives the consideration irrespective of result of the race. Thus, the totalisator holds money in trust on behalf of the punter before redistribution to the winner of stake which cannot be construed to be a consideration in terms of Section 2(31) of the Act.

27. Section 2(105) *(supra)* defines 'supply' who is a person supplying goods or services or both. Section 2 (107) means a taxable person who is liable to pay tax. One who supplies the goods is liable to pay tax. The impugned Rule make the petitioners a 'supplier' of bets which the petitioners do not and are not the supplier of bets and therefore, cannot be held liable to pay tax under the Act, as the service or supply that the petitioners do is only a totalisator component. The petitioners do not supply bets to the punters.

28. Above and apart from all what is aforesaid, it is germane to notice what the Government considers to be the activity of the petitioners. To demonstrate this understanding of the Government, the statement of objections filed in the case at hand will have to be noticed. The activities of the petitioners as understood by the Government is as follows:

> *"3. The respondents further submit that M/s. Bangalore Turf club Limited (hereinafter referred as BTC) basically conducts its business of Horse Race betting in two ways:*
> *a) The person who places his bets on the horse (called 'Punter') has two options, one is to place bets through Totalisator operated by the Bangalore Race Club and the other is to place bets with bookies authorized by BTC [bookies are called as 'Licensed Book Makers']*
>
> ***b) Where the Punter places his bets through the Totalisator operated by BTC, if Rs.100/- is placed as bet, Rs.30/- is retained by BTC as commission and the balance amount collected by the***

> ***Totalisator is distributed among the winners based on the winning horse and bet amount. Effectively, irrespective of the result of the race, the petitioner receives consideration in the form of Commission.*** *Whereas, when Punter places bets through the Licenced Bookmaker, the bet amount and the Odds on Individual Horses are decided by the Bookies. There could be situations wherein Bookies will make a loss, if all the bets end up in Winning Position."*
>
> *(emphasis added)*

In terms of what is stated on oath, it is the punter who places his bet through the totalisator operated by the petitioners. What is retained by the petitioners is the commission and the balance amount collected by the totalisator is distributed among the winners based on the winning horse and bet amount. The categorical statement made in the objections is that effectively, irrespective of the result of the race, petitioners receive consideration in the form of commission. This is exactly the submission of the petitioners that they are liable to

pay tax under the Act for the commission that they receive and not for the entire amount that passes through the totalisator which is meant for distribution amongst the winners. Thus, on the very understanding of the Government, *inter alia* the action impugned, is rendered unsustainable.

29. Notwithstanding the afore- made statement on oath, the Union and the State, in unison, advance arguments based upon Schedule-III to Section 7. The learned counsel lay emphasis on clause (6) of Schedule-III. The said clause reads as follows:

> ***"6. Actionable claims, other than lottery, betting and gambling."***

The said clause of the schedule to the Act excludes actionable claims concerning lottery, betting and gambling. The contention is that actionable claim concerning these three activities is held to be both goods and services and the petitioners become liable to

tax on the whole amount not only on the commission received by for providing services of a totalisator is concerned.

30. Actionable claim in terms of the act is not assigned any separate meaning but the meaning that is assigned to Section 3 of the Transfer of Property Act is made applicable. Therefore, Section 3 of the Transfer of Property Act requires to be noticed for ready reference and it reads as follows:

> *"3. **Interpretation-clause.**—In this Act, unless there is something repugnant in the subject or context,-*
>
> *xx xx xx xx*
>
> ***"actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest***

be existent, occurring, conditional or contingent;

(Emphasis supplied)

What is actionable claim under the Transfer of Property Act would mean a claim to any debt other than the debt secured by mortgage of immovable property. Elaborating this submission, the learned counsel relies on the judgment of a Constitution Bench of the Apex Court in the case of ***SUNRISE ASSOCIATES***[7] with particular reference to paragraphs 30, 33, 36, 40, 431, 42, 43, 46 and 48 which read as follows:

> ***"30.*** *The first dispute which has to be resolved is what H. Anraj [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] in fact held. Did it hold, as was found by the Karnataka High Court in Nirmal Agency v. CTO [(1992) 86 STC 450 (Kant)] , that the lottery tickets were goods only because they represented the right to participate in the draw? Or did it hold, as has been found by the Delhi High Court, that the lottery tickets themselves were the goods*

[7] ***SUNRISE ASSOCIATES v. GOVT. OF NCT OF DELHI [(2006) 5 SCC 603]***

which were sold? The conflict is a direct consequence of the somewhat ambiguous language used in H. Anraj [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] .

A. In para 23 of the Report (SCC), the Court did say that lottery tickets are movable property and as such would fall within the expression "goods". However, the Court qualified that statement immediately by saying that the questions whether tickets constituted goods properly so called or are slips of paper or memoranda merely evidencing the right to claim a prize by chance and whether these are actionable claims and hence excluded from the concept of goods, would be considered subsequently in the judgment.

B. In para 27 of the Report (SCC) (which we have quoted earlier), the Court categorically stated that a lottery ticket was goods—not as a physical article but as a slip of paper or memorandum evidencing (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. This is reiterated in para 29

of the Report (SCC). It was also stated that for the purpose of imposing the levy of sales tax, lottery tickets comprising the entitlement to a right to participate in a draw would have to be regarded as goods properly so called.

C. In the same paragraph the Court said what is transferred to the purchaser is the right to participate in the draw. That is the "goods" which was a chose-in-possession. The same right has been later described as the beneficial interest in movable property, that is to say that the right was not the movable property itself.

D. Then again in para 30 it was said: (H. Anraj case [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] , SCC p. 437, para 30)

> *"30. It is true that this entitlement to a right to participate in the draw is an entitlement to beneficial interest which is of incorporeal or intangible nature but that cannot prevent it from being regarded as goods."*

***"31.** This again indicates that it is the right to participate in the draw which was*

being described as the goods. Otherwise it was not necessary to refer to other incorporeal rights which had been judicially recognised as goods for the purposes of levying sales tax such as copyrights or intangible rights such as electricity.

32. *Ultimately, however, clarity in the matter is brought about by the concurring judgment of Sabyasachi Mukharji, J. (as His Lordship then was), when he said: (SCC p. 445, para 47)*

> *"47. I, however, agree with my learned Brother that 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 therefore lottery tickets, not as physical articles but as slips of paper or memoranda evidencing the right to participate in the draw can be regarded as dealer's merchandise and therefore goods which are capable of being bought or sold in the market."*
>
> *(emphasis supplied)*

36. *We have noted earlier that all the statutory definitions of the word "goods" in the State sales tax laws have uniformly excluded, inter alia, actionable claims from the definition for the purposes of the Act. Were actionable claims, etc., not otherwise includible in the definition of "goods" there was no need for excluding them. In other words, actionable claims are "goods" but not for the purposes of the Sales Tax Acts and but for this statutory exclusion, an actionable claim would be "goods" or the subject-matter of ownership. Consequently, an actionable claim is movable property and "goods" in the wider sense of the term but a sale of an actionable claim would not be subject to the sales tax laws.*

40. *An actionable claim would include a right to recover insurance money or a partner's right to sue for an account of a dissolved partnership or the right to claim the benefit of a contract not coupled with any liability (see Union of India v. Sri Sarada Mills Ltd. [(1972) 2 SCC 877] , SCC at p. 880). A claim for arrears of rent has also been held to be an actionable claim (State of Bihar v. Maharajadhiraja Sir Kameshwar Singh [1952 SCR 889 : AIR 1952 SC 252] , SCR at p. 910). A right to the credit in a provident fund account has also been held to*

be an actionable claim (Official Trustee v. L. Chippendale [AIR 1944 Cal 335 : ILR (1943) 2 Cal 325] ; Bhupati Mohan Das v. Phanindra Chandra Chakravarty [AIR 1935 Cal 756 : 40 CWN 102]). In our opinion a sale of a lottery ticket also amounts to the transfer of an actionable claim.

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. *Webster's Words and Phrases, Permanent Edn., Vol. 25-A Supplement defines a "ticket" as "a printed card or a piece of paper that gives a person a specific right, as to attend a theatre, ride on a train, claim or purchase, etc." The Madras High Court in SeshaAyyar v. Krishna Ayyar [AIR 1936 Mad 225 : ILR 59 Mad 562 (FB)] also held: (AIR p. 227)*

"Tickets of course are only the tokens of the chance purchased, and it is the purchase of this chance which is the essence of a lottery."

43. *The sale of a ticket does not necessarily involve the sale of goods. For example, the purchase of a railway ticket gives the right to a person to travel by railway. It is nothing other than a contract of carriage. The actual ticket is merely evidence of the right to travel. A contract is not property, but only a promise supported by consideration, upon breach of which either a claim for specific performance or damages would lie (Said v. Butt [(1920) 3 KB 497 : 1920 All ER Rep 232]). 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. Cases on whether the terms specified on such tickets bind the purchaser are legion. It is sufficient for our purpose to note that 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.*

48. *Even if the right to participate is assumed to be a separate right, there is no sale of goods within the meaning of sales tax*

> *statutes when that right is transferred. When H. Anraj [(1986) 1 SCC 414 : 1986 SCC (Tax) 190] said that the right to participate was a beneficial interest in movable property, it did not define what that movable property was. The draw could not and was not suggested to be the movable property. The only object of the right to participate would be to win the prize. The transfer of the right would thus be of a beneficial interest in movable property not in possession. By this reasoning also a right to participate in a lottery is an actionable claim.*

Placing reliance on the aforesaid paragraphs, the contention of the learned counsel for the respondents is that lottery which is also declared to be an actionable claim which is liable to be taxed is also held in a fiduciary capacity by the person who sells the lottery ticket. Though no amount is received by the said person on the lottery ticket, the claim being actionable claim he is liable to pay tax. The said judgment also interpreted actionable claim as defined under the Transfer of Property Act, but the issue that arose for consideration before the Apex Court was with regard to

Sales Tax and liability to pay sales tax on the sale of lottery.

31. The next judgment on which the learned counsel places reliance is the one rendered by a three Judge Bench of the Apex Court in ***SKILL LOTO SOLUTIONS***[8]. The issue before the Apex Court was as follows:-

> ***"The petitioner, an authorized agent, for sale and distribution of lotteries organized by State of Punjab has filed this writ petition impugning the definition of goods under Section 2(52) of Central Goods and Services Tax Act, 2017 and consequential notifications to the extent it levies tax on lotteries.*** *The petitioner seeks declaration that the levy of tax on lottery is discriminatory and violative of Articles 14, 19(1)(g), 301 and 304 of the Constitution of India.*

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[8] ***SKILL LOTO SOLUTIONS[8] PRIVATE LIMITED v. UNION OF INDIA [(2020) SCC Online SC 990]***

10. He reiterated his challenge on the ground of hostile discrimination with regard to only three categories of actionable claims, i.e., lottery, betting and gambling whereas all other actionable claims are not being taxed under Act, 2017. He submits that taxing only three items has no nexus with the object sought to be achieved. No rationale has been provided by the respondent. If actionable claim is a homogeneous clause, why only three have been picked out. Lottery is not something pernicious. *Relying on earlier circular dated 14.02.2017, Shri Shrivastava submits that prize money has to be excluded from face value. Shri Shrivastava further submits that lottery is held all across the world and in other countries, GST is levied by excluding the prize money. Shri Shrivastava has lastly submitted that notification, which has been issued during pendency of the writ petition now providing a uniform rate of lotteries organised by the States or authorised by the State having not been challenged in this writ petition, hence, petitioner reserve its right to challenge the notification dated 21.02.2020/02.03.2020 separately in appropriate proceedings.*

11. *We have considered the submissions of the learned counsel for the parties and have perused the records.*

12. *From the submissions of the learned counsel for the parties and materials on the record, following are the questions which arise for consideration in this writ petition:—*

(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?

74. *The Rules have been framed, namely, the Central Goods and Services Tax Rules, 2017 in which Rules by notification dated 23.01.2018 Rule 31A has been inserted dealing with value of supply in case of lottery, betting, gambling and horse racing. Article 31A as was inserted provides as follows:*

"Section 31A. Value of supply in case of lottery, betting, gambling and horse racing. -

(1) Notwithstanding anything contained in the provisions of this Chapter, the value in respect of supplies specified below shall be determined in the manner provided hereinafter.

(2)(a) The value of supply of lottery run by State Governments shall be deemed to be 100/112 of the face value of ticket or of the price as notified in the Official Gazette by the organising State, whichever is higher.

(b) The value of supply of lottery authorised by State Governments shall be deemed to be 100/128 of the face value of

ticket or of the price as notified in the Official Gazette by the organising State, whichever is higher.

Explanation : - For the purposes of this sub-rule, the expressions—

(a) —lottery run by State Governments means a lottery not allowed to be sold in any State other than the organizing State;

(b) —lottery authorised by State Governments means a lottery which is authorised to be sold in State(s) other than the organising State also, and

(c) —Organising State has the same meaning as assigned to it in clause (f) of sub-rule (1) of rule 2 of the Lotteries (Regulation) Rules, 2010.

(3) The value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator."

78. *For determining the value of the lottery, now, there is statutory provision contained in Section 15 read with Rule 31A as noted above. Section 15 of the Act, 2017 by sub-section (2) it is provided what shall be included in the value of supply. What can be included in the value is enumerated in sub-clause (a) to (e) of sub-section (2) of Section 15. Further, subsection (3) of Section 15*

provides that what shall not be included in the value of the supply. When there are specific statutory provisions enumerating what should be included in the value of the supply and what shall not be included in the value of the supply we cannot accept the submission of the petitioner that prize money is to be abated for determining the value of taxable supply. What is the value of taxable supply is subject to the statutory provision which clearly regulates, which provision has to be given its full effect and something which is not required to be excluded in the value of taxable supply cannot be added by judicial interpretation.

79. *Further, Rule 31A as noted above, sub-rule (2) as amended clearly provides that value of supply shall be deemed to be 100/128 of the face value of ticket or of the prize as notified in the Official Gazette by the Organising State, whichever is higher. Learned Additional Solicitor General has explained the working of Rule 31A of Rules by giving an example:*

*"For example, if Rs. 100 is the face value of lottery ticket, 28% GST is levied only on Rs. 78.125[(100*28)/128]. GST amount will be 21.875. Therefore, Rs. 100 includes GST of 21.875 on the taxable value of Rs. 78.125. This is a mechanism to split the face value of Rs. 100 in two parts (A and B). A is*

the transaction value. B is GST on A. The formula as above is to come to A by reverse calculation."

(emphasis applied)

32. Relying on the aforesaid paragraph of the judgment, the revenue would contend that the amendment is valid and the amount that comes to the totalisator is liable to be taxed as it is an actionable claim and all actionable claims are liable to be taxed in terms of the Act itself. The Rules have only qualified it further bringing in a specific provision for taxing 100% of the value of the bet amount paid into the totalisator. The learned counsel would also submit that lottery being a part of the Schedule Rule 31A fell for interpretation before the Apex Court and the Apex Court having held that sale of lottery being an actionable claim 100% of the face of the ticket or the price as notified whichever is higher was liable for payment of tax as the petitioners stand on the same footing.

33. This submission of the learned counsel is not acceptable to me. The issue before the Apex Court in Skill Lotto's (supra) as already noticed was concerning a challenge to the definition of goods and services under the Central Goods and Services Act, 2017. The challenge of the petitioner therein was with regard to hostile discrimination to three categories of actionable claims only being lottery, betting and gambling. The contention was only against those three items which were brought within the ambit of Act, 2017 which it was held has no nexus with the object sought to be achieved. It is on this premise that the Apex Court proceeded to answer the issue brought before it. The question before the Apex Court as quoted hereinabove was answered holding that the sale of lottery was an actionable claim and taxing entire amount on the face value of the ticket or of the price money as notified in the official gazette whichever was higher was to be paid. On a reading of the judgment two things become

unmistakably clear. The face value of the ticket is known by its publication in the official gazette which would fall under the Act. In the case at hand, the amount that gets into the totalisator is not the prior determined face value of the entire bet, which is before the beginning of the race and exit of it from the totalisator after the race is over by paying the money to its last pie to the winner of the stake can neither be construed to be business, consideration, goods or supply as defined under the Act, as the amount that lies in the totalisator is only for a brief period which is held by the petitioners/Race Club in its fiduciary capacity. All that the petitioners would become liable for payment of tax under the Act is the commission that it receives for rendering service of holding the bet in the totalisator for a brief period in a fiduciary capacity. Though the Apex Court has considered what is actionable claim *qua* sale of a lottery ticket that would be inapplicable to the case at hand as the challenge before the Apex Court and

the answer was on a different facts and circumstances. Therefore, the supply of an actionable claim as indicated in the Rule cannot include the entire amount brought into the totalisator.

34. The entire *lis* revolves around the fact whether Rule 31A(3) runs counter to the provisions of the Act with particular reference to sub-section (2) of Section 7. Sub-section (2) of Section 7 declares actionable claims to be neither goods or services except lottery, betting and gambling. Rule 31A(3) which came into effect from 23.01.2018 inserted Rule 31A(3) to depict value of supply in case of lottery, betting, gambling and horse racing. Sub- rule (3) declare the value of supply of actionable claim in the form of chance to win in betting, gambling or horse racing in a race club shall be at 100% face value of the bet or the amount paid into the totalisator. Therefore, the act which deals with supply of goods, consideration, business would not apply to the

function of the totalisator. Making the entire bet amount that is received by the totalisator liable for payment of GST would take away the principle that a tax can be only on the basis of consideration even under the CGST. The consideration that the petitioners receive is by way of commission for planting a totalisator. This can be nothing different from that of a stock broker or a travel agent - both of whom are liable to pay GST only on the income - commission that they earn and not on all the monies that pass through them. Therefore, Rule 31A(3) insofar as it declares that the value of actionable claim in the form of chance to win in a horse race of a race club to be 100% of the face value of the bet is beyond the scope of the Act. This is also, *inter alia*, in the light of the fact that the activity of the petitioners being a game of skill and not a game of chance as is held by the Apex Court in the case of ***K.R.Lakshmanan*** (supra).

35. It is germane to notice the judgment of the Apex Court in the case of ***CELLULAR OPERATORS***[9] wherein the Apex Court has delineated the parameters of judicial review of subordinate legislation at para 34 which reads:

> ***"Parameters of judicial review of subordinate legislation***
>
> *34. In State of T.N. v. P.Krishnamurthy [State of T.N. v. P. Krishnamurthy, (2006) 4 SCC 517], this Court after adverting to the relevant case law on the subject, laid down the parameters of judicial review of subordinate legislation generally thus: (SCC pp. 528-29, paras 15-16)*
>
> > *"15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognised that a subordinate legislation can be challenged under any of the following grounds:*
> > *(a) Lack of legislative competence to make the subordinate legislation.*

[9] ***CELLULAR OPERATORS ASSOCIATION OF INDIA v. TRAI [(1026) 7 SCC 703]***

(b) Violation of fundamental rights guaranteed under the Constitution of India.

(c) Violation of any provision of the Constitution of India.

(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.

(e) Repugnancy to the laws of the land, that is, any enactment.

(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules).

16. The court considering the validity of a subordinate legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate legislation conforms to the parent statute. Where a rule is directly inconsistent with a mandatory provision of the statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the rule is not with reference to any specific

> *provision of the enabling Act, but with the object and scheme of the parent Act, the court should proceed with caution before declaring invalidity."*
>
> *(emphasis supplied)*

In terms of the afore-extracted judgment of the Apex Court, the provision has to conform to the statute under which the Rule is made and exceeding the limits of the authority conferred by the enabling Act is one of those circumstances where the Rule could be struck down. Article 246A which introduced Goods and Services Act, 2017, the Goods and Services Act, 2017, the definitions and other provisions of the Act do not bring in the activity of the petitioners under the ambit of the Act. Rule 31A(3) travels beyond what is conferred upon the Rule making authority under Section 9 which is the charging section, by way of an amendment to the Rule. The totalisator is brought under a taxable event without it being so defined under the Act nor power being

conferred in terms of the charging section which renders the Rule being made beyond the provisions of the Act. The same follows to the impugned KSGST Rules which are identical to the impugned CGST Rules. Therefore, Rule 31A(3) which does not conform to the provisions of the Act will have to be held ultra vires the enabling Act and consequently opens itself for being struck down. In view of the preceding analysis, I answer the issues that arose for my consideration in favour of the petitioners striking down Rule 31A(3) of the CGST Rules and Rule 31A of the KSGST Rules as being contrary to the CGST Act and hold that the petitioners are liable for payment of GST on the commission that they receive for the service that they render through the totalisator and not on the total amount collected in the totalisator.

36. For the praefatus reasons, I pass the following:

O R D E R

(i) Writ Petitions are allowed.

(ii) I declare Rule 31A(3) of the Central Goods and Services Tax Rules, 2017 as amended in terms of notification dated 23.01.2018 as ultra vires the provisions of the Central Goods and Services Tax Act, 2017 Act and resultantly, quash the same only insofar as it concerns the petitioners.

(iii) Consequently, I declare Rule 31A of the Karnataka Goods and Services Tax Rules, 2017 as ultra vires the provisions of the Karnataka Goods and Services Tax Act, 2017 and resultantly quash the same insofar as it concerns the petitioners.

(iv) Sequentially, the clarification/Circular No.27/01/2018-GST dated 4.1.2018 vide Annexure 'A' is also quashed insofar as it concerns the petitioners.

(v) The petitioners shall be entitled to all consequential benefits that flow from the aforesaid orders.

Sd/-
JUDGE

bkp
CT:MJ