REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO.961 OF 2018

SKILL LOTTO SOLUTIONS PVT. LTD. ...PETITIONER

VERSUS

UNION OF INDIA & ORS. ...RESPONDENTS

J U D G M E N T

ASHOK BHUSHAN, J.

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

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Reason:

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violative of Articles 14, 19(1)(g), 301 and 304 of the Constitution of India.

2. We need to notice certain background facts which has given rise to this writ petition.

2.1 The Parliament enacted the Lotteries (Regulation) Act, 1998 to regulate the lotteries and to provide for matters connected therewith and incidental thereto. Section 2(b) of the Act defines lottery which provides that "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 chances of a prize by purchasing tickets. Section 4 provides that a State Government may organise, conduct or promote the lottery subject to conditions enumerate therein. Different States have been organizing and conducting lotteries in accordance with the aforesaid Act. It is to be noted that prior

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to parliamentary enactment for regulating the lotteries, different States have enacted legislation regulating the lotteries which were the legislations even prior to the enforcement of the Constitution, levying tax on the sale of lottery tickets. Reference is made to Bengal Finance Sales Tax Act, 1941 and Madras General Sales Tax Act, 1939. Another Statute to be noticed is Bombay Lotteries (Control and Tax) and Prize Competitions (Tax) Act, 1958.

2.2 There has been a series of litigation regarding taxability of lottery tickets and this Court had occasion to deliver several judgments on the subject which we shall notice hereinafter. Service tax was levied on lottery tickets by Finance Act, 1994. A Circular dated 14/21.2.2017 was also issued providing for mode of determination of the amount of service tax. Rules were also

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framed namely Lotteries (Regulation) Rules, 2010 by the Central Government containing a set of rules for regulation of the lotteries organized by the States.

2.3 By Constitution (One Hundred and First Amendment) Act, 2016, Article 246A was inserted in the Constitution containing special provisions with respect to Goods and Services Tax. Article 269A and Article 279A were also inserted by same constitutional amendment. Article 279A provided for constitution of Goods and Services Tax Council. The Parliament enacted the Central Goods and Services Tax Act, 2017 (Act No.12 of 2017) to make provisions for levy and collection of tax on intra-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto. The Act came into force w.e.f. 12.04.2017. The

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Parliament also enacted the Integrated Goods and Services Tax Act, 2017 (Act No.13 of 2017), the Union Territory Goods and Services Tax Act, 2017 (Act No.14 of 2017) and the Goods and Services Tax (compensation to States) Act, 2017 (Act No.15 of 2017).

2.4 Under Section 2(52) of Central Goods and Services Tax Act, 2017, the term “goods” has been defined which provides that “goods” means every kind of movable property other than money and securities but includes actionable claim……. Chapter III of the Act provides for levy and collection of tax. Section 15 deals with value of taxable supply. After the enactment of Act No.12 of 2017, Notification was issued by Government of India dated 28.06.2017 in exercise of power conferred by sub-section (1) of Section 9 notifying the rate of the integrated tax. By the notification dated 28.06.2017 with

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regard to lottery run by the State Government, value of supply of lottery was deemed to be 100/112 of the face value of the ticket or the prize as notified in the official gazette of the organising State, whichever is higher. With regard to lotteries authorised by the State Government value of supply of lottery was deemed to be 100/128.

2.5 The writ petitioner, an authorised agent for the state of Punjab for sale and distribution of lotteries organised by State of Punjab aggrieved by the provisions of Act No.12 of 2017 as well as notifications issued therein filed the present writ petition praying for following reliefs:-

> “a) By appropriate writ, order or direction, quash and set aside the definition of 'Goods' under Section 2(52) of the Central Goods and Services Tax Act, 2017 [Annexure P-18 (Pg.141 to 143)], Impugned Notifications 01/2017 Central Tax (Rate), 01/2017

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[Annexure P-19 (Pg.144 to 148)], Integrated Tax (Rate), 01/201 [Annexure P-20 (Pg. 149 to 154)], and the State rate Notifications of the Respondent State of Punjab [Annexure P-21(Pg.155 to 157)] to the extent it levies tax on Lottery by declaring the same to be discriminatory and violative of Article 49, (19)(1)(g), 301, 304 of the Constitution of India and of the CGST, SGST and IGST Act.

b) In the Alternative, by appropriate writ, order or direction quash and set aside the impugned Notifications 01/2017 Central Tax (Rate), 01/2017 Integrated Tax (Rate) 01/2017 and the State rate Notification of the Respondent State of Punjab to the extent it levies tax on the face value of the lottery ticket without abating the prize money Component of the lottery ticket when the said amount never forms part of the income of the Petitioner or the lottery trade.

c) In the Alternative, by appropriate writ, order or direction quash and set aside the Impugned Notifications 01/2017 Central Tax (Rate), 01/2017 Integrated Tax (Rate) 01/2017 and the State rate Notification of the Respondent State of Punjab to the extent it levies two different rates on tax on the face value of the lottery ticket and declare that the Respondents can levy an

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> uniform rate of 12% Tax on Lottery irrespective of place where it is being sold, and after adjusting the prize money component from the face value of lottery tickets."

3. We have heard Shri Ravindra Shrivastava, learned senior counsel for the petitioner and Shri Vikramjit Banerjee, learned Additional Solicitor General for the Union of India. We have also heard Shri C.A. Sundaram, learned senior counsel for the intervenor.

4. Shri Shrivastava submits that lottery is not a goods and under the Central Goods and Services Tax Act, 2017, GST is levied only on goods, hence levy of GST on lottery is ultra vires to the Constitution. It is further submitted that the Constitution Article 366 sub-article (12) define goods to include all materials, commodities and articles. The definition in the Constitution exclude actionable claims since it only refers to materials, commodities and articles. The definition of goods given in Section

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2(52) of Central Goods and Services Tax Act, 2017 (hereinafter referred to as "Act, 2017") is unconstitutional. It is further submitted that Constitution Bench of this Court in **Sunrise Associates Vs. Govt. of NCT of Delhi and Ors., (2006) 5 SCC 603** has categorically held that lottery is not a good. When Constitution Bench has held that lottery is not a good, the provisions of Act, 2017 treating the lottery as goods is contrary to the judgement of Constitution Bench in **Sunrise Associates (supra)**. The lottery is not an actionable claim as is now sought to be included in the definition of goods given in Section 2(52). The provisions of Act, 2017 are self-contradictory in as much as the definition of actionable claim is as per definition of Transfer of Property Act, which is only the claim and not the goods. Further, under the definition of goods, actionable claims have been included as goods under Section 2(52). It is further submitted that GST is being levied on the face value of the lottery tickets which is impermissible since the face value of the

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tickets also includes prize money to be reimbursed to the winners of the lottery tickets. Learned senior Counsel submits that meaning of goods as occurring in the Constitution of India has to be taken in its legal sense. The definition of goods as occurring in Sale of Goods Act, 1930 clearly excludes actionable claims from the definition of goods, which definition has been held to be definition of goods under the Constitution by this Court in **State of Madras Vs. Gannon Dunkerley & Co., (Madras) Ltd., (1959) SCR 329.** The attempt of including the actionable claim within the meaning of goods seems to be deliberate attempt to make the lottery fall within the scope of GST which would render the definition of goods contrary to the meaning ascribed to it by the Constitution of India as held by **Gannon Dunkerley (supra).** The words defined in the Constitution of India will have to be ascribed their legal meaning and not the popular meaning.

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5. Shri Shrivastava further submits that the Parliament does not enjoy an absolute power to make an inclusive definition of something to be taxed which is not taxable otherwise. There is no absolute power with the legislature to define something. If such definition has no rationale, such artificial definition cannot be treated only for the purpose of assuming taxation power. Shri Shrivastava further submits that taxing actionable claim only is discriminatory since all actionable claims are not being taxed. Shri Shrivastava submits that according to Schedule III to the Act, 2017 under Item No.6 actionable claims other than lottery, betting and gambling have been treated neither as supply of goods nor supply of services. There is a clear hostile discrimination in taxing only lottery, betting and gambling whereas all other actionable claims have been left out of the taxing net. Shri Shrivastava has further submitted that the observations made in the judgment of Constitution Bench in **Sunrise Associates (supra)** that lotteries are actionable

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claims are only obiter dicta and cannot be treated to be ratio of the judgment.

6. Shri Vikramjit Banerjee, learned Additional Solicitor General refuting the submissions of learned senior counsel for the petitioner at the very outset submits that the writ petition filed by the writ petitioner under Article 32 is not maintainable. It is submitted that lottery is "***res extra commercium***" and no right under Article 19(1)(g) and Article 301 can be claimed by the petitioner with regard to lottery. The transaction of lottery tickets cannot be raised to the status of trade, commerce or intercourse. There is no right with the petitioner which can be enforced by writ petition filed under article 32 of the Constitution, hence, the writ petition being not maintainable deserves to be dismissed. Mr. Banerjee further submits that the laws relating to economic activity need to be viewed with greater latitude than laws touching civil rights. He further submits that

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courts are loath to interfere with taxing policies of the States. The fact of not levying tax on other actionable claims apart from lottery, betting and gambling cannot be said to be discriminatory. It is submitted that Constitution Bench of this court in **Sunrise Associates (supra)** has held that an actionable claim is a movable property and goods in the wider sense. The definition of goods given in Section 2(52) of Act 2017 is in accord with the Constitution Bench judgment of this court in **Sunrise Associates (supra)** and the argument that definition of goods given in Section 2(52) is contrary to above Constitution Bench judgment in **Sunrise Associates (supra)** is misplaced. The definition of goods given under Article 366(12) of the Constitution is an inclusive definition. Article 366(12A) defines goods and services tax to mean tax on supply of goods or services or both except taxes on the supply of alcoholic liquor for human consumption. Lottery having been judicially held to be an actionable claim is covered within the meaning of term goods under

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section 2(52). The Union Parliament has the competence to levy GST on lotteries under article 246A of the Constitution. Under Article 279A the GST Council has approved the levy of GST on lottery tickets, hence, the inclusion of actionable claims in the definition of goods under section 2(52) is in keeping with the legislative and taxing policy. It is well settled that courts would not review the wisdom or advisability or expediency of a tax. The levy on face value is authorised by section 15(1) read with section 15(5) of the Act, 2017 and Rule 31(A) of the Central Goods and Services Tax Rules, 2017. The levy of 28% tax on face value is neither discriminatory nor beyond the taxing policy/powers of the State.

7. Shri Banerjee further submits that during pendency of the writ petition, Rule 31A has been amended vide notification dated 02.03.2020 merging earlier two separate rates, i.e., regarding value of supply of lottery run by the State Government, which was

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earlier 100/112 and value of supply of lottery authorised by the State Government, which was 100/128 has been made uniform and by virtue of Rule 31A sub-rule(2), value of supply of lottery is one and the same, i.e., 100/128 of the face value of the ticket or prize as notified by the organising State, whichever is higher. He submits that in view of the above amendment dated 02.03.2020, which is not challenged in the present writ petition, the argument on the ground of discrimination in the rate of tax is no longer available to the petitioner. Shri Banerjee further submits that judgment of this Court in **State of Madras Vs. Gannon Dunkerley (supra)** relied by learned senior counsel for the petitioner is not attracted in the facts of the present case. It is submitted that the above decision dealt with the definition of term “sale” and was not concerned with the interpretation of “goods”.

8. Shri Sundaram appearing for the intervenor submits that the Constitution permits tax on goods and

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actionable claims being not taxed under the Constitution, the Parliament cannot have the power of taxing lottery. The taxing power of legislature is traceable to the Constitution alone. It is not open to the legislature to enlarge its taxing power. The word “goods” is not a new word and is a concept well known in the Constitution. Legislature cannot tax something which is constitutionally not goods. The Act, 2017 cannot include something that was not part of the definition as provided for in the Constitution. The definition of goods under the GST Act would necessarily have to be guided by the definition of goods given under the Constitution. Shri Sundaram further submits that in any event, the prize money in a lottery deducted from a lottery claim ought not to be taxed at all and the tax, if at all ought to be levied only on the invoice value, i.e., the transaction value of the lottery ticket or the lottery scheme after deducting the prize money. The lottery ticket has a zero value and is only a chance, which cannot be taxed. Shri Sundaram submits

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that lottery ticket is not even an actionable claim but only a chance, which is treated as an actionable claim by ratio of Constitution Bench judgment in **Sunrise Associates (supra)**, which will not be a good within the meaning of Article 366(12) of the Constitution. He submits that since it is not a good under the Constitution, Union and the States had no right to tax. A Statute cannot bring in a definition something as good, which Constitution itself excludes. Exclusion of all actionable claims from levy of GST except three, i.e., lottery, betting and gambling is nothing but hostile discrimination. Shri Sundaram submits that when the lottery is being permitted by the States, it is a commercial activity. When the State itself organise a lottery, it is not pernicious. No reason is forthcoming as to why only three actionable claims are taxed leaving all others out of tax net.

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9. Shri Ravindra Shrivastava in his rejoinder submits that he is not claiming any violation of right under Article 19(1)(g) or Article 301. He submits that writ petition is fully maintainable under Article 32 of the Constitution. A Parliamentary enactment on ground of violation of Article 14 is sought to be challenged in the writ petition, which writ petition is fully maintainable. Shri Shrivastava questions the legislative competence of Parliament to tax lottery as goods. Shri Shrivastava submits that he has placed reliance on the principle, which has been laid down by this Court in **Gannon Dunkerley (supra).** This court in **Gannon Dunkerley (supra)** laid down that definition of goods has to be taken as it is meant under the Sale of Goods Act, 1930, which definition is also to be taken for the purposes of Article 366(12) of the Constitution. Goods has to be interpreted in its legal sense. Goods cannot be defined in an artificial manner as has been done by the Parliament in Section 2(52). Shri Shrivastava submits that inclusive definition cannot be expansive

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and unrealistic. He submits that there is no similarity in goods and actionable claims. There cannot be artificial expansion of definition of goods. He submits that lottery acquires property only when prize is declared. A ticket is only a chance and GST is levied on every sale of lottery ticket, which is not permissible since it is not an actionable claim.

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.

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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:-

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(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

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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?

Question No. I

13. Learned Additional Solicitor General submits that petitioner, who is an authorised agent on behalf of the State of Punjab for the lotteries organised by the State of Punjab cannot complain violation of Article 19(1)(g) of the Constitution and lottery being a res extra commercium, the writ petition cannot be entertained. He submits that right to practice any profession or to carry on any occupation, trade or business does not extend to practicing a profession or carrying on an occupation, trade or business which is inherently vicious and

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pernicious. Shri Ravindra Shrivastava, learned senior counsel appearing for the petitioner submits that he is not claiming any violation of right under Article 19(1)(g) in the writ petition. In view of this submission of the learned senior counsel for the petitioner, we need not consider the writ petition with reference to violation of Article 19(1)(g).

14. Article 32 confers a right to move to Supreme Court for enforcement of the right conferred by the Part III, which is guaranteed by sub-article (1) of Article 32 of the Constitution. Article 32 is an important and integral part of the basic structure of the Constitution. Article 32 is meant to ensure observance of rule of law. Article 32 provides for the enforcement of the fundamental rights, which is most potent weapon. In the Constituent Assembly Debates, **Dr. B.R. Ambedkar** speaking about this Article made following statement:-

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> "If I was asked to name any particular Article in the Constitution as most important…… an Article without which the Constitution would be nullity – I could not refer, to any other Article except this one. It is the very soul of the constitution and the very heart of it."

15. By this petition, the petitioner has challenged the provisions of Central Goods and Services Tax Act, 2017 insofar as it imposes tax on the lottery. The grounds of challenge include violation of Article 14 of the Constitution of India. The levy of GST has been attacked as discriminatory. It is also submitted that there is a hostile discrimination in taxing only lottery, betting and gambling whereas leaving all other actionable claims from the taxing net as is evident by entry 6 of Schedule III of Act, 2017.

16. The writ petition alleging the violation of Article 14 specially with respect to a parliamentary Act can very well be entertained under Article 32. We may

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also notice that with regard to the matter of lottery itself, this Court had entertained a writ petition earlier under Article 32. Reference is made to judgment of this Court in **H. Anraj and Ors. Vs. State of Maharashtra, (1984) 2 SCC 292** where the writ petitioner, who were agents for the sale of tickets for the lottery filed a writ petition questioning the ban imposed on the sale of lottery tickets within the State of Maharashtra. Even judgment of this Court in **H. Anraj Vs. Government of Tamil Nadu, (1986) 1 SCC 414** was also a writ petition, which was heard alongwith a civil appeal questioning the leviability of the sales tax by the State Legislature on the sale of lottery tickets.

17. We are, thus, of the considered opinion that on the grounds, which have been raised in the writ petition, the writ petition cannot be said to be not maintainable under Article 32 and the preliminary objection made by the learned ASG that the writ

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petition cannot be entertained under Article 32 and is overruled.

Question Nos. II and III

18. Both the above questions being inter-related are taken together. The question to be considered is as to what is the legal meaning of goods and whether actionable claim can also be a part of goods. We need to first notice as to what is the concept of goods.

19. The Sale of Goods Act, 1930 defines goods in Section 2(7) in following words:

> **Section 2. Definitions.** In this Act, unless there is anything repugnant in the subject or context,—
>
> .....
>
> (7)"goods" means every kind of movable property other than actionable claims and money; and includes stock and shares,

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> 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;"

20. Section 311(2) of the Government of India Act, 1935 which has been referred by this Court as Constitution Act defines the goods as including all materials, commodities and articles. Entry 48 in List II of Seventh Schedule of the Government of India Act, 1935 was "Taxes on the Sale of Goods". Prior to the enforcement of the Constitution of India goods were defined in different provincial legislations. Article 366 of the Constitution of India contains heading 'definition'. Article 366 sub-clause (12) defines goods. Article 366 sub-clause (12) is as follows:

> "In this Constitution, unless the context otherwise requires, the following expression has, the meaning hereby respectively assigned to them, that is to say
>
> (12)goods includes all materials, commodities, and articles;"

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21. Another expression which we may need to notice is “actionable claim”. Section 3 of the Transfer of Property Act, 1882 which is interpretation clause defines the actionable claim in following words:

> “actionable claim" means 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 recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent;”

22. Now, we may notice the definition of goods in the Central Goods of Services Tax Act, 2017 which definition is under challenge in the present writ petition. Section 2 sub-section (52) defines goods in the following words:

> “Section 2(52)- “goods” means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached

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> to or forming part of the land which are agreed to be severed before supply or under a contract of supply;”

23. Section 2(1) defines actionable claim in following words:

> “Section 2(1) “actionable claim” shall have the same meaning as assigned to it in section 3 of the Transfer of Property Act, 1882;”

24. The definition of goods as contained in the Sale of Goods Act, 1930 in Section 2(7) : “goods” means every kind of movable property other than actionable claims and money; whereas definition of goods in Section 2(52) in the Act, 2017 while defining goods as every kind of movable property other than money and securities “but includes actionable claim”. We have noted above the various grounds of attack on the inclusion of actionable claim in the definition of goods under Section 2(52) as raised by the learned counsel for the petitioner. The first ground of

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attack of the learned counsel for the petitioner is that expression goods is well known concept and is also defined in the Constitution of India. The definition of goods as meant and understood in the Constitution of India has to be adopted and not departed by the Legislature.

25. Shri Srivastava in his usual persuasive style submits that goods as defined in the Sale of Goods Act, 1930 is the concept which has been held to be applicable with respect to goods as understood in the Constitution of India also. The Act, 2017 could not have taken any contrary definition and the contrary definition taken in Section 2(52) of Act, 2017 is unconstitutional and liable to be struck down. Sheet anchor of the arguments of Shri Srivastava is the Constitution Bench Judgment in **The State of Madras vs. Gannon Dunkerley & Co.(Madras) Ltd.,** 1959 SCR 379. In the above case this Court had occasion to consider Entry 48 in List II in Schedule VII of the

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Government of India Act, 1935 that is “Taxes on the sale of goods”. The Madras General Sales Tax Act, 1939 was amended by the Madras General Sales Tax (Amendment) Act, 1947 introducing several new provisions. Section 2(c) of the Act had defined “goods” as meaning “all kinds of movable property other than actionable claims, stocks and shares and securities and as including all materials, commodities and articles”. The provision was amended and so as to include materials “used in the construction, fitting out, improvement or repair of immovable property or in the fitting out, improvement or repair of movable property”. The definition of “sale” in Section 2(h) was also enlarged so as to include “a transfer of property in goods involved in the execution of a works contract”. The assessing authorities included in the turnover of respondent the value of the materials used in construction works which was contested by the respondent on the ground that power of the Madras Legislature to impose a tax on sales under Entry 48 in List II in Schedule VII of

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the Government of India Act, does not extend to imposing a tax on the value of materials used in works, as there is no transaction of sale in respect of those goods, and the provisions introduced by the Madras General Sales Tax(Amendment) Act, 1947, authorising the imposition of such tax are *ultra vires*. The High Court deciding the question in favour of the respondent held that expression sale of goods had the same meaning in Entry 48 which had in Sale of Goods Act, 1930. The State of Madras filed an appeal in this Court. The question which fell for consideration in the above case has been noticed in the judgment in the following words:

> "The sole question of determination in this appeal is whether the provisions of the Madras General Sales Tax Act are *ultra vires*, in so far as they seek to impose a tax on the supply of materials in execution of works contract treating it as a sale of goods by the contractor, and the answer to it must depend on the meaning to be given to the words "sale of goods" in Entry 48 in List II of Schedule VII to the Government of India Act, 1935...."

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26. This Court laid down that the expression “sale of goods” in Entry 48 has to be interpreted in its legal sense. Following observation was made at page 396:

> "...We must accordingly hold that the expression “sale of goods” in Entry 48 cannot be construed in its popular sense, and that it must be interpreted in its legal sense. What its connotation in that sense is, must now be ascertained...."

27. This Court at page 404 held:

> “...We think that the true legislative intent is that the expression “sale of goods” in Entry 48 should bear the precise and definite meaning it has in law, and that that meaning should not be left to fluctuate with the definition of “sale” in laws relating to sale of goods which might be in force for the time being. ...”

28. Interpreting the expression of “sale of goods” at page 413 this Court held:

> "...If the words “sale of goods” have to be interpreted in their legal sense, that sense can only be what it has in the interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the

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> legislature must be taken to have intended that they should be understood in that sense. In interpreting an expression used in a legal sense, therefore, we have only to ascertain the precise connotation which it possesses in law. ...”

29. Summing up its conclusion this Court at page 425 held:

> "To sum up, the expression “sale of goods” in Entry 48 is a *nomen juris,* its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. In a building contract which is, as in the present case, one, entire and indivisible- and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose tax on the supply of the materials used in such a contract treating it as a sale.”

30. We may also notice the following pertinent observation made by this Court in the above case at page 426:

> “....It is also a fact that acting on the view that Entry 48 authorises it, the States have enacted laws imposing a tax on the supply of materials in works contracts, and have been realising it, and their validity has been affirmed by

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> several High Courts. All these laws were in the statute book when the Constitution came into force, and it is to be regretted that there is nothing in it which offers a solution to the present question. We have, no doubt, Art. 248 and Entry 97 in List I conferring residual power of legislation on Parliament, but clearly it could not have been intended that the center should have the power to tax with respect to works constructed in the States. In view of the fact that the State Legislatures had given to the expression "sale of goods" in Entry 48 a wider meaning than what it has in the Indian Sale of Goods Act, that States with sovereign powers have in recent times been enacting laws imposing tax on the use of materials in the construction of buildings, and that such a power should more properly be lodged with the States rather than the center, the Constitution might have given an inclusive definition of "sale" in Entry 54 so as to cover the extended sense. But our duty is to interpret the law as we find it, and having anxiously considered the question, we are of opinion that there is no sale as such of materials used in a building contract, and that the Provincial Legislatures had no competence to impose a tax thereon under Entry 48. ”

31. The ratio of the above judgment which is heavily relied by Shri Srivastava is that this Court laid down that legal meaning of expression “sale of goods”

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has to be taken. It is further submitted that this Court relied on the definition of “sale of goods” as occurring in Sale of Goods Act, 1930 for interpreting Entry 48 in List II Schedule VII of the Government of India Act, 1935. We may notice that in the above judgment this Court had occasion to deal with the definition of term “sale” and explaining the legal meaning as existed at the time of enactment of Government of India Act, 1935, the above law was laid down.

32. We may further notice that by the Constitution (Forty-sixth Amendment) Act, 1982 sub-Article (29A) has been inserted in the Article 366 of the Constitution. Defining tax on sale or purchase of goods which is inclusive definition. the above Constitution Amendment was made with the intent to tax on the sale or purchase of goods on the transfer, otherwise than in pursuance of a contract, of property. Definition of sale as interpreted by this

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Court in **Gannon Dunkerley & Co.(Madras) Ltd. case (supra)** is no longer applicable any more and work contracts were also taxed. We may also notice subsequent Constitution Bench judgment in the case of M/s **Gannon Dunkerley and Co. and Others Vs. State of Rajasthan and others, 1993 (1) SCC 364 ,** where this Court had occasion to examine Article 366(29A) sub-clause (b) of the Constitution. This Court referring to its earlier judgment in **Builders' Association of India vs. Union of India, (1989) 2 SCC 645,** made following observations in paragraphs 25 and 30:

> "25. We find it difficult to accept this contention. The question whether as a result of the Forty Sixth Amendment an independent taxing power has been conferred on the States had arisen for consideration before this Court in Builders' Association case (supra) since it was specifically raised in the contentions urged on behalf of the States. While summarising the said contentions this Court has thus mentioned this contention Sub-clause (b) of Clause 29-A of Article 366 of the Constitution has conferred on the Legislatures of States the power to levy tax on works contract which is independent of the power conferred on the Legislatures of the States under Entry 54 of the State List,

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(p.346). The said contention was rejected with these observations.

> The object of the new definition introduced in Clause (29-A) of Article 366 of the Constitution is, therefore, to enlarge the scope of tax on sale or purchase of goods wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in Sub-Clauses (a) to (f) thereof wherever such transfer, delivery of supply becomes subject to levy. of sales tax. So construed the expression tax on the sale or purchase of goods in Entry 54 of the State List, therefore, includes a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also. The tax leviable by virtue of Sub-clause (b) of Clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution."

30. Having regard to the observations referred to above and the stand of the parties during the course of arguments before us, we do not consider it appropriate to reopen the issues which ; are covered by the decision in Builders' Association case (supra) and we will, therefore, deal with the matter in accordance with the law as laid down in that case that the expression tax on the sale or purchase of goods in Entry 54 of the State List includes a tax

> on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract also and the tax leviable by virtue of Sub-clause (b) of clause (29-A) of Article . 366 of the Constitution is subject to the discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. ”

33. Definition of goods as occurring in Section 311(12) of Government of India Act, 1935 although was noticed by this Court in **Gannon Dunkerley and Co.(supra)** but definition of goods was not further elaborated. Definition of goods as occurring in Article 366(12) is inclusive definition and does not specifically excludes actionable claim from its definition. Whenever inclusive definition is given of an expression it always intended to enlarge the meaning of words or phrases, used in the definition. In this context, it is relevant to refer to the judgment of this Court in **Reserve Bank of India vs. Peerless General Finance and Investment co.Ltd. And others,1987(1) SCC 424** with regard to the inclusive

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definition. Following was observed in paragraphs 32-33:

> "32....All that is necessary for us to say is this: Legislatures resort to inclusive definitions (1) to enlarge the meaning of words or phrases so as to take in the ordinary, popular and natural sense of the words and also the sense which the statute wishes to attribute to it, (2) to include meanings about which there might be some dispute, or, (3) to bring under one nomenclature all transactions possessing certain similar features but going under different names. ....
>
> 33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. ..."

34. The Constitution framers were well aware of the definition of goods as occurring in the Sale of Goods Act, 1930 when the Constitution was enforced. By providing an inclusive definition of goods in Article

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366(12), the Constitution framers never intended to give any restrictive meaning of goods.

35. In **The State of Madras v. Gannon Dunkerley & Co.**, **(supra)** this Court was concerned with the Provincial Legislatures under Entry 48 in List II in Schedule VII of the Government of India Act, 1935. We have extracted the observations made by this Court at page 426. This Court at page 426 of the judgment held that none of the Provincial Legislatures could have exercised the power conferred to make law with respect to sale of goods in the Lists, to impose a tax on construction contracts. This Court further observed that before such a law could be enacted it would have been necessary to have had recourse to the residual powers of the Governor-General under under Section 104 of the Act. This Court has further observed that it has no doubt, Article 248 and Entry 97 of List I conferring residual powers of legislation on Parliament, but clearly it could not

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have been intended that Centre should have power to tax with respect to works constructed in the States.

36. The Act, 2017 is an Act of Parliament in exercise of power of Parliament as conferred under Article 246A of the Constitution. Article 246A is extracted for ready reference:

> **"Article 246A. Special provision with respect to goods and services tax.** (1) Notwithstanding anything contained in articles 246 and 254, Parliament, and, subject to clause (2), the Legislature of every State, have power to make laws with respect to goods and services tax imposed by the Union or by such State.
>
> (2) Parliament has exclusive power to make laws with respect to goods and services tax where the supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.
>
> Explanation.—The provisions of this article, shall, in respect of goods and services tax referred to in clause (5) of article 279A, take effect from the date recommended by the Goods and Services Tax Council."

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37. When the Parliament has been conferred power to make law with respect to goods and services, the legislative power of the Parliament is plenary. The observations of this Court in **The State of Madras v. Gannon Dunkerley & Co.,(supra)** at page 426 are clear pointer that although the State Legislature had no legislative competence to enact impugned legislation but Parliament on the strength of residual power could have legislated. We are the view that the judgment of this Court in **The State of Madras v. Gannon Dunkerley & Co.,(supra)** does not lend support to the submission of the learned counsel for the petitioner that Parliament could not have defined the goods in Act, 2017, expanding the definition of goods as existing in Sale of Goods Act, 1930.

38. Now, we come to the Constitution Bench judgment of this Court in **Sunrise Associates vs. Govt. of NCT of Delhi and others, (2006) 5 SCC 603,** on which judgment learned counsel for both the parties have placed

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reliance. The above Constitution Bench was constituted to reconsider the earlier judgment of this Court in **H. Anraj and Ors. Vs. Government of Tamil Nadu and Ors. , (1986) 1 SCC 424.** Paragraphs 4 and 5 of the referring order (**Sunrise Associates vs. Govt. of NCT of Delhi and others, 2010 (10) SCC 420**) reads:

> "4. We are inclined to agree that the judgment in *H. Anraj* requires reconsideration for the reason that, prima facie, the only right of the purchaser of a lottery ticket is to take the chance of winning the prize. There seems to us to be no good reason to split the transaction of the sale of a lottery ticket into the acquisition of (I) the right to participate in the lottery draw, and (ii) the right to win the prize, dependent on chance.
>
> 5. In the case of *Vikas Sales Corpn. v. Commr. Of Commercial Taxes (1996 (4) SCC 433), a Bench of three learned Judges agreed with the decision in H. Anraj.* It is, therefore, necessary that these appeals should be heard by a Constitution Bench."

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39. Before we further look into the judgment of this Court in **Sunrise Associates**, we need to notice very briefly judgment of this Court in **H. Anraj**. In the above case the question arose out of the levy of tax on sales of lottery tickets under Tamil Nadu General Sales Act 1959. A writ petition was filed questioning the levy of tax imposed on sale of lottery tickets before this Court. The contention which was urged before this Court for challenging levy has been noticed in paragraph 5 of the judgment in the following words:

> "5. ....Counsel pointed out that under the charging provision contained in both the Acts (s. 3 of the Tamil Nadu Act 1959 and Section 4 of the Bengal Act 1941) the taxable event is the sale of goods (here lottery tickets) and the levy is imposed upon the taxable turnover of every dealer in regard to the sales of lottery tickets and therefore, quite clearly, each of the State Legislatures has purported to Act in the exercise of its own taxing power under Entry 54 of List II. But according to counsel Entry 54 of List II enables legislation imposing a tax, inter alia, on "sale of goods" that it is well-settled that the expression "sale of goods" has to be construed in the sense which it has in the Indian Sale of Goods Act, 1930(vide

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> Ganon Dunkerley's case) MANU/SC/0152/1958 : [1959]1SCR379 "goods under Section 2(7) thereof comprises within its scope every kind of movable property but specifically excludes actionable claim, that the essence of lottery is a chance for a prize, that a sale of such a chance is not a sale of goods and therefore the levy of sales tax on sale of lottery tickets would be beyond the ambit of Entry 54 of List II. Alternatively, counsel contended that a lottery ticket is an actionable claim as defined in Section 3 of Transfer of Property Act or a chose-in-action known to English law, the ticket itself being merely a slip of paper or memorandum evidencing the right of the holder thereof to claim or receive a prize if successful in the draw and therefore the impugned levy is outside Entry 54 of List II. …"

40. This Court in the above judgment noted the definitions of goods as occurring in Sale of Goods Act, 1930, sale of goods in Tamil Nadu General Sales Act, 1959, and definition of goods in Article 366 (12). After considering, this Court in **H Anraj** came to the conclusion that lottery to the extent that they comprise the entitlement to participate in the draw are "goods" properly so called, and they are

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not actionable claims. In paragraph 33 of the judgment following was laid down:

> "33. In the light of the aforesaid discussion my conclusions are that lottery tickets to the extent that they comprise the entitlement to participate in the draw are "goods" properly so called, squarely falling within the definition of that expression as given in the Tamil Nadu Act, 1959 and the Bengal Act, 1941, that to that extent they are not actionable claims and that in every sale thereof a transfer of property in the goods is involved. In view of these conclusions the impugned Amendments made in the two concerned Acts for levying tax on sale of lottery tickets will have to be upheld as falling within the legislative competence of the concerned State legislature under Entry 54 of List II in the Seventh Schedule and therefore, we think it unnecessary to go into the validity of the alternative submission made by the learned Attorney General that legislative competence for enacting the impugned Amendments would also be there under Entry 62 of List II in the Seventh Schedule of the Constitution."

41. As noted above the judgment of **H Anraj** came to be questioned. A Bench of three Judges in **Vikas Sales Corporation and another vs. Commissioner of Commercial Taxes and another, (1996) 4 SCC 433,**

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agreed with the decision of **H Anaraj** necessitating reference before the Constitution Bench in **Sunrise Associates,** the Constitution Bench noticed the question which arose before the Constitution Bench. In paragraph 29 it noticed that “only question we are called upon to answer is whatever the decision in **H Anaraj** that lottery tickets are “goods” for the purposes of Article 366(29A)(a) of the Constitution and the State sales tax laws, was correct”. The Constitution Bench in paragraph 33 observed that to the extent that the lottery ticket evidenced the right to claim the prize, it was not goods but an actionable claim and therefore not “goods” under the sales tax laws. In paragraph 33 following has been observed:

> "33. In other words, the second conclusion which we have indicated against 'B', was the ratio. The lottery ticket was held to be merely evidence of the right to participate in the draw and therefore goods the transfer of which was a sale. To the extent that the lottery ticket evidenced the right to claim the prize, it was not goods but an actionable claim and therefore not 'goods' under the Sales Tax

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> Laws. A transfer of it was consequently not a sale. The lottery ticket per se had no innate value. The interpretation by the Delhi High Court of the ratio in H. Anraj was in our opinion erroneous. ”

42. The pertinent observation has been made by the Constitution Bench in paragraph 36 wherein it noticed that in States sales tax laws actionable claims have been uniformly excluded from the definition of goods. This Court held “were actionable claims, etc. not otherwise includible in the definition of “goods” there was no need for excluding them”. Following has been laid down in paragraph 36:

> “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

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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."

43. In paragraph 40 the Constitution Bench reiterated that a sale of lottery ticket also amounts to the transfer of an actionable claim. Following was laid down in paragraph 40:

"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. Sarada Mills Ltd. SCC at p.880, (1972) 2 SCC 877). A claim for arrears of rent has also been held to be an actionable claim (State of Bihar v. Maharajadhiraja Sir Kameshwar Singh, SCR at p.910 (1952) SCR 889). A right to the credit in a provident fund account has also' been held to an actionable claim (Official Trustee, Bengal v. L. Chippendale, AIR 1944 Cal 335; Bhupati Mohan Das v. Phanindra Chandra Chakravarty and Anr., AIR 1935 Cal 756. In our opinion a sale of a lottery ticket also amounts to the transfer of an actionable claim."

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44. Further in paragraphs 46 and 48 this Court held lottery to be an actionable claim. Paragraphs 46 and 48 are to the following effect:

> "46. There is no value in the mere right to participate in the draw and the purchaser does not pay for the right to participate. The consideration is paid for the chance to win. There is therefore 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.
>
> 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 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. "

45. This Court concluded in paragraph 51 that in **H Anraj** it was incorrectly held that a sale of a lottery

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ticket involved a sale of goods. Paragraph 51 is as follows:

> "51 We are therefore of the view that the decision in **H. Anraj** incorrectly held that a sale of a lottery ticket involved a sale of goods. There was no sale of goods within the meaning of Sales Tax Acts of the different States but at the highest a transfer of an actionable claim. The decision to the extent that it held otherwise is accordingly overruled though prospectively with effect from the date of this judgment. "

46. One of the submissions which has been pressed by Shri Srivastava is that the observations made by the Constitution Bench in the above paragraphs that lottery is an actionable claim is based on an *obiter dicta* since the question was not up for consideration. He submits that Court was to consider as to whether lottery tickets are goods or not within the meaning of Section 2(j) of Tamil Nadu General Sales Act, 1959 as amended. The definition of goods in Section 2(j) as noticed by the Constitution Bench in paragraph 9 states that 'goods' means all kinds of

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movable property (other than newspaper, actionable claims, stocks, shares and securities). The exclusion of the actionable claims from the goods as enumerated in the definition is also a part of the definition. If a particular item is covered by exclusion it is obvious that it does not fall in the definition of the goods. When the Constitution Bench came to the conclusion that the lottery is an actionable claim it was considering the definition of 2(j) itself and what has been held by the Constitution Bench cannot be held to be *obiter dicta*.

47. Explaining *obiter dicta* this Court in **Municipal Corporation of Delhi vs. Gurnam Kau, 1989(1) SCC 101,** made following observation in paragraphs 10 and 11:

> "10....The only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and and are not authoritative. ....

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> 11. Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. ....”

48. It cannot be said that the question as to whether lottery is a goods or actionable claim had not arisen in the decision in **Sunrise Associates.** When an item was covered by excluded category, the said conclusion could have been arisen only after consideration of the definition and the exclusionary clause. We, thus, are not in agreement with the submission of the learned counsel for the petitioner that the observations of the Constitution Bench holding lottery as actionable claim is only obiter dicta and not binding. The Constitution Bench in **Sunrise Associates** has categorically held that lottery is actionable claim after due consideration which is ratio of the judgment. When Section 2(52) of Act, 2017 expanded the definition of goods by including actionable claim also, the said definition in Section 2(52) is in the line with the Constitution Bench

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pronouncement in **Sunrise Associates** and no exception can be taken to the definition of the goods as occurring in Section 2(52).

49. We are of the view that definition of goods under Section 2(52) of the Act,2017 does not violate any constitutional provision nor it is in conflict with the definition of goods given under Article 366(12). Article 366 clause(12) as observed contains an inclusive definition and the definition given in Section 2(52) of Act, 2017 is not in conflict with definition given in Article 366(12). As noted above the Parliament by the Constitution(One Hundred and First Amendment) Act, 2016 inserted Article 246A. a special provision with respect to goods and services tax. The Parliament was fully empowered to make laws with respect to goods and services tax. Article 246A begins with non obstante clause that is “Notwithstanding anything contained in Articles 246 and 254”, Which confers very wide power to make laws.

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The power to make laws as conferred by Article 246A fully empowers the Parliament to make laws with respect to goods and services tax and expansive definition of goods given in Section 2(52) cannot be said to be not in accord with the constitutional provisions.

50. Shri Shrivastava with his usual ability and skill submits that Parliament does not enjoy an absolute power to make an inclusive definition of something to be taxed, which is not taxable otherwise. The power of legislature to lay definition has limitations and cannot include something which cannot in rational sense be included. While goods and actionable claims are both different concepts, lottery has no resemblance with either. The legislature can only provide an extended meaning by inclusive definition only for preventing tax evasion. To support his submission, he has relied on judgment of this Court in **Bhopal Sugar Industries Ltd., M.P. And Anr. Vs. D.P. Dube, Sales Tax Officer and Anr., (1964) 1 SCR**

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481. The facts of the case have been noticed by the Constitution Bench of this Court in following words:

> "By this petition under Article 32 of the Constitution it is claimed that the definition of "retail sale" in Section 2(1) of the Act which seeks to render consumption by the owner of motor-spirit liable to tax under the Act by virtue of Section 3 is beyond the competence of the State Legislature and hence void and the order of the first respondent seeking to impose liability upon the Company for payment of tax infringes the fundamental rights of the Company under Article 19(1) (f) and (g) of the Constitution."

51. This Court held that consumption by an owner of goods in which he deals is not a sale within the meaning of sale of goods. It was held that extended definition, which includes consumption by a retail dealer of motor spirit or lubricants is beyond the competence of the State legislature. Following was laid down by this Court:-

> "Consumption by an owner of goods in which he deals is therefore not a sale within the meaning of the Sale of Goods Act and therefore it is not "sale of goods" within the meaning of Entry 54 List II Schedule VII of the Constitution. The legislative

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> power for levying tax on sale of goods being restricted to enacting legislation for levying tax on transactions which conform to the definition of sale of goods within the meaning of the Sale of Goods Act, 1930, the extended definition which includes consumption by a retail dealer himself of motor spirit or lubricants sold to him for retail sale" is beyond the competence of the State legislature. But the clause in the definition in, Section (1) "and includes the consumption by a retail dealer himself or on his behalf of motor spirit or lubricant to him for retail sale which is ultra vires the State Legislature because of lack of competence under Entry 54 in List II Schedule VII of the Constitution is saverable, from the rest of the definition, and that clause alone must be declared invalid."

52. In the above case, the Constitution Bench was considering the concept of "sale" and the extended definition of sale by which consumption by owner himself was treated to be sale was held ultra vires to the legislative competence of the State. The present is a case where we are not dealing with concept of sale and further in the case before us, it is the Parliament, which has enacted the Act, 2017

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which has competence to make a law imposing tax on goods and services.

53. We may notice another Constitution Bench Judgment of this Court in **Navinchandra Mafatlal Bombay Vs. Commissioner of Income Tax, Bombay City, AIR 1955 SC 58**. In the above case, challenge was made to Section 12-B of the Indian Income Tax Act, 1922. It was contended that Section 12-B, which authorise the levy of tax on capital gains was ultra vires to the central legislature. The Constitution Bench laid down following in paragraph 5:-

> "**5.** ……..If we hold, as we are asked to do, that the meaning of the word "income" has become rigidly crystallized by reason of the judicial interpretation of that word appearing in the Income Tax Act then logically no enlargement of the scope of the Income Tax Act, by amendment or otherwise, will be permissible in future. A conclusion so extravagant and astounding can scarcely be contemplated or countenanced.
>
> XXXXXXXXXX"

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54. This Court further laid down that a word appearing in a Constitution Act, must not be construed in any narrow and pedantic sense. Following was laid down in paragraph 6:-

> "6. It should be remembered that the question before us relates to the correct interpretation of a word appearing in a Constitution Act which, as has been said, must not be construed in any narrow and pedantic sense……"

55. Another judgment of Constitution Bench of this Court to be noticed is **Navnitlal C. Javeri Vs. K.K. Sen, Appellate, Assistant Commissioner of Income Tax, (1965) 1 SCR 909**. In the above case, question arose regarding constitutionality of Section 12(1B) read with Section 2(6A)(e) of Income Tax Act, 1922. It was contended before this court that a loan advanced to a shareholder by the company cannot, in any legitimate sense, be treated as his income; and so, the artificial manner in which such dividend is ordered to be treated as income by the impugned provision is not justified. It is true that this

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Court has laid down that Parliament cannot choose to tax as income an item which in no rational sense can be regarded as a citizen's income. Following was observed:-

> "This doctrine does not, however, mean that Parliament can choose to tax as income an item which in no rational sense can be regarded as a citizen's income. The item taxed should rationally be capable of being considered as the income of a citizen. But in considering the question as to whether a particular item in the hands of a citizen can be regarded as his income or not, it would be inappropriate to apply the tests traditionally prescribed by the Income Tax Act as such."

56. This Court held that legislature has not travelled beyond the legislative field while enacting the impugned provision. Following was observed:-

> "……There must no doubt be some rational connection between the item taxed and the concept of income liberally construed. If the legislature realises that the private controlled companies generally adopt the device of making advances or giving loans to their shareholders with the object of evading the payment of tax, it can step in to meet

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> this mischief, and in that connection, it has created a fiction by which the amount ostensibly and nominally advanced to a shareholder as a loan is treated in reality for tax purposes as the payment of dividend to him. We have already explained how a small number of shareholders controlling a private company adopt this device. Having regard to the fact that the legislature was aware of such devices, would it not be competent to the legislature to devise a fiction for treating the ostensible loan as the receipt of dividend? In our opinion, it would be difficult to hold that in making the fiction, the legislature has travelled beyond the legislative field assigned to it by Entry 82 in List I."

57. In view of what has been laid down by the Constitution Bench, as above, there has to be a rational connection between the item taxed but it is well settled that with regard to taxing policy of the legislature, the Courts have very limited role to play. It is useful to refer the observations of this Court in **Sri Krishna Das Vs. Town Area Committee, Chirgaon, (1990) 3 SCC 645** wherein paragraph 31, following was observed:-

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> "**31.** The contention that the tax is discriminatory in view of the exemptions granted to some of the products and to those that enter the TAC by rail or motor transport is equally untenable. It is for the legislature or the taxing authority to determine the question of need, the policy and to select the goods or services for taxation. The courts cannot review these decisions……."

58. We have already noted that under Article 246A notwithstanding anything contained in Articles 246 and 254, Parliament has power to make laws with respect to goods and services tax. Article 246A is a special provision with regard to goods and services tax w.e.f. 16.09.2016, which special power has to be liberally construed empowering the Parliament to make laws with respect to goods and services tax. The submission of learned counsel for the petitioner is that actionable claim has been artificially and with a view to assume the power to tax has been included in Section 2(52). The Constitution Bench of this Court in **Sunrise Associates (supra)** has held that actionable claims are includible in the definition of

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goods and had actionable claims were not includible there was no need for excluding them. The Constitution Bench held “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 purpose of Sales Tax Acts and but for this statutory exclusion, an actionable claim would be “goods” or the subject-matter of ownership”.

59. Thus, in view of what has been said above by the Constitution Bench, the submission of the petitioner that actionable claims have been artificially included in the definition of goods cannot be accepted. The Constitution Bench has clearly laid down that actionable claims are goods. We, thus, do not agree with the submission of Shri Shrivastava that Parliament has exceeded its jurisdiction in including actionable claims in the definition of “goods” under Section 2(52).

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60. We, thus, answer Question Nos.II and III in the following manner:

Answer No.II

61. The inclusion of actionable claim in definition "goods" as given in Section 2(52) of Central Goods and Services Tax Act, 2017 is not contrary to the legal meaning of goods and is neither illegal nor unconstitutional.

Answer NO.III

62. The Constitution Bench judgment of this Court in **Sunrise Associates** has laid down that lottery is an actionable claim as proposition of law. The observation cannot be said to be *obiter dicta*.

Question No. IV

63. As noted above, another limb of attack mounted by Shri Shrivastava is on the ground of hostile

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discrimination while taxing lottery, betting and gambling and excluding other actionable claims. Reference is made to Item No.6 of Schedule III of Act, 2017. Schedule III begins with heading "activities or transactions which shall be treated neither as supply of goods nor supply of services. Item No.6 of Schedule III is as follows:-

> "Item No.6 – Actionable claims other than lottery, betting and gambling."

64. Submission is that assuming the lotteries to be actionable claims, the Act, 2017 suffers from a hostile discrimination in first including actionable claims within the category of goods and then excluding all actionable claims from supply of goods and creating a further exception of lottery, betting and gambling in Schedule III. Further submission is that there is no intelligible differentia for excluding lotteries, betting and gambling from the other actionable claims, nor does such exclusion have any nexus with the purpose of the Act. In support

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of the above preposition, Shri Shrivastava has relied on judgment of this Court in **Ayurveda Pharmacy and Anr. Vs. State of Tamil Nadu, (1989) 2 SCC 285**. This Court in the above case laid down that when the commodities belong to same class or category, there must be rational basis for discrimination between one commodity and other for purpose of imposing the tax. In paragraph 6 of the judgment, following has been laid down:-

> **6.** ……It is open to the legislature, or the State Government if it is authorised in that behalf by the legislature, to select different rates of tax for different commodities. But where the commodities belong to the same class or category, there must be a rational basis for discriminating between one commodity and another for the purpose of imposing tax. It is commonly known that considerations of economic policy constitute a basis for levying different rates of sales tax. For instance, the object may be to encourage a certain trade or industry in the context of the State policy for economic growth, and a lower rate would be considered justified in the case of such a commodity. There may be several such considerations bearing directly on the choice of the rate of sales tax, and so long as there is good

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> reason for making the distinction from other commodities no complaint can be made. What the actual rate should be is not a matter for the courts to determine generally, but where a distinction is made between commodities falling in the same category a question arises at once before a court whether there is justification for the discrimination……”

65. Another judgment laying down the same preposition as relied by learned counsel for the petitioner is **State of Uttar Pradesh and Ors. Vs. Deepak Fertilizers & Petrochemical Corporation Ltd., (2007) 10 SCC 342.**

66. There can be no dispute to the above preposition laid down by this Court. The question to be answered is as to whether there is any rational reason for taking out only three actionable claims, i.e., lottery, betting and gambling while leaving other actionable claims from tax net.

67. Whether there is any rational basis for taking out only these three actionable claims is a question to

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be answered, whether the legislature has created a hostile discrimination by taxing only these three whereas leaving other actionable claims out of the tax net.

68. Even before enforcement of the Constitution of India, there were several legislations by different States regulating lottery, betting and gambling. Before a Constitution bench of this court in **State of Bombay Vs. R.M.D. Chamarbaugwala and Anr., AIR 1957 SC 699**, this Court had occasion to consider the nature of activities akin to lottery, betting and gambling. Bombay Lotteries and prize Competition Control and Tax Act, 1948 was enacted to regulate the tax, lotteries and prize competition. The petitioner, who was conducting and running the prize competition from State of Mysore where entries were received from various parts of India including the State of Bombay had challenged the Act, 1948 and the Rules namely Bombay Lotteries and Prize Competitions Control and

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Tax Rules, 1952. The writ petition was allowed by the High Court, against which State of Bombay had filed an appeal. The Constitution Bench held the activity of respondent as activity of gambling nature. This Court laid down following in paragraphs 41 and 46:-

> **"41.** It will be abundantly clear from the foregoing observations that the activities which have been condemned in this country from ancient times appear to have been equally discouraged and looked upon with disfavour in England, Scotland, the United States of America and in Australia in the cases referred to above. We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Article 19(1)(*g*). We find it difficult to persuade ourselves that gambling was ever intended

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to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Article 301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word “trade”, “business”, or “intercourse”. We are, however, clearly of opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Articles 19(1)(*g*) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Article 19(1)(*g*) or Article 301 of our Constitution.

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

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> newspaper printed and published outside the State of Bombay. The prize competitions being of a gambling nature, they cannot be regarded as trade or commerce and as such the petitioners cannot claim any fundamental right under Article 19(1)(*g*) in respect of such competitions, nor are they entitled to the protection of Article 301. The result, therefore, is that this appeal must be allowed and the orders of the lower courts set aside and the petitions dismissed and we do so with costs throughout. The state will get only one set of costs of hearing of this and Appeals Nos. 135, 136, & 187 of 1956 throughout."

69. In a later decision, **Union of India and Ors. Vs. Martin Lottery Agencies Limited, (2009) 12 SCC 209**, this Court had occasion to consider levy of service tax on the lottery tickets. This Court had held that law as it stands today recognises lottery to be gambling, which is res extra commercium. In paragraph 17, following has been laid down:-

> **"17.** We fail to persuade ourselves to agree with the aforementioned submission. The law, as it stands today (although it is possible that this Court in future may take a different view), recognises lottery

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> to be gambling. Gambling is res extra commercium as has been held by this Court in *State of Bombay* v. *R.M.D. Chamarbaugwala* [AIR 1957 SC 699] and *B.R. Enterprises* v. *State of U.P.* [(1999) 9 SCC 700]"

70. Lottery, betting and gambling are well known concepts and have been in practice in this country since before independence and were regulated and taxed by different legislations. When Act, 2017 defines the goods to include actionable claims and included only three categories of actionable claims, i.e., lottery, betting and gambling for purposes of levy of GST, it cannot be said that there was no rationale for including these three actionable claims for tax purposes. Regulation including taxation in one or other form on the activities namely lottery, betting and gambling has been in existence since last several decades. When the parliament has included above three for purpose of imposing GST and not taxed other actionable claims, it cannot be said that there is no

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rationale or reason for taxing above three and leaving others.

71. It is a duty of the State to strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The Constitution Bench in **State of Bombay Vs. R.M.D. Chamarbaugwala and Anr. (supra)** has clearly stated that Constitution makers who set up an ideal welfare State have never intended to elevate betting and gambling on the level of country's trade or business or commerce. In this country, the aforesaid were never accorded recognition of trade, business or commerce and were always regulated and taxing the lottery, gambling and betting was with the objective as noted by the Constitution Bench in the case of **State of Bombay Vs. R.M.D. Chamarbaugwala and Anr. (supra)**, we, thus, do not accept the submission of

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the petitioner that there is any hostile discrimination in taxing the lottery, betting and gambling and not taxing other actionable claims. The rationale to tax the aforesaid is easily comprehensible as noted above. Hence, we do not find any violation of Article 14 in Item No. 6 of Schedule III of the Act, 2017.

Question No.5

72. The petitioner's contention is that price money should be abated from the face value of the lottery ticket for levy of GST. The prices are paid to the winner of the lottery ticket by the distributer/agent. It has been submitted that in the earlier regime of service tax also for the purposes of computing service tax the value of service tax was taken into account as the total face value of the ticket sold minus the total cost of the ticket and the prize money paid by the distributor. Further, service tax was levied at a miniscule rate of 0.82%

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and 1.2% as compared to the exorbitant rate of 28% which is being charged now. The question to be answered is that while determining the face value of the ticket for levy of tax the price money of the ticket is to be excluded. The reliance has also been placed on the circular dated 14.02.2007 which provided that the value of taxable service shall be taken into account at the total face value of the ticket sold minus (a) the total cost of the ticket paid by the distributor to the State Government and (b) price money paid by the distributer. Further, reliance has been placed on the Constitution Bench judgment of this Court in **M/s. Gannon Dunkerley and co. and others vs. State of Rajasthan and others, 1993(1) SCC 364,** where the Constitution Bench laid down that the value of the goods involved in execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. The reliance is placed on paragraph 47 of the judgment which is to the following effect:

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> "45. Keeping in view the legal fiction introduced by the Forty Sixth Amendment whereby the works contract which are entire and indivisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. This would mean that labour charges for execution of works item no (i) amounts paid to a sub-contractor for labour and services [item No. (ii), charges for planning, designing and architect's fees [item No. (iii), charges for obtaining on hire or otherwise machinery and tools used in the execution of a works contact [item No. (iv), and the cost of consumables such as water, electricity, fuel etc. which are consumed in the process of execution of a works contract item No. (v) and other similar expenses for labour and services will have to be excluded as charges for supply of labour and services. ..."

73. We may first notice the statutory scheme under the Act, 2017 and Rules framed thereunder regarding determination of value of supply. Section 15 of the Act deals with value of taxable supply. Section 15 (1) to (4) which is relevant for the present case is as follows:

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Section 15. (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply.

(2) The value of supply shall include——

(a) any taxes, duties, cesses, fees and charges levied under any law for the time being in force other than this Act, the State Goods and Services Tax Act, the Union Territory Goods and Services Tax Act and the Goods and Services Tax (Compensation to States) Act, if charged separately by the supplier;

(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;

(c) incidental expenses, including commission and packing, charged by the supplier to the recipient of a supply and any amount charged for anything done by the supplier in respect of the supply of goods or services or both at the time of, or before delivery of goods or supply of services;

(d) interest or late fee or penalty for delayed payment of any consideration for any supply; and

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(e) subsidies directly linked to the price excluding subsidies provided by the Central Government and State Governments.

Explanation.——For the purposes of this sub-section, the amount of subsidy shall be included in the value of supply of the supplier who receives the subsidy.

(3) The value of the supply shall not include any discount which is given——

(a) before or at the time of the supply if such discount has been duly recorded in the invoice issued in respect of such supply; and

(b) after the supply has been effected, if —(i) such discount is established in terms of an agreement entered into at or before the time of such supply and specifically linked to relevant invoices; and

(ii) input tax credit as is attributable to the discount on the basis of document issued by the supplier has been reversed by the recipient of the supply.

(4) Where the value of the supply of goods or services or both cannot be determined under sub-section (1), the same shall be determined in such manner as may be prescribed."

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

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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;

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(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."

75. Rule 31A has now been amended vide notification dated 02.03.2020 by which following sub-rule (2) has been substituted:

"Sub-Rule (2). The value of supply of lottery 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."

76. We may first deal with submission of the petitioner based on circular dated 14.02.2007. Circular dated 14.02.2007 was issued when the service tax was levied on distributor of paper lottery. The circular provided for determination of value of taxable

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service by deducting total cost of ticket paid by the distributor and price money paid by the distributor, that was regime when it was treated as business auxilliary service rendered by distributor. The said circular has no relevance or application after the 2017 enactment.

77. We may also refer to Constitution Bench judgment of **Gannon Dankerley and Co.(second)** where this Court laid down that value of the goods involved in the execution of the works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services. As noted above in paragraph 47 this Court noted items which were to be excluded while determining the value of goods involved in the works contract. What was held by this Court in the above case relates to works contract which judgment has no application on the issue which has arisen before us that is abatement of price money while determining the value of the lottery.

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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, sub-section (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

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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."

80. The value of taxable supply is a matter of statutory regulation and when the value is to be transaction value which is to be determined as per Section 15 it is not permissible to compute the value of taxable supply by excluding prize which has been contemplated

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in the statutory scheme. When prize paid by the distributor/agent is not contemplated to be excluded from the value of taxable supply, we are not persuaded to accept the submission of the petitioner that prize money should be excluded for computing the taxable value of supply the prize money should be excluded. We, thus, conclude that while determining the taxable value of supply the prize money is not to be excluded for the purpose of levy of GST.

81. Learned counsel for the petitioner has also relied on various taxing statutes of other countries, wherein the petitioner submits that prize money of the lottery ticket are not being computing for levy of tax. He has referred to provisions of United Kingdom-Value Added Tax, 1994; Excise Tax Act of Canada; Goods and Services Tax Act of Singapore; Goods and Services Act, 1985 of New Zealand and Sri Lanka-Value Added Tax Act, 2002. When the levy of GST, determination of taxable value are governed by the Parliamentary Act in this country, we are of the view

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that legislative scheme of other countries may not be relevant for determining the issue which has been raised before us. The taxing policy and the taxing statute of various countries are different which are in accordance with taxing regime suitable and applicable in different countries. The issue which has been raised before us has to be answered by looking into the statutory provisions of the Act, 2017 and the Rules framed therein which govern the field.

82. In the foregoing discussion we are of the view that the petitioner is not entitled to reliefs as claimed in the writ petition.

83. We may, however, notice that petitioner has prayed for grant of liberty of challenging the notifications dated 21.02.2020/02.03.2020 by which rate of GST for lottery run by the State and lottery organized by the State have been made the same, which notification has not been challenged in the writ petition since the

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notifications were issued during the pendency of writ petition. Petitioner has prayed that the said issue be left open, the notification having not been challenged in the writ petition liberty be given to the petitioner to challenge the same in appropriate proceedings. We accept the above prayer of the petitioner. The petitioner shall be at liberty to challenge the notifications dated 21.02.2020/02.03.2020 (challenging the rate of levy tax uniformally at 28%) separately in appropriate proceedings. Subject to liberty as above, the writ petition is dismissed.

.....J.
(Ashok Bhushan)

.....J.
(R.Subhash Reddy)

.....J.
(M.R. Shah)

NEW DELHI,
DECEMBER 03, 2020.

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