

M/S. SUNRISE ASSOCIATES
v.
GOVT. OF NCT OF DELHI AND ORS.

APRIL 28, 2006

[RUMA PAL, B.N. SRIKRISHNA, S.H. KAPADIA, TRAUN CHATTERJEE
AND P.P. NAOLEKAR, JJ.]

Delhi Sales Tax Act, 1975;

Lottery tickets—Whether goods—Sale of—Liability to sales tax—Held, sale of a lottery ticket amounts to the transfer of an actionable claim and as such it is not a sale of goods for the purposes of the sales tax laws—Article 366(29A)(a), Constitution of India—Sections 3 and 130 of the Transfer of Property Act, 1882.

On the question whether sales tax can be levied by States on the sale of lottery tickets, a Bench of two-Judges has held in *H. Anraj v. Government of Tamil Nadu*, [1986] 1 SCC 414, that a lottery involved (i) the right to participate in the lottery draw, and (ii) the right to win the prize, depending on chance. The Judges were of the opinion that while the second right was a chose in action and therefore not 'goods' for the purpose of the levy of Sales Tax, the first was a transfer of a beneficial interest in moveable goods and was a sale within the meaning of Article 366(29-A)(d) of the Constitution and consequently subject to sales tax. Against the decision of the High Court of Delhi dated 17th July, 1998 in *Haryana State Lotteries v. Govt. of NCT*, (1998) 46 DRJ 397 disposing of a series of writ petitions construing *H. Anraj* and holding that lottery tickets were goods and are liable to sales tax under the Delhi Sales Tax Act, 1975, several appeals have been filed before this Court. In the appeal preferred by Sunrise Associates, the order of reference was made on the *prima facie* view that there was no good reason to split a lottery into two separate rights and, therefore, the judgment in *H. Anraj* reconsideration. Since in the case of *Vikas Sales Corporation v. Commissioner of Commercial Taxes*, (supra), a Bench of three-Judges had agreed with the decision of *H. Anraj*, it was necessary that the appeal had to be heard by a Constitution Bench.

The appellants, who are dealers in the sale of lottery tickets, have

A contended that *H. Anraj* wrongly drew a distinction between the right to participate in the draw and chance to win the prize. Such bifurcation was artificial as both were part of the same transaction. It was further contended that even on the “two rights” theory each of those rights would be chose in action. As far as the decision in *Vikas Sales* is concerned, it was contended that the additional reason given namely, free transferability for holding that

B a particular thing was goods, was erroneous. It was pointed out that even actionable claims such as negotiable instruments and debentures may be freely transferable. As far as the DEPB is concerned, according to the appellants, it was in the nature of a notional credit which an exporter acquires on export by way of an entry in a passbook. This credit was utilizable by the importer to be

C adjusted against the import duty payable on goods imported. The credit was freely transferable but it could not be said to be goods only by that reason. At best it was an actionable claim. According to some appellants, the right to participate in a draw which was held to be a sale of goods by *H. Anraj* was only a right to service rendered by the lottery organizers. There was no transfer of any moveable property in the entire transaction. It was also

D submitted that when there were divisible elements in a contract, the predominant element would determine the nature of the right. As far as lottery tickets were concerned, the right to participate in the draw was overwhelmingly dominated by the element of the right to claim the prize by the prize winner. It was contended that value wise the prize money constituted

E 90% of the total amount collected from the purchasers whereas the value of the right to participate would be limited to the administrative expenses for holding the draw which accounted for the balance 10% of the monies collected.

The State Governments have not taken consistent stands. The

F Government of the National Capital Territory of Delhi advanced the very arguments which had been made, considered and rejected in *H. Anraj's* case. It was submitted that the reasoning in *H. Anraj* did not require reconsideration. It had held the field for several decades and had been followed in a number of cases. It was submitted that a lottery ticket represents a

G commodity within the meaning of Article 366(12).

The State of Tamil Nadu on the other hand submitted that the lottery ticket itself was a chattel or goods and, therefore, falls squarely within the net of taxation under the Tamil Nadu Sales Tax Act. It was submitted that there can be a value addition to the lottery tickets by valuing all the rights

H accruing to the holder of the ticket, but these additional rights did not detract

from the fact that the lottery ticket itself is an item of merchandise and liable to be sold as such. Reliance was also placed on the General Clauses Act with regard to the definition of moveable property. It was contended that since a lottery ticket was not immoveable property it was moveable property and, therefore, goods. A

The State of Maharashtra addressed on the question whether the sale of a Duty Entitlement Pass Book (DEPB) should attract sales tax under the Bombay Sales Tax Act, 1959. It was submitted that considering the valuable right conferred by the DEPB, it is an item of movable property and therefore 'goods' within the definition of the word in Section 2(13) of the Act. The definition in common with other State Sales Tax Acts includes every kind of movable property other than actionable claims and money. It was submitted that "actionable claim" as defined in Section 3 of the Transfer of Property Act, is substantially different from the concept of "chose in action" in English law and it was submitted that what is a 'chose in action' was not necessarily an actionable claim. The reasoning in *Vikas Sales* was urged to be reaffirmed. The other appearing States have adopted the arguments made on behalf of the NCT, Delhi and Tamil and Maharashtra. B C D

Answering question referred to it, the Court

HELD: 1.1. The sale of a lottery ticket amounts to transfer of an actionable claim and as such it is not a sale of goods for the purposes of the sales tax laws. A lottery ticket has no value in itself. It is a mere piece of paper. Its value lies in the fact that it represents a chance or a right to conditional benefit of winning a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this right. 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. [440-C-D; 441-H; 442-A] E F

H. Anraj v. Government of Tamil Nadu, [1986] 1 SCC 414, partially overruled. G

Vikas Sales Corporation and Anr. v. Commissioner of Commercial Taxes and Anr., [1996] 4 SCC 433; *The State of Madras v. Gannon Dunkerley & Co. Ltd.*, [1958] SCR 379; *United States v. Mueller*, (1942) 1 ELR 224; *Said v. Butt*, (1920) 3 KB 497; in *B.R. Enterprises v. State of U.P. and Ors.*, [1999] H

A 2 SCC 700, referred to.

Tata Consultancy Services v. State of Andhra Pradesh, [2005] 1 SCC 308; *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.*, (1906) 33 Cal. 702; *Bharat Nidhi Ltd. v. Takhatmat*, [1969] 1 SCR 595; *Union of India v. Sarada Mills*, [1972] 2 SCC 877, 880; *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh*, [1952] SCR 889, 910; *Official Trustee, Bengal v. L. Chippendale*, AIR (1944) Cal. 335 and *Bhupati Mohan Das v. Phanindra Chandra Chakravarty and Anr.*, AIR (1935) Cal. 756, relied upon.

Sesha Ayyar v. Krishna Ayyar, AIR (1936) Mad. 225, approved.

C *Nirmal Agency v. Commercial Tax Officer*, (1992) 86 STC 450, impliedly overruled.

D 1.2. A lottery in essence is a chance for a prize, the sale of a lottery ticket can only be a sale of that chance. There is no other element. Every right can be sub-divided into lesser rights. When these lesser rights culminate in a legally recognizable right, it is the latter which defines the right. The right to participate in the draw is a part of the composite right of the chance to win and it does not feature separately in the definition of the word "lottery". It is an implicit part of the chance to win. It is not a different right. The separation is specious since neither of the rights can stand without the other. A draw without a chance to win is meaningless and one cannot claim a prize without participating in the draw. In fact the transfer of the chance to win assumes participation in the draw. [441-D-F]

E *State of West Virginia v. John Wassick*, 156 W. Va. 128, 191 S.E.2d 283; and *Van Rassel v. Kroon*, [1953] HCA 3: (1953) 87 CLR 298 (4 March (1953))
F and *Jones v. Carter*, 8 Q.B. 134, referred to.

CIVIL ORIGINAL JURISDICTION : Civil Appeal No. 4552 of 1998.

From the Judgment and Final Order dated 17.7.1998 of the Delhi High Court in C.W.P. No. 529 of 1997.

G WITH

CA. Nos. 4553-4557/1998, 4913, 6256-6260/1998, 177-179/1999, 2155/2000, 6893 of 2003 & SLP(C) Nos.2469, 2473, 2614, 2617, 2507, 2841, 5225-26, 5608, 11129, 11768 of 2000, W.P. (C) Nos. 33/2002, 127/2005 & SLP (C) Nos. 18466/
H 2002, 16270/2001, 6907/2002 and 17894/2002.

H.N. Salve, K.K. Venugopal, T.S. Doabia, T.L.V. Iyer, S. Ganesh, S. Kural, P.N. Misra, Bhargava V. Desai, S.K. Singh, Ms. M. Grover, Ms. A. Singh, Ms. S. Parwanda, Ms. N. Kanungo, Anil K. Kher, Kapil Kher, A.K. Jain, Rajesh Jain, Devendra Singh, Dr. S. Balwada, H.R. Bhatia, M. Sumantaray, Ghanshyam, Pradeep Misra, Sushil Kumar Jain, S.K. Bhattacharya, L.K. Paonam, S.P. Sharma, Yogesh Jogia, Ms. Hetu Arora, K.V. Vijayakumar, Jay Savla, Vinay Kumar Garg, Hari Shankar, K. Randhir Chawla, Pradeep Tara, Ms. Renu Saigal, Praveen Kumar, Ms. Prasanthi Prasad, T.P. Hariprasad, Ms. Anju Bala, Mrs. Padmavathy, J.B. Ravi, M.P.S. Tomar, Mrs. Anil Katiyar, A. Desai, Jay Savla, Ms. Meenakshi Ogra, Ms. Reena Bagga, K.K. Mani, K.B. Sandeep, K.V. Vijayakumar, D.S. Mahra, Subramonium Prasad, Jai Kishore, Abhay Kumar, R.K. Adsure, Ajay Siwach, P. Dahiya, Sandeep Sharma, T.V. George, Ms. Renu Sahgal, E. Abhar, S.K. Jain, Pradeep Agarwal, A.P. Dhamija, Ram Viwas, H.D. Thanvi, S. Singhania and B.K. Sharma for the appearing parites.

The Judgment of the Court was delivered by

RUMA PAL, J. By an order dated 13th October, 1999 in *Sunrise Associates v. Government of NCT of Delhi & Ors.*, [2000] 1 SCC 420, the decisions of this Court in *H. Anraj v. Government of Tamil Nadu*, [1986] 1 SCC 414 as well as *Vikas Sales Tax Corporation & Anr. v. Commissioner of Commercial Taxes and Anr.*, [1996] 4 SCC 433 (in so far as it affirmed the decision in the *H. Anraj*) have been referred to this Bench for re-consideration.

The question in *H. Anraj* was whether sales tax can be levied by States on the sale of lottery tickets. A bench of two-Judges held that a lottery involved (i) the right to participate in the lottery draw, and (ii) the right to win the prize, depending on chance. The learned Judges were of the opinion that while the second right was a chose in action and therefore not 'goods' for the purposes of the levy of Sales Tax, the first was a transfer of a beneficial interest in moveable goods and was a sale within the meaning of Article 366 (29-A)(d) of the Constitution and consequently subject to sales tax.

The immediate cause for the present reference was a decision of the High Court of Delhi dated 17th July, 1998 in *Haryana State Lotteries v. Govt. of NCT*, (1998) 46 DRJ 397 disposing of a series of writ petitions which construed *H. Anraj* and held that lottery tickets were goods and are liable to sales tax under the Delhi Sales Tax Act, 1975. Several of the writ petitioners before the Delhi High Court have challenged the decision of the Delhi High Court before this Court. In the appeal preferred by *Sunrise Associates*, the order of reference was made on the *prima facie* view that there was no good

A reason to split a lottery into two separate rights and, therefore, the judgment in *H. Anraj* required reconsideration. Since in the case of *Vikas Sales Corporation v. Commissioner of Commercial Taxes* (supra), a bench of three-Judges had agreed with the decision of *H. Anraj*, it was necessary that the appeal should be heard by a Constitution Bench.

B The relevant provisions of law which formed the background in the context of which the decision of *H. Anraj* was given are considered by us prior to assessing the correctness of the decision. Entry 54 of List II of the Seventh Schedule read with Article 246(3) of the Constitution gives the States power to make laws with respect to “taxes on the sale or purchase of goods other than newspapers subject to the provisions of Entry 92(A) of List I”. The meaning of the expression “sale of goods” was considered by a Constitution Bench in the *The State of Madras v. Gannon Dunkerley & Co. Ltd.*, [1958] SCR 379. The question arose in connection with assessment of sales tax under the Madras General Sales Tax Act, 1939 for the year 1949-50 on the value of materials used by the respondent-assessee for the execution of a works contract. The Constitution, although it defines ‘goods’ under Article 366(12) as ‘including all materials, commodities and articles’, contains no definition of the expression ‘sale of goods’. The Court held that the expression ‘sale of goods’ in the entry cannot be construed in its popular sense and it must be interpreted in its legal sense. After considering various authorities as well as the provisions of the Sales of Goods Act, 1930, the Court held that the expression ‘sale of goods’ is what it means in the Sale of Goods Act, 1930. A contract for the sale of goods, according to Section 4(1) of the Sale of Goods Act, 1930 “is a contract whereby the seller agrees to transfer the property in goods to the buyer for a price”.

F This classical concept of sale was held to apply to the entry in the legislative list in that there had to be three essential components to constitute a transaction of sale before tax could be imposed - namely, (i) an agreement to transfer title (ii) supported by consideration, and (iii) an actual transfer of title in the goods. In the absence of any one of these elements it was held that there was no sale. Therefore, a contract under which a contractor agreed to set up a building would not be a contract for sale. It was one contract, entire and indivisible and there was no separate agreement for sale of goods justifying the levy of sales tax by the provincial legislatures. Parties could have provided for two independent agreements, one relating to the labour and work involved in the erection of the building and the second relating to the sale of the material used in the building in which case the latter would be an

agreement to sell and the supply of materials thereunder, a sale. Where there was no such separation, the contract was a composite one and it was not classifiable as a sale. A

The narrow definition put on the word "sale" by *Gannon Dunkerley* was followed by Courts in several cases excluding other transactions such as hire purchase, long leases etc. from the scope of "sale" on the ground that one or more of the three components of sale were absent. Consequently Article 366 of the Constitution was amended by introduction of Clause 29A which is to the effect that "tax on the sale or purchase of goods" for the purposes of the Constitution would include six particular transactions which were, by virtue of judicial decision, excluded from the phrase. We are concerned with the first class of transaction so included namely: B

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration; C

xxx xxx xxx D

xxx xxx xxx

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made; E

Therefore in order to constitute a deemed sale within the meaning of Art. 366(29A)(a), there has to be 1) goods 2) a transfer of property in the goods 3) valuable consideration. The requirement of an agreement for sale is not necessary for constituting a sale under this sub-clause. The absence of any one of these elements would mean that the transaction far from being a sale within the *Gannon Dunkerley* definition, would not even be a deemed sale within the extended definition of sale under Art. 366(29A)(a). F

Following the Constitutional amendment, the States amended their respective Sales Tax Laws to incorporate the constitutional definition of tax on the sale or purchase of goods. The States of Tamil Nadu and West Bengal were no exception. The Tamil Nadu General Sales Tax Act 1959 and the Bengal Finance (Sales Tax) Act 1941 were both amended to incorporate new definitions of 'sale'. G

H

A Section 2(j) and Section 2(n) of the Tamil Nadu Act defined 'goods' and 'sale' as noted in *H. Anraj* thus:

B "2(j) 'Goods' means all kinds of movable property (other than newspapers, actionable claims, stocks and shares and securities) and includes all materials, commodities, and articles (including those to be used in the fitting out improvement or repair of moveable property); and all growing crops, grass or things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale;

C 2(n) 'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable considerations;

D Other clauses give extended meanings which are not material.

Similarly the expressions 'goods' and 'sale' were defined in Section 2(d) and (g) respectively of the Bengal Act thus:

E "2(d) 'goods' include all kinds of movable property other than actionable claims, stocks, shares or securities;

2(g) 'sale' means any transfer of property in goods for cash or deferred payment or other valuable consideration.

These definitions of 'goods' reflect the definition of the word in the Sales of Goods Act, 1930 which reads:

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

G All these definitions exclude *inter alia* an actionable claim from the definition of "goods". An "actionable claim" has in turn been defined in Section 3 of The Transfer of Property Act, 1882 as meaning:

H "a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property-not in the

possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent”.

The dealers’ (who were the appellants in *H. Anraj*) contention was that a lottery ticket was only a slip of paper or memorandum evidencing the right of the holder to share in the prize or the distributable funds and was merely a convenient mode for ascertaining the identity of the winner. It was contended that a sale of a lottery ticket was nothing more than a sale of a chance to win a prize, and therefore, it was merely a contingent interest in money. Alternatively it was submitted that the lottery tickets were in fact actionable claims within the meaning of Section 3 of the Transfer of Property Act, 1882, and therefore, outside the definition of “goods” under the Sales Tax Acts.

The Court in *H. Anraj* came to the conclusion that the transfer of a lottery ticket upon consideration paid by the purchaser was not a mere contract creating an obligation or right in *personam* between the parties, but was in the nature of a grant. The Court noted the various definitions of the word “lottery” in dictionaries and authoritative text books and decisions of the Courts and held that a lottery was composed of three essential elements, namely: 1) chance, 2) consideration, and 3) prize. As we have mentioned earlier, according to the learned Judges a sale of a lottery ticket conferred on the purchaser two rights *viz.* a) the right to participate in the draw and b) the right to claim a prize contingent upon the purchaser being successful in the draw. Both were held to be beneficial interests in moveable property, the former “*in praesenti*”, the latter in *future* depending on the contingency. To use the words of the Court:-

“Lottery tickets, not as physical articles, but as slips of paper or memoranda evidence not one but both these beneficial interests in moveable property which are obviously capable of being transferred, assigned or sold and on their transfer, assignment or sale both these beneficial interests are made over to the purchaser for a pricethe two entitlements which arise on the purchase of a lottery ticket are of a different character, inasmuch as the right to participate arises in *praesenti*, that is to say it is a choate on perfected right in the purchaser on the strength of which he can enforce the holding of the draw, while the other is inchoate right which is to materialize in future as and when the draw takes place depending upon his being successful

A in such draw. Moreover, on the date of the purchase of the ticket, the entitlement to participate in the draw can be said to have been delivered into the possession of the purchaser who would be enjoying it from the time he has purchased the ticket and as such it would be a chose in possession while the other would be an actionable claim or a chose in action as has been held in *Jones v. Carter*¹ and *King v. Connare*² on which counsel for the dealers relied. It is thus clear that a transfer of the right to participate in the draw which takes place on the sale of a lottery ticket would be a transfer of beneficial interest in movable property to the purchaser and therefore, amounts to transfer of goods and to that extent it is no transfer of an actionable claim; to the extent C that it involves a transfer of the right to claim a prize depending on a chance it will be an assignment of an actionable claim.”

It was also said that :-”

D “If incorporeal right like copyright or an intangible thing like electric energy can be regarded as goods exigible to sales tax there is no reason why the entitlement to a right to participate in a draw which is beneficial interest in moveable property of incorporeal or intangible character should not be regarded as ‘goods’ for the purpose of levying sales tax. As stated above lottery tickets which comprise such entitlement do constitute a stock-in-trade of every dealer and therefore E his merchandise which can be bought and sold in the market. Lottery tickets comprising such entitlement, therefore, would fall within the definition of ‘goods’ given in the Tamil Nadu Act and the Bengal Act.”

F The Court also rejected the submission of the counsel for the dealers that a sale of a lottery ticket does not involve the transfer of any right. The contention was that just as a company before it issues share capital does not hold any of the shares which come to exist only in the hands of the shareholders through subscribing for them, so in the case of a lottery the promoter sponsoring it, does not have the right to participate in the draw or G the right to claim the prize. Since one cannot ‘transfer’ what one does not have, it was argued that there was no ‘transfer’ of any right by the promoter to the purchaser of the ticket. The submission was rejected on the ground

1. 8Qb 134; 115 ER 825, 826.

2. 61 CLR 596. 607.

that the analogy was inapt as Joint Stock Companies were governed by the provisions of the Company's Act and Memorandum of Articles of Association of the Company's whereas the issue of lottery tickets was governed by raffle schemes and the rules framed therefor by the promoter containing provisions which were entirely different. Secondly, the context in which lottery tickets were issued was different from the context in which shares were allotted. Moreover it was said that:-

"...the agreement that comes into existence as a result of the sale of a lottery ticket by a promoter to a buyer is in the nature of a grant conferring the two rights (the right to participate and the right to claim a prize) as distinct from the right to receive or claim a prize in such draw, needs to be highlighted which has a significant bearing on the question whether the lottery tickets would be goods or not. It cannot be disputed that this right to participate in the draw under a lottery ticket remains a valuable right till the draw takes place and it is for this reason that licenced agents or wholesalers or dealers of such tickets are enabled to effect sales thereof till the draw actually takes place and as such till then the lottery tickets constitute their stock-in-trade and therefore a merchandise. In other words, lottery tickets, not as physical articles but as slips of paper or memoranda evidencing the right to participate in the draw must in a sense be regarded as the dealer's merchandise and therefore, goods, capable of being bought or sold in the market."

The Court also relied upon the decision in *United States v. Mueller*³ to hold that for the purpose of imposing levy of sales tax lottery tickets comprising the entitlement to a right to participate in a draw will have to be regarded as goods properly so called.

Justice Mukharji (as His Lordship then was) concurred with some hesitation with the decision of Justice Tulzapurkar, J. who delivered the main judgment, particularly with regard to the question of transfer of a right by the seller of the lottery ticket to the purchaser. This hesitation is more than clearly brought out in his short judgment where he said:-

"I have, however persuaded myself to agree with the order proposed by my learned brother because the promoter of lottery in the cases involved before us is the State and the grant is in derogation of the

3. (1942) 1 ELR 224.

A rights of the State. The State in my opinion, can create such right for the first time, and such transfer of the right by the state as a promoter would amount to a transfer of property and being in consideration of a price can be sale of goods. I should, however, not be understood to accept the position that if private lotteries are permissible and legal, a point which need not be decided in these cases, in such cases sale of goods was involved or not.”

B Both learned Judges, however, agreed that the right to participate in the draw under a lottery ticket was a valuable right and that lottery tickets, not as physical articles but as slips of paper or memoranda evidencing the right to participate in the draw can be regarded as dealers merchandise and, therefore goods which are capable of being bought or sold in the market.

C The logical corollary of this was drawn by the Karnataka High Court in the case of *Nirmal Agency v. Commercial Tax Officer*, (1992) 86 STC 450. Given the dual nature of the rights involved in a lottery as decided by D *H. Anraj*, the High Court said that sales tax could be levied only on that part of the lottery ticket which had been held to amount to a transfer of goods. The Assessing Authority would have to determine how much of the consideration was referable to the right to participate in the draw and how much to the chance of winning, and thereafter assess the dealer on the first part alone.

E *Vikas Sales Corporation & Anr. v. Commissioner of Commercial Taxes and Anr.*⁴ was a case where the issue before this Court was whether REP Licenses or replenishment licences were goods so that Sales tax could be levied on their transfer. The REP licences gave permission to an exporter to take credit for the exports made. Such credit could be adjusted against import duty if and when the exporter wished to import goods. The Import and Export Policy, 1993, which contained the relevant provisions relating to REP licences specifically permitted transferability of the licences. This Court considered the definition of “goods” in the Constitution, in the Sales of Goods Act 1930, the Central Sales Tax Act, 1956 the Tamil Nadu General Sales Tax Act, 1959, the F Karnataka Sales Tax Act, 1957, as well as the Kerala General Sales Tax Act, 1963 and said that all these definitions provided that goods mean *inter alia* all kinds of moveable property. The definition of property in several authorities was thereafter considered and it was concluded that the material on record showed a uniform emphasis on the expansive manner in which the expression

H 4. [1996] 4 SCC 433.

'property' was understood. It was noted that debts, contracts and other choses in action were chattels no less than furniture or stock in trade. Similarly, patents, copyrights and other rights *in rem* were also included within the meaning of moveable property. The Court rejected the argument that REP licences were actionable claims within the meaning of Section 3 of the Transfer of Property Act and said:-

"When these licences/scrips are being bought and sold freely in the market as goods and when they have a value of their own unrelated to the goods which can be imported thereunder, it is idle to contend that they are in the nature of actionable claims. Indeed, in *H. Anraj* the main contention of the petitioners was that a lottery ticket was in the nature of an actionable claim. The said argument was rejected after an elaborate discussion of law on the subject. We agree with the said decision and on that basis hold that the REP Licences/Exim Scrips are not in the nature of actionable claims." (para 35 pg.449)

Relying on the decision in *H. Anraj* and *Vikas Sales Corporation* the Delhi High Court in the judgment on which the referral order has been passed, rejected a challenge to the constitutional validity of Section 4(1)(cc) of the Delhi Sales Tax Act, 1975 as introduced by the Delhi Sales Tax (Second Amendment) Act 1994 with effect from 2.1.1995. The amendment was challenged by the dealers on various grounds. It was argued *inter alia* that the sale of lottery tickets did not involve a sale of goods within the meaning of the Sales Tax Act, and that even if it did, only that right which was held to be a sale namely, the right to participate in the draw could be subject to Sales Tax. The value of the right to win the lottery prize would have to be segregated. The Delhi High Court rejected the submissions based on its reading of the decision in *H. Anraj* and *Vikas Sales*.

We are not called upon to decide all the grounds taken by the appellants impugning the decision except to the extent that the High Court relied on the two decisions which are under reconsideration before us. The High Court construed the decision in *H. Anraj* and held that it was an authority for the proposition that lottery tickets themselves are goods. It was said:-

"A reading of the judgment (in *Anraj*) in its entirety.....leaves no manner of doubt that the lottery tickets have been held to be merchandise or trading stock of the dealer and hence goods properly so-called. Undoubtedly, one of the components of the lottery tickets

A is a right to enforce the holding of the draw and to claim a prize but that is a right running along with the lottery tickets. It does not detract from the holding that the lottery tickets are goods. Even at the risk of repetition we would like to stress that in *H. Anraj-II* their Lordships have held the lottery ticket comprising of two components in the process of analyzing its juridical concept. But at more places than one they have clearly said (i) lottery tickets are movable property as opposed to immovable property, (ii) the assumption of lottery tickets being contractual documents cannot militate against their being goods, (iii) till the draw takes place they are freely marketed as goods, and (iv) they must be regarded as the dealer's merchandise or stock in trade freely changing hands. The lottery tickets have a value of their own *de hors* their components".

Having held that the decision in *H. Anraj* decided that the lottery tickets themselves were goods, the High Court differed with the view expressed by the Karnataka High Court in *Nirmal Agency v. Commercial Tax Officer* (supra) which had proceeded on the basis that *H. Anraj* had held that the goods in a sale of lottery tickets comprised of the rights to participate in the draw and the chance to win.

Before us the appellants, who are dealers in the sale of lottery tickets, have submitted that *H. Anraj* wrongly drew a distinction between the right to participate in the draw and chance to win the prize. It was submitted that such bifurcation was artificial as both were part of the same transaction. It was submitted that even on the "two rights" theory each of those rights would be choses in action. As far as the decision in *Vikas Sales* is concerned, it was submitted that the additional reason given namely free transferability for holding that a particular thing was goods, was erroneous. It was pointed out that even actionable claims such as negotiable instruments and debentures may be freely transferable. As far as the DEPB is concerned, according to the appellants, it was in the nature of a notional credit which an exporter acquires on export by way of an entry in a passbook. This credit was utilizable by the importer to be adjusted against the import duty payable on goods imported. The credit was freely transferable but it could not be said to be goods only by that reason. At best it was an actionable claim.

According to some appellants, the right to participate in a draw which was held to be a sale of goods by *H. Anraj* was only a right to services rendered by the lottery organizers. There was no transfer of any moveable

property in the entire transaction. It was also submitted that when there were divisible elements in a contract, the predominant element would determine the nature of the right. As far as lottery tickets were concerned, the right to participate in the draw was overwhelmingly dominated by the element of the right to claim the prize by the prize winner. It was contended that value wise the prize money constituted 90% of the total amount collected from the purchasers whereas the value of the right to participate would be limited to the administrative expenses for holding the draw which accounted for the balance 10% of the monies collected. Several other issues have been raised on the merits of the decision of the Delhi High Court. As we have said, those other issues will have to be considered separately at the time of disposal of the appeals after we have disposed of the subject matter of this reference.

The State Governments have not taken consistent stands. As far as the Government of the National Capital Territory of Delhi is concerned, it was submitted that the very arguments which had been made, considered and rejected in *H. Anraj's* case were sought to be reagitated again by the appellants. It was submitted that the reasoning in *H. Anraj* did not require reconsideration. It had held the field for several decades and had been followed in a number of cases. It was submitted that a lottery ticket represents a commodity within the meaning of Article 366(12).

The State of Tamil Nadu on the other hand submitted that the lottery ticket itself was a chattel or goods and, therefore, falls squarely within the net of taxation under the Tamil Nadu Sales Tax Act. It was submitted that there can be a value addition to the lottery tickets by valuing all the rights accruing to the holder of the ticket, but these additional rights did not detract from the fact that the lottery ticket itself is an item of merchandise and liable to be sold as such. Reliance was also placed on the General Clauses Act with regard to the definition of moveable property. It was contended that since a lottery ticket was not immoveable property it was moveable property and therefore, goods.

The State of Maharashtra has addressed us on the question whether the sale of a Duty Entitlement Pass Book (DEPB) should attract sales tax under the Bombay Sales Tax Act, 1959. It was submitted that considering the valuable right conferred by the DEPB, it is an item of movable property and therefore 'goods' within the definition of the word in Section 2(13) of the Act. The definition in common with other State Sales Tax Acts, includes every kind of movable property other than actionable claims and money. It was submitted

A that “actionable claim” as defined in Section 3 of the Transfer of Property Act, is substantially different from the concept of “chose in action” in English law and it was submitted that what is a ‘chose in action’ was not necessarily an actionable claim. The reasoning in *Vikas Sales* (supra) has been relied on, which it was urged, should be reaffirmed. The other appearing States have adopted the arguments made on behalf of the NCT, Delhi and Tamil Nadu and Maharashtra.

C It is necessary at this stage to clarify that the order of reference in *Sunrise v. NCT, Delhi* (supra) is limited to the question whether lottery tickets are ‘goods’. We have not been called upon to answer the question whether REP licences (or the DEPB which has replaced the REP licences) are ‘goods’. Although we have heard counsel at length on this, having regard to the limited nature of the reference, we do not decide the issue. The decision in *Vikas Sales* was referred to only because it approved the reasoning in *Anraj* and not because the referring Court disagreed with the conclusion in *Vikas Sales* that REP licences were goods for the purposes of levy of sales tax. D Indeed REP licences were not the subject matter of the appeal before the referring Court and could not have formed part of the reference. The only question we are called upon to answer is whether the decision in *H. Anraj* that lottery tickets are goods for the purposes of Article 366 (29A)(a) of the Constitution and the State Sales Tax Laws, was correct.

E The first dispute which has to be resolved is what *H. Anraj* in fact held. Did it hold, as was found by the Karnataka High Court in *Nirmal Agency v. Commercial Tax Officer*, that the lottery tickets were goods only because they represented the right to participate in the draw? Or did it hold, as has been found by the Delhi High Court, that the lottery tickets themselves were the goods which were sold? The conflict is a direct consequence of the somewhat ambiguous language used in *H. Anraj*.

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

H B: In paragraph 27 of the report (which we have quoted earlier), the

Court categorically stated that a lottery ticket was goods - not as a physical article but as a slip of paper or memorandum evidencing a) the right to participate in the draw and b) the right to claim a prize contingent upon the purchaser being successful in the draw. This is reiterated in paragraph 29 of the report. It was also stated that for the purpose of imposing the levy of sales tax, lottery tickets comprising the entitlement to a right to participate in a draw would have to be regarded as goods properly so called.

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

D: Then again in paragraph 30 it was said:-

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

This again indicates that it is the right to participate in the draw which was being described as the goods. Otherwise it was not necessary to refer to other incorporeal rights which had been judicially recognized as goods for the purposes of levying sales tax such as copyrights or intangible rights such as electricity.

Ultimately, however, clarity in the matter is brought about by the concurring judgment of Justice Sabyasachi Mukharji (as his Lordship then was), when he said:-

"I, however, agree with my learned brother that the right to participate in the draw under a lottery ticket remains a valuable right till the draw takes place and it is for this reason that licensed agents or wholesalers or dealers of such tickets are enabled to effect sales thereof till the draw actually takes place and therefore lottery tickets, not as physical articles but as slips of paper or memoranda *evidencing* the right to participate in the draw can be regarded as dealer's merchandise and therefore goods which are capable of being brought or sold in the market".

In other words, the second conclusion which we have indicated against

- A '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 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.

Interestingly, some of the States, in particular the State of Tamil Nadu have expressly jettisoned the reasoning in *H. Anraj* and have asserted that the ticket itself is the subject matter of sale which is assessable to Sales tax.

- C The submission is unacceptable.

The word 'goods' for the purposes of imposition of sales tax has been uniformly defined in the various sales tax laws as meaning all kinds of moveable property. The word "property" may denote the nature of the interest in goods and when used in this sense means title or ownership in a thing.

- D The word may also be used to describe the thing itself. The two concepts are distinct, a distinction which must be kept in mind when considering the use of the word in connection with the sale of goods. In the Dictionary of Commercial law by A.H. Hudson (1983 Edn.) the difference is clearly brought out. The definition reads thus:

- E " 'Property' -In commercial law this may carry its ordinary meaning of the subject-matter of ownership. But elsewhere, as in the sale of goods it may be used as a synonym for ownership and lesser rights in goods". Hence, when used in the definition of 'goods' in the different sales tax statutes, the word 'property' means the *subject matter* of ownership. The same word in the context of a 'sale' means the transfer of the *ownership* in goods.

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

H

Distinct elements are deducible from the definition of 'actionable claim' in Section 3 of the Transfer of Property Act. An actionable claim is of course as its nomenclature suggests, only a claim. A claim might connote a demand, but in the context of the definition it is a right, albeit an incorporeal one. Every claim is not an actionable claim. It must be a claim either to a debt or to a beneficial interest in movable property. The beneficial interest is not the movable property itself, and may be existent, accruing, conditional or contingent. The movable property in which such beneficial interest is claimed, must not be in the possession of the claimant. An actionable claim is therefore an incorporeal right. That goods for the purposes of Sales Tax may be intangible and incorporeal has been held in *Tata Consultancy Services v. State of Andhra Pradesh*, [2005] 1 SCC 308.

What then is the distinction between actionable claims and other goods on the sale of which sales tax may be levied?

The Court in *Vikas Sales* (supra) said "when these licenses/scrips are being bought and sold freely in the market as goods and when they have a value of their own unrelated to the goods which can be imported thereunder, it is idle to contend that they are in the nature of actionable claims". It was assumed that actionable claims are not transferable for value and that that was the difference between 'actionable claims' and those other goods which are covered by the definition of 'goods' in the Sale of Goods Act, 1930 and the Sales Tax Laws. The assumption was fallacious and the conclusion in so far as it was based on this erroneous perception, equally wrong.

The Transfer of Property Act 1882, deals with transfer of actionable claims in Chapter VIII of that Act. Section 130 of the Transfer of Property Act provides that an actionable claim may be assigned for value. A right on the fulfillment of certain conditions to call for delivery of goods mentioned in a contract is an actionable claim and assignable under Section 130. (See *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.*, (1906) 33 Cal.702). There may also be assignments of an actionable claim *dehors* Section 130 (See *Bharat Nidhi Ltd. v. Takhatmat*, [1969] 1 SCR 595). Negotiable Instruments, another species of actionable claim, are transferable under the Negotiable Instruments Act 1881. Transferability is therefore not the point of distinction between actionable claims and other goods which can be sold. The distinction lies in the definition of actionable claim. Therefore if a claim to the beneficial interest in movable property not in the vendee's possession is transferred, it is not a sale of goods for the purposes of the sales tax laws.

A 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*, [1972] 2 SCC 877, 880). A claim for arrears of rent has also been held to be an actionable claim (*State of Bihar v. Maharajadhiraja Sir Kameshwar Singh*, [1952] SCR 889, 910). 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 & Anr.*, AIR 1935 (Cal.) 756). In our opinion a sale of a lottery ticket also amounts to the transfer of an actionable claim.

C A lottery ticket has no value in itself. It is a mere piece of paper. Its value lies in the fact that it represents a chance or a right to a conditional benefit of winning a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this right. The Court in *H. Anraj*, as we have seen, held that a lottery ticket is a slip of paper or memoranda evidencing the transfer of certain rights. We agree.

E Webster's Words and Phrases Permanent Edition, Vol. 25-A Supplement defines a 'ticket' as "a printed card or a piece of paper that gives a person a specific right, as to attend a theatre, ride on a train, claim or purchase, etc." The Madras High Court in *Sesha Ayyar v. Krishna Ayyar*, AIR (1936) Mad. 225 also held "tickets of course are only the tokens of the chance purchased, and it is the purchase of this chance which is the essence of a lottery".

F The sale of a ticket does not necessarily involve the sale of goods. For example the purchase of a railway ticket gives the right to a person to travel by railway. It is nothing other than a contract of carriage. The actual ticket is merely evidence of the right to travel. A contract is not property, but only a promise supported by consideration, upon breach of which either a claim for specific performance or damages would lie (*Said v. Butt*, 1920 3 KB 497). Like railway tickets, a ticket to see a cinema or a pawn brokers ticket are memoranda or contracts between the vendors of the ticket and the purchasers. G Cases on whether the terms specified on such tickets bind the purchaser are legion. It is sufficient for our purposes to note that tickets are themselves, normally evidence of and in some cases the contract between the buyer of the ticket and its seller. Therefore a lottery ticket can be held to be goods if H at all only because it evidences the transfer of a right.

The question is, what is this right which the ticket represents? There can be no doubt that on purchasing a lottery ticket, the purchaser would have a claim to a conditional interest in the prize money which is not in the purchaser's possession. The right would fall squarely within the definition of an actionable claim and would therefore be excluded from the definition of 'goods' under the Sale of Goods Act and the Sales Tax statutes. This was also accepted in *H. Anraj* when the Court said that to the extent that the sale of a lottery ticket involved a transfer of the right to claim a prize depending on chance, it was an assignment of an actionable claim. Significantly in *B.R. Enterprises v. State of U.P. and Ors.*, [1999] 2 SCC 700 construing *H. Anraj* the Court said

"52. So, we find three ingredients in the sale of lottery tickets, namely, (i) prize, (ii) chance, and (iii) consideration. So, when one purchases a lottery ticket, he purchases for a prize, which is by chance and the consideration is the price of the ticket".

The further distinction sought to be drawn in *H. Anraj* between the chance to win and the right to participate in the draw was in our opinion unwarranted. A lottery having been held to be in essence a chance for a prize, the sale of a lottery ticket can only be a sale of that chance. There is no other element. Every right can be sub-divided into lesser rights. When these lesser rights culminate in a legally recognizable right, it is the latter which defines the right. The right to participate in the draw is a part of the composite right of the chance to win and it does not feature separately in the definition of the word "lottery". It is an implicit part of the chance to win. It is not a different right. The separation is specious since neither of the rights can stand without the other. A draw without a chance to win is meaningless and one cannot claim a prize without participating in the draw. In fact the transfer of the chance to win assumes participation in the draw. The Supreme Court of Appeals of West Virginia, in *West Virginia in State of West Virginia v. John Wassick*, 156 W.Va.128, 191 S.E.2d 283, held that "free plays" which could be won predominantly by chance for consideration by operating multiple coin pinball machines for cash payoffs was a prize and the pinball machine constituted the lottery. This indicates that a draw is merely a method of holding the lottery just as a pinball machine may be a method of holding the lottery and does not constitute a separate right.

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

A 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.

The authorities considered by the Court in *H. Anraj* do not support the sub division of the chance to win into a further distinct right to participate.

B The Court sought to draw the distinction between the chance to win and the right to participate by describing the former as a right '*in futuro*' and the latter as "*in praesenti*". Both the rights are in fact '*in futuro*'. In any event the distinction is immaterial to the question as to whether the subject matter of the transfer is an actionable claim, since an actionable claim may be existent, accruing, conditional or contingent.

C

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 moveable property, it did not define what that moveable property was. The draw could not and was not suggested to be the moveable 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.

D

E We may with profit compare the views of other countries having similar systems of law as our own as to whether the sale of a lottery ticket is a sale of goods or an actionable claim. The High Court of Australia had held in *Van Rassel v. Kroon*, [1953] HCA 3: (1953)87 CLR 298 (4 March 1953):

F "The person in whose name the lottery ticket issues obtains the legal title to what is a chose in action".

In *Jones v. Carter*, 8 Q.B. 134 a lottery was held regarding the outcome of a horse race. The subscribers paid a sum of money and then drew lots. On each lot was written the name of a horse. If that horse won, the subscriber with the name of that winning horse got a prize. The original subscriber sold his ticket to Jones. The horse named on that ticket won the race. When Jones approached the organizers of the race for payment, they refused to pay. Jones filed a suit for recovery of the money. His suit was dismissed on the ground that there was no privity between the organizers of the race and Jones. The court also held :-

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“Though there may have been a valid assignment, it was of a chose in action; and the law does not permit the party interested to sue on such a transfer.” A

The views expressed correctly represent the law in this country as well.

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. B

We accordingly answer the question referred to us as indicated above. Let the matters be placed before an appropriate Bench for disposal of the several appeals on merits in the light of this judgment. C

B.K.

Referred question answered.