
(1998) 03 AHC CK 0115

Allahabad High Court

Case No: C.M.R.P. No. 18963 of 1998 in C.M.W.P. No. 5733 of 1998

Maa Vaishnav Lotteries
Agencies

APPELLANT

Vs

State of U.P. and
others

RESPONDENT

Date of Decision: March 25, 1998

Acts Referred:

- Constitution of India, 1950 - Article 123, 123(2), 19(1), 298, 301
- Lotteries (Regulation) Ordinance, 1997 - Section 3, 4, 5

Citation: (1998) 2 AWC 1137 : (1998) 2 UPLBEC 1047 : (1998) 2 UPLBEC 1039

Hon'ble Judges: S.L. Saraf, J; M. Katju, J

Bench: Division Bench

Advocate: H.C. Mishra and D.K. Dewan, for the Appellant;

Final Decision: Dismissed

Judgement

M. Katju, J.

This is a review petition for recall of our judgment dated 10.3.98 passed in Writ Petition No. 5733 of 1998, M/s. Maa Valshnav Lotteries Agency v. State of U. P. and others. By the aforesaid decision we had held that in view of the Lotteries Ordinance, 1997 promulgated by President of India and the order of the Governor dated 29.10.97 issued u/s 5 of the Lotteries Ordinance, all State Lotteries, whether of Nagaland or any other State, are banned and hence they cannot be sold in U. P.

2. Along with the review application, the judgment of the learned single Judge of Gauhati High Court dated 16.1.98 has been annexed by which the Lotteries Ordinance, 1997 has been declared unconstitutional.

3. With profound respect to the Gauhati High Court, we are unable to agree with the aforesaid judgment and we are clearly of the view that the Lotteries Ordinance, 1997 is

valid and constitutional.

4. The learned single Judge of Gauhati High Court has struck down this Ordinance on the following grounds :

(i) that it is violative of Article 298 of the Constitution ;

(ii) that Section 5 of the Ordinance is invalid as legislative functions have been delegated without any guidelines :

(iii) that Section 5 of the Lotteries Ordinance is violative of Articles 301 and 303 of the Constitution ; and

(iv) that Section 4 (a), (f) and (g) are unconstitutional.

In our opinion all these grounds are untenable.

5. We will deal with these points seriatim. Is the Lotteries Ordinance, 1997 violative of Article 298 of the Constitution?

6. In the five judges Constitution Bench decision of the Supreme Court in [The State of Bombay Vs. R.M.D. Chamarbaugwala](#) , it has been held that lottery (which is a form of gambling) is not trade or business, and that decision has been only cursorily referred to in the Gauhati High Court judgment.

7. There can be no doubt that lottery is a form of betting or gambling. This has been stated in para 18 (page 708) of the aforesaid decision in State of Bombay v. R. M. D., Chamarbaugwala (supra), where it has been observed "A competition, success wherein does not depend to a substantial degree upon the exercise of skill, is now recognized to be of a gambling nature."

Similarly in [H. Anraj and Others Vs. State of Maharashtra](#) , it has been observed that "there is no dispute before us that betting and gambling included, and has always been understood to have included, conduct of lotteries". in State of Bombay in R. M. D. Chamarbaugwala (supra). It has been clearly held that such lotteries do not amount to a trade or business, in that decision the Supreme Court observed (in para 42) "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 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."

8. It appears that the decision of the Five Judges Supreme Court bench in *State of Bombay v. R. M. D. Chamarbaugwala* (supra), was not brought to the attention of the subsequent three Judges Supreme Court Bench in *H. Anraj v. State of Maharashtra* (supra). There is no reference in the decision in *H. Anraj v. State of Maharashtra* (supra), to the Five Judges Full Bench decision in *State of Bombay v. R. M. D. Chamarbaugwala*, and it was assumed in the 3 Judges Bench that lottery is a form of trade or business. However, since it has been held in the Five Judges Bench of the Supreme Court in *State of Bombay v. R. M. D. Chamarbaugwala* (supra), that lottery is not trade or business, obviously we have to prefer the view of the larger five Judges Bench of the Supreme Court instead of the smaller three Judges Bench in *H. Anraj's* case (supra). It is well settled that the decision of the larger Bench will prevail over that of the smaller Bench. particularly when the smaller Bench has not noticed the earlier larger Bench, Hence no benefit can be derived by the petitioner from the decision of the smaller Bench of the Supreme Court in *H. Anraj's* case (supra), since lottery is not a trade or business at all as held in the five Judges Bench of the Supreme Court in *State of Bombay v. R. M. D. Chamarbaugwala* (supra). Hence we fail to understand how Article 298 can be said to have been violated by the impugned Ordinance.

9. Moreover, in our opinion Article 298 merely means that it is not necessary that there should be a legislation to entitle the State to do trade or business, and it can do trade or business by virtue of its executive power vide [State of Tamil Nadu Vs. Hind Stone and Others](#),

10. in our opinion, the executive power is always subject to the legislative power. When there is a Central Legislation in the form of the Lotteries Ordinance, 1997. obviously it will override the executive power provided or recognised by Article 298. It is settled law that the executive power is always subject to the legislative power (provided of course, that the legislative power has been exercised constitutionally). The Gauhati High Court, has held that an Ordinance of the President cannot be equated to legislation by Parliament. We are afraid we cannot agree, in our opinion, an Ordinance made by the President has the same status as a law made by Parliament, though with the limitations in Article 123, in

fact. Article 123(2) Itself states that an Ordinance promulgated in this Article shall have the same force and effect as an Act of Parliament. Thus, the power in the President to make an Ordinance under Article 123 is co-extensive with the power of Parliament to make a law on the same subject, vide *Sat Pal v. Lt. Gou.* AIR 1979 SC 155 . An Ordinance made by the President is not an executive but a legislative act vide [T. Venkata Reddy and Others Vs. State of Andhra Pradesh,](#) ; [K. Nagaraj and Others Vs. State of Andhra Pradesh and Another,](#) and *A. K. Roy v. Union of india.* AIR 1985 SC 710. Hence we cannot at all agree with the Gauhati High Court that an Ordinance of the President under Article 123 cannot be equated with legislation by Parliament.

Whether Section 5 of the Ordinance is invalid as legislative function has been delegated without guidelines?

11. The Gauhati High Court has held that Section 5 of the impugned Ordinance has delegated essential legislative power without guidelines, and it has relied on certain decisions of the Supreme Court referred to in para 30 of the said judgment.

12. We are afraid, we cannot agree with the Gauhati High Court on this point also. The Lotteries Ordinance. 1997 clearly shows that the Central Legislative authority (in this case the President exercised legislative power in the form of the Lotteries Ordinance) has clearly recognized the evils of lottery, and thus the legislative policy of banning of lotteries has clearly been stated in the Lotteries Ordinance. Section 3 of the Lotteries Ordinance states : "Save as Otherwise provided in Section 4, no State Government shall organise, conduct or promote any lottery." Thereafter Section 4 states that the State Government may organise, conduct or promote a lottery subject to certain conditions which have been mentioned in clauses (a) to (j). Section 5 of the Lotteries Ordinance states "A State Government may within the State, prohibit the sale of tickets of a lottery organised, conducted or promoted by another State". These and other provisions clearly indicate the legislative policy of the Central legislation which has recognised the evils of lottery and aims to control or ban it.

13. in fact the evil of lottery has been recognised since ancient times.

14. From ancient times, seers and law-givers of india looked upon gambling as a sinful and pernicious vice and deprecated its practice. Hymn XXXIV of the Rigveda proclaims the demerit of gambling. Verses 7. 10 and 13 say :

"7. Dice verily are armed with goads and driving hooks deceiving and tormenting, causing grievous woe. They give frail gifts and then destroy the man who wins, thickly anointed with the player"s fairest good.

10. The gambler"s wife is left forlorn and wretched ; the mother mourns the son who wanders homeless, in constant fear, in debt, and seeking riches he goes by night unto the home of others.

11. Play not with dice ; no, cultivate they cropland. Enjoy the gain, and deem that wealth sufficient. There are thy cattle, there thy wife. O gambler, so this good Savitar himself hath told me."

The Mahabharata deprecates gambling by depicting the woeful conditions of the Pandavas who had gambled away their kingdom. Manu forbade gambling altogether. Verse 221 advises the king to exclude from his realm gambling and betting, for those two vices cause the destruction of the kingdom of princes. Verse 224 enjoins upon the king the duty to corporally punish all those persons who either gamble or bet or provide an opportunity for it. Verse 225 calls upon the king to instantly banish all gamblers from his town.

In verse 226 the gamblers are described as secret thieves who constantly harass the good subjects by their forbidden practices. Verse 227 calls gambling a vice causing great enmity and advises wise men not to practice it even for amusement. The concluding verse 228 provides that on every man who addicts himself to that vice either secretly or openly the king may inflict punishment according to his discretion.

While Manu condemned gambling outright. Yajnavalkya sought to bring it under State control, but he too in Verse 202 (2) provided that persons gambling with false dice or other instruments should be branded and punished by the king. Kautilya also advocated State control of gambling and, as a practical person that he was, was not averse to the State earning some revenue therefrom.

Vrihaspati dealing with gambling in Chapter XXVI, Verse 199, recognises that gambling had been totally prohibited by Manu because it destroyed truth honesty and wealth while other law-givers permitted it when conducted under the control of the State so as to allow the king a share of every stake. Such was the notion of Hindu Law-givers regarding the vice of gambling.

Similarly. Hamilton in his Hedaya Vol. IV, Book XLIV, includes gambling as a kiraheeat or abomination.

He says ; "It is an abomination to play at chess, dice or any other game ; for if anything is staked it is gambling, which is expressly prohibited in the Koran ; or if on the other hand nothing be hazarded it is useless and vain."

The Supreme Court of America in Phaten v. Commonwealth of Virginia (1850) 49 US 163: 12 Law Ed. 1030 observed :

"Experience has shown that the common forms of gambling are, comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but, the latter infests the whole community : it enters every dwelling ; it reaches every class ; it preys upon the hard earnings of the poor : it plunders the ignorant and the simple."

15. We are, therefore, of the opinion that the Lotteries Ordinance has laid down the essential legislative policy and has only delegated the power to the State Government to ban lottery at the appropriate time. Different State Governments may have different local problems due to the local situation, and hence the Lotteries Ordinance has left it to the State Government to apply the ban at a time when it thinks it suitable, but that does not mean that the essential legislative function has been delegated. Thus in [The Edward Mills Co. Ltd., Beawar and Others Vs. The State of Ajmer and Another](#), it has been held by the Supreme Court that Section 27 of the Minimum Wages Act which gives power to the appropriate Government to add to the schedule of the Act any employment in respect of which it is of opinion that minimum wages should be fixed does not amount to delegation of essential function, since power has been given to the Government to decide with reference to the local conditions whether it was desirable that minimum wages should be fixed in regard to a particular trade or industry which was not included in the list. Similarly, in [Mohammad Hussain Gulam Mohammad and Another Vs. The State of Bombay and Another](#), it was held that Section 29 of the Bombay Agricultural Product Market Act was not invalid on the ground of delegation of essential legislative functions, in our opinion, the Lotteries Ordinance has laid down the essential legislative policy which is directed against the evil of lottery, but it has left it to the State Government to determine as to whether and at what time the lotteries should be banned or regulated, in *Basant v. Eagle Rolling Mills* AIR 1964 SC1620 it has been held that legislation can empower the administrative authority to adopt a legislative scheme by stages and indifferent phases, by fixing different dates for the introduction of different provisions of the Act and in different parts of the territory. Thus, we are clearly of the opinion that the Lotteries Ordinance is not unconstitutional on the ground that it has delegated essential legislative functions.

Whether Section 5 of the Ordinance is violative of Articles 301 and 303 of the Constitution?

16. Since it has been held by the Five Judges Bench of the Supreme Court in *State of Bombay v. R. M. D. Chamarbaugwala* (supra), that lottery is not trade and commerce, hence it cannot be said that the Lotteries Ordinance is violative of Articles 301 and 303 of the Constitution. Hence we cannot agree with the judgment of the learned single Judge of Gauhati High Court on this point also.

Whether Section 4 (a) (f) and (g) of the Ordinance are unconstitutional?

17. This question obviously does not call for an answer by us as we are not concerned with Section 4 but with Section 5 of the Lotteries Ordinance. Since this question does not arise in this case, it is not necessary for us to answer it. It may be noted that the order of the Governor dated 29.10.97 has been issued in exercise of power u/s 5 of the Lotteries Ordinance, 1997, and it has nothing to do with Section 4.

18. In view of the above discussion, we are clearly of the opinion that the Lotteries Ordinance, 1997 and the G. O. dated 17.3.1998 passed thereunder are valid and constitutional and there is no force in this review petition. It is accordingly dismissed.

19. Before parting with this case, we would like to mention that any one who goes to any nook or corner in any city of Uttar Pradesh or even in villages will find lotteries being sold on an extensive scale. Poor people particularly spend their hard earned money on lotteries (due to their addiction to this vice) instead of giving their earnings to their wives and children. One can very often see queues of people standing at lottery counters for buying lotteries which is nothing but a kind of gambling on a large scale, and this habit destroys people's lives and is a great social evil. Hence the steps taken by the Lotteries Ordinance and the State Government in this connection should be commended as it is for the good of society.

20. We would also like to mention that we had dismissed this writ petition on 10.3.1998, and thereafter a review application was filed on 18.3.1998 by M/s. Deep Mala Agency. On 18.3.1998 learned counsel for the applicant had appeared before us and had stated that he is relying on the Gauhati High Court judgment dated 16.1.1998 which held the Lotteries Ordinance, 1997 to be unconstitutional and he wanted to raise the question of constitutional validity of the Lotteries Ordinance in the review petition since the question had not been decided in our judgment dated 10.3.1998.

21. Learned counsel for the applicant had on 18.3.1998 submitted that the Lotteries Ordinance, 1997, is violative of Article 298 of the Constitution. This Court was not agreeable to that contention of the learned counsel for the applicant and had further observed that lotteries are a great social evil which is devastating society because poor people have become addicted to lottery and their hard earned money is not given to their family and children who have consequently to starve. However, we fixed the review petition for today, i.e., 25.3-1998.

22. It appears that in the meantime seeing the Court's mind and observations, other petitioners approached the Lucknow Bench of Allahabad High Court and obtained some interim orders in some other petitions. It is well settled that an interim order is not a precedent. Today a request was made by one of the counsel for the petitioners that the review petition be dismissed as not pressed. In the above background, this Court refused to accept the prayer and carefully considered the review application on our own and have noted all the points raised therein and after deep deliberation are dismissing the review application on merits. We are pained to note that the persons doing this lottery business are indulging in bench hopping, sometimes going to Gauhati High Court, sometimes to the Lucknow Bench and sometimes coming to this Bench. This kind of practice has to be deprecated, particularly since the matter is so serious as it affects lacs of families which are being devastated due to the evil of lottery. Hence we went through the review petition as well as the judgment of the Gauhati High Court and have dealt with the same. Shri Pradeep Kumar, learned Addl. Chief Standing Counsel, has appeared for the State

Government.