

(1999) 01 MP CK 0050
In the Madhya Pradesh High Court
Case No : Writ Petition No. 2495 of 1998

Dinesh Gurjar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-01-1999

Acts Referred:

Constitution of India, 1950 — Article 1, 11, 226, 245, 246
Lotteries (Regulation) Act, 1998 — Section 5
Madhya Pradesh Lotteries Pratibandh Act, 1993 — Section 3

Citation : (1999) 2 JLI 37

Hon'ble Judges : C.K. Prasad, J

Bench : Single Bench

Advocate : Rohit Arya, for the Appellant; Abhay Gohil and O.P. Namdeo for Respondent No. 1, S.L. Saxena, General for Respondent No. 2 and Satish Agnihotri, for the Respondent

Final Decision : Dismissed

Judgement

C.K. Prasad, J.—By this writ petition, filed under Articles 226 of the Constitution of India, Petitioner prays for issuance of a writ in the nature of Mandamus or for any other appropriate writ, order or direction restraining Respondents No. 2 and 3 in creating hinderance in sale of lottery tickes of the Royal Government of Bhutan in the State of Madhya Pradesh. Petitioner is the manager of M/s. Surya Enterprise, which is the distributors of lotteries of Royal Government of Bhutan and has been authorised by it to file the writ petition.

2. Shorn of unnecessary details, facts giving rise to the present writ petition are that an agreement was entered into between the Govt. of India and the Govt. of Bhutan on 29.2.. 1995 on Trade and Commerce between the Royal Govt. of Bhutan and the Govt. of Republic of India (Annex. P-2). Article 1 of the agreement contemplates free Trade & Commerce between the territories of the kingdom of Bhutan and the Republic of India. Protocol to the agreement on Trade & Commerce further stated that for the purposes of the agreement, the term

"free Trade & Commerce" in Article 1 shall be understood to include within its scope sale of Bhutan lottery tickets in India and the sale of Indian Govt. or State Lottery tickets in Bhutan subject to the relevant laws which may be enforced in the territory of the kingdom of Bhutan and India, as the case may be. According to Article 11 of the said agreement, the agreement was to come into force w.e.f. 2nd March, 1995 and to remain in force for a period of 10 years. It is the stand of the Petitioner that although Section 3 of the M.P. Lottery Pratibandh Act, 1993, has not prohibited sale of lottery organised, conducted and promoted by any of the State Govt. or Union Territory within the State of M.P., still the Petitioner who carries on his business of selling and marketing lottery tickets of Royal Government of Bhutan in the State of Madhya Pradesh, is not being permitted to sell lottery tickets of the Royal Govt. of Bhutan. It is the stand of the Petitioner that taking shelter behind the provision of M.P. Act No. 8 of 1993, the functionaries of the State are putting restraint on sale of lottery tickets of the Royal Govt. of Bhutan. Petitioner's further stand is that the State Govt. is not empowered to prohibit the sale of lottery tickets of any other State Govt. and the lottery tickets of the Royal Govt. of Bhutan being the lottery tickets of Anr. country, sale of lottery tickets of Royal Govt. of Bhutan cannot be interfered with by the State Govt. Further plea of the Petitioner is that u/s 5 of the Lottery (Regulation) Act, 1998, State Govt. can prohibit the sale of tickets of a lottery organised, conducted or promoted by Anr. State and not of Anr. country, with whom on account of agreement, it has right to sell the lottery tickets.

3. It is relevant here to state that detrimental social and economic impact of the lottery business particularly on the poorer section of the society, leading to serious adverse effect on public order was taken cognizance of by the Legislative Assembly; which passed a resolution requesting the Union Govt. to ban lotteries of States. Before this could be done, the Governor of the State promulgated M.P. Lottery Pratibandh Ordinance, 1992 on 18.11.1992. This was followed by Anr. Ordinance and ultimately became an Act of the State Legislature namely Madhya Pradesh Lottery Pratibandh Act, 1993 (M.P. Act No. 8 of 1993).

4. It is relevant here to state that to regulate the sale of lottery tickets, the President of the Republic of India promulgated the Lotteries (Regulation) Ordinance, 1997 which was later on enacted as an Act of Parliament namely the Lottery (Regulation) Act, 1998 (Act No. 17 of 1998), hereinafter referred to as the Central Act. Section 5 of the said Act gives discretion to the State Govt. to prohibit the sale of tickets of lottery organised, conducted or promoted by every other States within the State. It seems that after the promulgation of the Ordinance by the President, Royal Govt. of Bhutan apprehended that the State Govts. may invoke Section 5 of the Ordinance prohibiting the sale of Bhutan Lottery and was brought to the notice of Govt. of India. This was taken cognizance of by the Ministry of Home Affairs of the Govt. of India and in consultation with the Ministry of Law and Justice and Ministry of External Affairs, it wrote to the Chief Secretaries of all the States and Union territories as follows:

Section 5 of the Ordinance only deals with the regulation by the State Government, within their territory, the sale of tickets of a lottery organised, conducted or promoted by Anr. State. The scope of this provision does not extend to the sale of lottery ticket of Anr. country like Bhutan. They have further opined that as it is the responsibility of the Central Government to implement the provisions of the Treaties/Agreements, in terms of Entry 14 of the Union List of the Seventh Schedule to the Constitution, it is the Central Government which has the power to regulate the Bhutan Lotteries, including sale of its tickets in India.

It is, therefore, requested that appropriate instructions may be issued to the concerned department in this regard. The sale of tickets of lottery of the Royal Government of Bhutan in India will, however be subject to India laws on the subject.

Royal Govt. of Bhutan brought to the notice of the Finance Secretary of the State Govt. the aforesaid letter of the Ministry of Home and requested issuance of necessary orders allowing the sale of Bhutan Lottery tickets in this State. In the said letter, it was further stated that Royal Govt. of Bhutan shall abide by instructions issued by the Govt. of India in this regard from time to time. Thereafter, also, the Bhutan Lottery tickets were not allowed to be sold in the State of Madhya Pradesh and various other States of the Union and the Royal Govt. of Bhutan brought this to the notice of the Ministry of External Affairs in its office memorandum date 27.4.98 (Annex. P-10). Ministry of Home Affairs took cognizance of the same and, wrote to the Chief Secretaries of all the States as follows:

Under the agreement, Royal Government of Bhutan has agreed to allow the sale of lottery tickets of your State in Bhutan. You may therefore, allow the sale of lottery tickets of Royal Government of Bhutan in your State even at your State either has no lottery of its own for sale in Bhutan or does not wish to have such a reciprocal facility.

5. However, it seems that the Government of Madhya Pradesh as also various other States of the Union of India stuck to its guns and did not allow sale of lottery tickets of the Royal Govt. of Bhutan and the Govt. of India on 21st May, 1998 wrote the Chief Secretaries as follows:

As you are aware the matter of sale of lottery tickets of the Royal Govt. of Bhutan is pursued by the Ministry of External Affairs keeping in view the excellent and special commitment of the Govt. of India and the Royal Govt. of Bhutan as reflected in bilateral agreement of trade and commerce signed between the two countries for a period of ten years from the 2nd March, 1995. This bilateral agreement inter alia includes sale of lottery tickets in India. The Bhutan Government have also in their application to various State Governments confirmed that they will abide by the law of the land in so far as conduct of their lottery trade is concerned, which was communicated to you vide letter No. V-21011/1/96-GPA. IV dated 20th May, 1996.

All these communication, according to the Petitioner did not move the Govt. of Madhya Pradesh and Bhutan Lottery ticket are not being allowed to be sold in the territory of Madhya Pradesh.

6. Return has been filed on behalf of Respondents No. 2 and 3 and their stand is that in view of Section 3 of State Act No. 8 of 1993, the State Govt. has every authority to put a ban on the sale of lottery tickets of the Royal Govt. of Bhutan within the State of Madhya Pradesh. Their further stand is that in the absence of any legislation as contemplated under Article 253 of the Constitution of India, the agreement entered into between the Royal Govt. of Bhutan and Govt. of India, cannot be given effect to, as the same will directly come in conflict with the provisions of the State enactment i.e. Act No. 8 of 1993.

7. Shri Satish Agnihotri, appearing on behalf of Respondent No. 3 has also raised a preliminary objection to the maintainability of the writ petition at the instance of the Petitioner. He contends that in sum and substance, this writ petition has been filed to enforce the international agreement and the question of enforcement of an international agreement can be gone into only at the instance of the party to the agreement. He submits that the writ petition has been filed not by the Royal Government of Bhutan, but by a citizen of this country and in that view of the matter, according to his submission, writ petition deserves to be dismissed on this ground alone. Petitioner has stated in the writ petition that he is manager of M/s. Surya Enterprise, which is distributor of Bhutan lotteries in the State of Madhya Pradesh. He has further stated that he has been authorised by the Surya Enterprise to file the writ petition. This assertion of the Petitioner has not been denied by the Respondents in the return. Thus, the writ petition has been filed by the manager of the distributor of Bhutan lotteries, who has been authorised to file the writ petition. Ban on sale of lottery has adversely affected the distributor. In view of the international agreement, according to the Petitioner, he is entitled to carry on the business of sale of Bhutan Govt. lotteries. In the backdrop of the fact that the Petitioner claims benefit under the international agreement, he has locus-standi to file the writ petition for enforcement of the international agreement. I over-rule this preliminary objection of Shri Agnihotri.

8. From the pleadings of the parties there seem no controversy that in accordance with the agreement on trade and commerce between the Govt. of Kingdom of Bhutan and the Govt. of Republic of India, sale of Bhutan lottery tickets in India is permissible subject to the relevant laws which may be enforced in the territory of India. Further, it is not admitted by Respondents No. 2 and 3 that sale of Bhutan lottery tickets is not being allowed in the State of Madhya Pradesh, in view of the provisions of Act No. 8 of 1993.

9. Mr. Arya contends that Govt. of India is competent to enter into agreement with the Government of kingdom of Bhutan and in view of the trade and commerce agreement, hereinafter referred to as the "International Agreement", the Petitioner is entitled to carry on the business of sale of Bhutan lottery tickets

in the State of Madhya Pradesh. True it is that under Entry 14 of List I of the Seventh Schedule, Govt. of India is competent to enter into international agreement i.e. entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries sale of Bhutan lottery tickets in India. In my opinion, per se Govt. of India did not commit any illegality in entering into the international agreement and in fairness to Sri Saxena, the learned Advocate General, he did not dispute the authority of the Govt. of India to enter into such agreement. According to the international agreement itself, sale of Bhutan lottery tickets in India is subject to relevant laws in force in the territory of India. Otherwise also, I am of the opinion that notwithstanding such clause in the agreement, sale of Bhutan lottery tickets has to be subject to the laws in force in India.

10. Mr. Arya submits that Section 5 of Central Act No. 17 of 1998 does not enable the State Govt. to stop the sale of Bhutan lottery in the State of Madhya Pradesh. Section 5 of Central Act No. 17 of 1998 reads as follows:

5. A State Government may, within the State prohibit the sale of tickets of a lottery organised, conducted or promoted by every other State.

Mr. Abhay Ghil, appearing on behalf of Respondent No. 1 supports the submission of Sri Arya. As regards the submission of Sri Arya that sale of Bhutan lottery tickets cannot be stopped u/s 5 of Central Act No. 17 of 1998, it is not the stand of the Respondents No. 2 and 3 that its provisions have been taken recourse to stop the sale of Bhutan lottery. True it is that Section 5 of the Central Act 17 of 1998 gives liberty to a State Govt. to prohibit the sale of tickets of a lottery organised, conducted or promoted by every other States within the State. Other State may not be read to mean the kingdom of" Bhutan. State would mean any territory which the Government of dominion of India recognised as such State. Therefore, provisions of Section 5 of the Central Act 17 of 1998 cannot be invoked to ban sale of Bhutan lottery. But this would not mean that it cannot be done by the State Legislature, if it has such power.

11. Sri Arya then contends that international agreement for sale of Bhutan lottery tickets in India being valid cannot be made subject to the laws of the State and M.P. Act No. 8 of 1993 can be resorted to stop sale of Bhutan lottery tickets in the State of Madhya Pradesh. While elaborating his submission contends the international agreement in no uncertain terms permits sale of Bhutan lottery tickets in India. He submits that Entry 14 of List I of VIIth Schedule, Parliament has the exclusive power to make laws with respect to entering into treaties and agreements with various foreign countries and implementing of treaties, agreement and convention with foreign countries. He further submits that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Accordingly, stand of Sri Arya is that the various communication of the Ministry of Home as referred to in the preceding paragraphs of the judgment is the exercise of the executive power by the Union in relation to matters with respect to which Parliament has

power to make laws and the Govt. Of India having exercised its power under Article 73 of the Constitution, directing for sale of Bhutan lottery tickets in the State of Madhya Pradesh, action of the State Govt. in not allowing the same is illegal.

12. Mr. Arya all the time emphasised that the State Legislature under Entry 34 of the State List cannot ban the sale of lottery tickets of Anr. State or the Govt. of India which would necessarily include the lottery of other country, In support of his submission, he has placed reliance on a judgment of the Andhra Pradesh High Court in the case of Lachmandas Balachand, Paradise Lottery Centre, 124, Park Lane Secunderabad and Others Vs. The State of Andhra Pradesh and Others, . My attention has been drawn to the following passage, which reads as under:

4. Now Entry 40 in List I is "Lotteries organised by the Government of India or the Government of a State". Entry 34 of List II is "betting and gambling". The expression "betting and gambling" has always been understood to include the conduct of lotteries and this was not disputed before me by the learned Counsel. There is an apparent overlapping between Entry 40 in List I and Entry 34 in List II. It must follow that out of the field of legislation comprised by the expression "betting and gambling" (including the conduct of lotteries), lotteries organised by the Government of India or the Government of a State are taken out and reserved to be dealt a State can, therefore, make a law touching lotteries organised by the Government of India or the Government of a State.

13. Another decision on which Sri Arya has placed reliance is the order of the Supreme Court in the case of State of Haryana Vs. Suman Enterprises and Others, and my attention has been drawn to the flowing paragraph of the said order:

2. The order clearly implies - if it did not, it would have required the order to be read down to mean that prohibition does not extend to the sale of lottery tickets of lotteries "organised" by other States. This is the implication arising out of a proper construction of Entry 40 of List I and Entry 34 of List II of the Seventh Schedule. The said Entry 34 of List II provides "Betting and Gambling". Entry 40 of List I provides "Lotteries organised by the Government of India or the Government of a Slate.

14. Part XI of the Constitution of India governs relation between the Union and the States and Chapter I thereof governs legislative relation. Article 246 of the Constitution confers exclusive power to the Parliament to make laws with respect to any of the matter enumerated in List I in the VIIth Schedule. Article 246(3) confers exclusive power to Legislature of the State to make laws for the State in respect of matters enumerated in List II of the VIIth Schedule. Power of the State Legislature to make law is subject to Clauses 2 and 3 of Article 246 of the Constitution whereas, the power of the Parliament under Article 246(1) of the Constitution is notwithstanding anything provided under Clauses 2 and 3 of the said Article. Entry 40 of List I of the VIIth Schedule (hereinafter referred to as

the Union List) confers power to the Parliament to make laws in relation to the lotteries organised by the Govt. of India or the Govt. of the State. In exercise of the said power Parliament has framed the Lottery (Regulation) Act, 1998 (Act No. 17 of 1998). Similarly, State Legislature in exercise of the power flowing from Entry 34 of List II of VIIth Schedule (hereinafter referred to as the State List) enacted M.P. Lottery Pratibandh Act, 1993.

15. Scope and ambit of Entry 34 of the State List and Entry 40 of the Union List came up for consideration in the case of H. Anraj and Others Vs. State of Maharashtra, and in which the Apex Court has held as follows:

4. Entry 40 of List I of the VIIth Schedule to the Constitution is "Lotteries organised by the Government of India or the Government of a State". Entry 34 of List II of VIIth Schedule is "Betting and gambling". There is no dispute before us that the expression "Betting and gambling" included and has always been understood to have included the conduct of lotteries. Quite obviously, the subject "Lotteries organised by the Government of India or the Government of a State" has been taken out from the legislative field comprised by the expression "Betting and gambling" and is reserved to be dealt with by Parliament. Since the subject "Lotteries organised by the Government of India or the Government of a State" has been made a subject within the exclusive legislative competence of Parliament it must follow, in view of Article 246(1) and (3), that no legislature of a State can make a law touching lotteries organised by the Government of India or the Government of a State. This much is beyond controversy and the Maharashtra legislature has acknowledged the position, as indeed it must, in Section 32 of the Bombay Lotteries (Control and Tax) and Prize Competitions (Tax) Act, 1958. It is an Act to control and tax lottries and to tax prize competitions in the State of Maharashtra. Section 32(b) expressly provides that nothing in the Act shall apply to "a lottery organised by the Central Government or a State Government." This, as we said, is but a recognition of the prevailing situation under the Constitution. The Constitutional position cannot be altered by an act of the State Legislature.

Chapter I of Part XI of the Constitution deals with distribution of legislative powers. Entry 14 of the Union List gives exclusive power to the Parliament for entering into treaty and implementation of treaties. In my opinion, in case implementation of the treaty involves legislation or change of law enforced in the State falling exclusively within the State, it can be achieved only by enacting a law under Article 253 of the Constitution. In my opinion, Article 253 of the Constitution gives power to the Union Parliament to invade the State List to the extent it may be necessary for implementing the international agreement.

16. In my opinion, under Entry 34 i.e. betting and gambling of List II of the VIIth Schedule, Legislature of the State has exclusive power to make laws for the State and the said legislative power having been conferred to the Legislature of the State, it resorted to exercise the same and framed M.P. Act No. 8 of 1993 and prohibited sale of lottery organised, conducted and promoted by any other

"person" u/s 3 of the Act. Section 3 of the Act reads as follows:

Notwithstanding any agreement or contract entered into by the State Government with any person, no person shall be permitted to deal within a trade or business of lottery or be an agent or promoter in respect of any lottery nor shall he sell, distribute or purchase any lottery within the territory of Madhya Pradesh.

In my opinion, expression "Person" as used in Section 3 of M.P. Act No. 8 of 1993 shall also include the lottery of Royal Govt. of Bhutan. While doing so the State legislature has not encroached upon the field of legislation which has been conferred to the Parliament under Entry 40 of List I of VIIth Schedule i.e. lotteries organised by the Govt. of India or the Govt. of State. Lotteries of the Royal Govt. of Bhutan cannot be said to be lottery organised by the Govt. of India or the Govt. of State over which Entry 40 of List I of VIIth Schedule. Parliament has exclusive power to make laws. As held earlier, international agreement itself has made sale of Bhutan lottery tickets subject to the relevant laws in force in India. Notwithstanding so, in my opinion it is imperative that sale of Bhutan lottery tickets has to be subject to laws in force in India. Thus, allowing sale of Bhutan State Lotteries in my opinion, would be in the teeth of Section 3 of M.P. Act No. 8 of 1993 and the same being a valid piece of legislation, the functionary of the State is well within its right to take recourse to Section 3 of the said Act and stop sale of Bhutan lottery tickets in its State.

17. Sri Arya, then, contends that under Entry 14 of the Union, Parliament has exclusive power to make laws in respect of entering into treaties and agreement with foreign countries and implementing of treaties, agreement and convention with foreign countries. He submit that under Article 73 of the Constitution, the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. He submits that the various communication of the Ministry of Home to the State Govt. asking them to allow sale of Bhutan lottery tickets clearly shows that the Union has exercised its executive powers to allow sale of Bhutan lottery tickets in the State. He submits that same is permissible and in support of his submission, he has placed reliance on a Constitution Bench judgment of the Supreme Court in the case of Maganbhai Ishwarbhai Patel etc. Vs. Union of India (UOI) and Another, and my attention has been drawn to the following passage from paragraph 82 from the said judgment, rendered by Shah, J.:

82. The arguments raised at the Bar that power to make treaty or to implement a treaty, agreement or convention with a foreign State can only be exercised under authority of law, proceeds upon a misreading of Article 253. Article 253 occurs in Chapter I of Part XI of the Constitution which deals with legislative relations : Distribution of Legislative Powers. By Article 245 the territorial operation of legislative power of the Parliament and the State Legislatures is delimited, and Article 246 distributes legislative power subject-wise between the Parliament and the State Legislatures. Articles 247, 249, 250, 252 and 253 enact

some of the exceptions to the rule contained in Article 246. The effect of Article 253 is that if a treaty, agreement or convention with a foreign State deals with a subject within the competence of the State Legislature, the Parliament alone has, notwithstanding Article 246(3), the power to make laws to implement the treaty, agreement or convention or any decision made at any international conference, association or other body. In terms, the Article deals with legislative power : thereby power is conferred upon the Parliament which it may not otherwise possess. But it does not seek to circumscribe the extent of the power conferred by Article 73. If, in consequence of the exercise of the executive power, rights of the citizens or Ors. are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation: where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power.

18. Sri S.L. Saxena, the learned Advocate General, appearing on behalf of Respondent No. 2 and Shri Agnihotri, appearing on behalf of Respondent No. 3 however submits that as the implementation of the treaty would invade the law made by the State Legislature under Entry 34 of the State List, in such circumstance, legislation by the Parliament under Article 254 of the Constitution is sine qua non to give effect to the international agreement. In their submission in the absence of any legislation as contemplated under Article 253 of the Constitution of India by the Parliament, for giving effect to the international agreement Petitioner in the face of the State Act No. 8 of 1993 can carry out the business of sale of Bhutan lottery in the State of Madhya Pradesh.

19. I have already held earlier that M.P. Act No. 8 of 1993 is a valid piece of legislation and Section 3 of the State Act inter alia bans sale of lottery of any other person shall include the sale of Bhutan Govt. Lottery tickets in this State. Permitting sale of Bhutan State Lottery would infringe Section 3 of aforesaid Act. Constitution makers have foreseen a situation in which implementation of an international treaty may lead to invading the State List and to meet a situation like this, Article 253 of the Constitution has been engrafted. Article 253 which starts with a non obstante clause is in Chapter I of Part XI of the Constitution and Article 246(3) which is also in the same chapter and part confers exclusive power to the Legislature to make laws in relation to the matters enumerated in State List. Notwithstanding the exclusive power of the Legislature of the State, to make laws in relation to the matters enumerated in the State List, under Article 253, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention. It is common ground that Parliament has not enacted any law for implementing of the international treaty permitting sale of Bhutan lotteries in the State of Madhya Pradesh. In view of the discussions aforesaid, in the present state of law i.e. absence of legislation under Article 253 of the Constitution, permitting sale of Bhutan Lottery tickets, within the State of Madhya Pradesh, I am of the opinion that the State Govt. is competent to ban sale of Bhutan lotteries in the State of Madhya Pradesh exercising its power u/s 3 of Act No. 8 of 1993. Situation

however may be different in case the Parliament exercises its power under Article 253 of the Constitution of India. International agreement as stated earlier, itself has made the terms of the agreement subject to the law enforce in the territory of India. In my opinion, M.P. Act No. 8 of 1993 is a valid piece of legislation and Section 3 of the said Act prohibits business of lottery in the territory of Madhya Pradesh. Heace, the action of Respondents No. 2 and 3 in not allowing the sale of Bhutan Lottery tickets cannot be said to be illegal.

20. In the case of Manganbhai (supra) on which Sri Arya has placed reliance, also does not lay down the law that no legislation is required under Article 253 of the Constitution even, if it infringes a law made by the State Legislature. Consequences may be different in case the executive power of the Union when exercised under Article 73 of the Constitution does not lead to the invasion of any of the powers under the State List. In the said case, it has been held as follows:

If, in consequence of the exercise of the executive power, rights of the citizens or Ors. are restricted or infringed, or laws are modified, the exercise of power must be supported by legislation: where there is no such restriction, infringement of the right or modification of the laws, the executive is competent to exercise the power.

21. In the result, I do not find any merit in the writ petition and it is dismissed accordingly. However, in the facts and circumstances of the case, there shall be no order as to cost.