

(1992) 12 KAR CK 0036

In the Karnataka High Court

Case No : W.A. No's. 1268 to 1270 and W.P. No. 17227 of 1992

G. Moorthy

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 22-12-1992

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (1) (g), 73

Citation : (1993) ILR (Kar) 367 : (1993) 1 KarLJ 376

Hon'ble Judges : K.A. Swami, Acting C.J.; N.D.V. Bhat, J

Bench : Division Bench

Advocate : Abdul Wajid, Additional Central Government Stdg. Counsel, R.N. Narasimha Murthy, for K.G. Raghavan, A.G. Holla and Radesh Prabhu, for the Appellant; B.V. Acharya, Advocate General and Somayaji, Government Advocate, for the Respondent

Judgement

K.A. Swami, Ag. C.J.

1. Writ Appeal Nos. 1268 to 1270/1992 are preferred against the order dated 29.6.1992 passed by the learned single Judge in W.P.Nos.14735, 14406 and 14656 of 1992 respectively. The learned single Judge has rejected the Writ Petitions. Therefore, the petitioners have come up in Writ Appeals.

2. In the Writ Petition (W.P.No. 14735 of 1992) the petitioners-appellants have sought for a Writ in the nature of Mandamus directing the respondents by themselves, their agents, servants or anyone through them to forbear from interfering with the sale or distribution of lottery tickets of the lottery organised by Royal Government of Bhutan in the State of Karnataka; in W.P. 14406/92, the petitioner has sought for a declaration that the alleged high-handedness of respondents 4 and 5 therein (Circle Inspector of Police, Chickpet Police Station, Bangalore and the Sub Inspector of Police, Upparpet Police Station Bangalore) in taking away the lottery tickets from the petitioner on the 22nd April 1992 of Royal Bhutan Government lottery is unauthorised, arbitrary, mala fide and violative of Articles 14, 19(1)(g) of the Constitution of India and also opposed to

the principles of natural justice. He has also sought for a declaration that there could be no ban in, or by, the State of Karnataka on the sale of lottery tickets organised by the Government or Governments of other States including the one organised by the Royal Bhutan Government and any such restriction or ban, if imposed, is unconstitutional and void. In addition to this, the petitioner has sought for a Writ in the nature of Mandamus directing the respondents therein to forthwith restore to the petitioner the lottery tickets whisked away from him by the respondents on the 22nd April 1992. The prayer made in W.P.No. 14656/92 is to issue a direction to the respondents 6 to 9 therein, not to enforce the provisions of the Karnataka Lotteries and Prize Distribution Control and Tax Act, 1951 (hereinafter referred to as the "Act") and also to declare that selling, distributing and dealing with the Royal Bhutan Lottery tickets in Karnataka is legal and the provisions of the Act are not applicable. He has further sought for issue of a Writ in the nature of Mandamus restraining respondents 6 to 9 therein, from interfering with the selling or distributing and dealing with the Bhutan Lottery tickets in Karnataka.

3. In W.P.No. 17227/92, filed by one K. Subramanyam son of Sri K. Venkatanarayana Rao, claiming to be a public interest litigation, the petitioner has sought for issue of a Writ, Order or Direction, declaring the lotteries promoted, organised and sold in the name of Royal Bhutan Government Lotteries in Karnataka as illegal and as being opposed to the provisions of the 1951 Act.

4. When W.P.17227/92 came up before the learned single Judge, on 20.8.1992, it appears to have been brought to the notice of the learned single Judge that the aforesaid Writ Petitions have been dismissed and W.As. 1268 to 1270 of 1992 have been preferred against the order of the learned single Judge. Therefore, the learned single Judge has referred the above Writ Petition to the Division Bench to be heard along with W.A.Nos. 1268 to 1270/92. Hence this Writ Petition is posted along with the above Writ Appeals.

5. We have heard both the sides in the Writ Appeals and the Writ Petition.

6. In the light of the prayers made in the Writ Petitions and contentions urged on both sides, the following Points arise for Consideration:

1) Whether, as claimed by the petitioners in W.P.Nos. 14735/92, 14406/92 and 14656/92, the lottery organised by the Royal Bhutan Government in the Karnataka State is permissible in law, and whether it is permissible for the Government of Karnataka to interfere with it and stop organising or selling the tickets of such lotteries?

2) Whether the order of the learned single Judge passed in W.P.Nos. 14735/92, 14406/92 and 14656/92 requires to be interfered with?

3) Whether the petitioner in W.P.No. 17227/92 is entitled to have the declaration that the lotteries promoted, organised and the tickets of such lotteries sold in the name of Royal Bhutan Government in Karnataka are illegal as being opposed to

the provisions of the Karnataka Lotteries and Prize Competitions Control and Tax Act, 1951?

7. Before we consider the contentions relevant on the Points raised for Determination, we may also state the undisputed facts:

The Lotteries organised by the Royal Bhutan Government are not the lotteries organised by the Government of India or the Government of any State in India. It is also not the case of the appellants that the lottery organised by the Royal Bhutan Government in the State of Karnataka is the one organised by the Government of India or the Government of any State in India. It is also the case of the Government of India in its Statement of Objections that it is not a lottery organised by the Government of India or any other State in India. The lottery organised by the Royal Government of Bhutan only falls under Entry No. 34 of List II of the 7th Schedule to the Constitution of India. Therefore, it is for the State of Karnataka to permit such lottery to be organised by the Royal Bhutan Government. That it is so is not disputed by the learned Counsel appearing for the appellants.

8. However, it is contended on behalf of the appellants that the State Government is incompetent to take any action against those who have organised the lottery on behalf of the Royal Bhutan Government because such an activity comes within the trade and commerce relationship with a foreign Government which matter falls under Entry 41 of List-I of the Seventh Schedule of the Constitution; that at any rate this is a matter which brings the Union of India into the picture as Bhutan is a foreign Country and that therefore, it squarely falls under Entry No. 10 of List I of the Seventh Schedule of the Constitution. It is, therefore, contended that it is the Union of India alone which can take action against the Royal Bhutan Government or anyone organising the said lottery on behalf of the Royal Bhutan Government either in the State of Karnataka or in any other State in India and that therefore, the action taken by the Government of Karnataka in seizing the lottery tickets organised by the Royal Bhutan Government is without the authority of law and beyond the competence of the State Government.

9. On the contrary, it is the contention of the learned Advocate General Sri B.V. Acharya and Sri A.G. Holla, learned Counsel appearing for the petitioner in Writ Petition No. 17227/92 that the State is competent to pass an Act on the subject which falls under Entry 34 of List-II of the 7th Schedule of the Constitution, and the validity of the Act is not in question. Therefore, there cannot be any direction by the Court to restrain the State Government or any other authority acting under the Act from enforcing the provisions of the Act and no authority including the Royal Bhutan Government, even though it is a foreign Government, can conduct the lotteries in the State of Karnataka contrary to the provisions of the Act; that conducting of the lottery without obtaining the licence under the Act, is violative of the provisions of the Act and as such, the "persons who conduct or organise or sell the tickets, the lottery in the name of Royal Government of

Bhutan are liable to be prosecuted as per the provisions of the Act and the tickets sold by them relating to Royal Bhutan Government are also liable to be seized. It is also contended that the Union Government also has no power to issue any direction in exercise of its power under Article 73 of the Constitution because no direction can be issued in exercise of its executive power contrary to the provisions of law and the provisions of the Constitution; as such the correspondence by the Government of India even if it amounts to a direction, cannot have any value in the eye of law. It is further contended that those correspondence also do not lead to any decision in the matter nor the same can be construed as amounting to a direction issued by the Government of India because the correspondence was only in the process of arriving at a decision or persuading the State Governments to permit the Royal Bhutan Government lottery in various States. It is also further contended by the learned Advocate General as well as Sri A.G. Holla, learned Counsel for the petitioner in W.P.No. 17227/92 that even if it is construed that the Act and the action of the" State Authority incidentally encroach or affect the alleged trade and commerce with a foreign Country and the alleged foreign affairs, the act or the action cannot at all be declared as unconstitutional because the question as to whether a statute travels beyond legislative power of the State Legislature has to be determined on ascertaining its pith and substance the purpose of the Act, the mischief it tries to set right or remove; and whether it is a legislation which falls within the State List (List No. 11). It is submitted that looked at from any point of view, the Act and the action taken by the State Authority are perfectly well within its power and as such no interference is called for. Therefore, the learned single Judge is justified in rejecting the Writ Petitions.

10. Sri. Radhesh Prabhu, learned Counsel who appears along with Sri A.G. Holla, also contends that in fact there is no lottery as such organised by the Royal Bhutan Government; that some persons who are Indian Citizens taking advantage of the Royal Bhutan Government, are conducting the lotteries in India and in the State of Karnataka and as such the action taken by the Authorities of the State Government is justified and does not call for interference. It is also contended that having regard to the provisions of the Constitution and the Act passed by the State, the declaration sought for by the petitioner in W.P.No. 17227/92 deserves to be granted.

It is in the context of the submissions briefly summarised hereinabove that the different points raised for Decision are required to be considered.

POINT NO. (1):

11. Before we take up for consideration Point No. (1), we consider it necessary to refer to the settled legal position with reference to Entry No. 40 of List I and Entry No. 34 of List II of the VII Schedule, as ruled by the Supreme Court, in H. Anraj and Others Vs. State of Maharashtra, and in J.K. Bharati Vs. State of Maharashtra and Others,

In H. ANRAJ's case, it has been held that the State Government cannot ban the sale of lottery tickets of the lottery organised by the Government of India or the Government of a State; that on a reading of Articles 73 and 298 together, it is clear that the executive power of the State in the matter of carrying on any trade or business with respect to which the State Legislature may not make laws is subject to legislation by Parliament but is not subject to the executive power of the Union. The Government of a State is not therefore required to obtain the permission of the Union Government in order to organise its lotteries, in the absence of Parliamentary legislation. Even assuming that such permission is necessary, a condition imposed by such permission that lottery tickets of one State may not be sold in other State, cannot be enforced by the other State. The other State has no power to make laws in regard to the lotteries organised by the first State. Its executive power, by virtue of Articles 298, extends to lotteries organised by itself, but not to lotteries organised by the other State. If a State acts in breach of the condition imposed by the President while entrusting power under Article 258, it is open to the President to revoke the permission or to take such further or other action as may be constitutionally permissible but it cannot possibly enable the Government of the other State to do a thing about it except to complain, perhaps to the Union Government.

This Decision has been further explained in J.K. Bharati's case. On considering Entry No. 34 of List II and Entry No. 40 of List I of VII Schedule and also Article 298 of the Constitution, it has been specifically laid down that there is no question about the competence of the State Legislature to legislate in respect of the sale or distribution, in its jurisdiction, of tickets of all lotteries organised by any agency whatsoever other than the Government of India or the Government of a State. The relevant portion of the Judgment is as follows:

"The exemption from the applicability of the Act granted to lotteries "specially authorised by the State Government", that is, by the Government of Maharashtra u/s 2(c), cannot be said to be discriminatory, merely because the exemption was not extended to all lotteries authorised by the Government of any State Whatsoever. The reason for exempting lotteries authorised by the Government of Maharashtra from the applicability of the Act and not lotteries authorised by the Governments of other States is patent. In the case of lotteries authorised by the Government of Maharashtra, the Government of Maharashtra may retain to itself all the necessary powers for the regulation and control and the prevention of misuse of funds and exploitation of guileless members in the public. In the case of lotteries authorised by the Governments of other States it may be difficult and even impossible for the Government of Maharashtra to take adequate regulatory steps to prevent abuse of the authority given by Governments of other States to non-Governmental agencies to organise lotteries. It may be equally difficult for the Governments of other States to take adequate measures for prevention of abuse of such authority within the State of Maharashtra. Therefore, no hostile discrimination whatever is involved in not extending the exemption from the applicability of the Act to lotteries authorised but not organised by the

Governments of other States."

Therefore, reading of both these Decisions together makes it clear that the Government of any State of the Union of India can organise the lottery in its territory or also in the territory of other States. Even in exercise of its executive power the State in which the lottery is organised by any other State/s of the Union of India, will not be entitled to interfere with it even though it has passed a law in that regard. The Union of India also can organise lottery in any of the States throughout the Country. For that also the Government of a State cannot take any action against it, nor cause interference with it. Further, it is open to the State Government to control or regulate the lotteries to be conducted by others other than those falling under Entry No. 40 of List I of the VII Schedule, by a Legislative enactment. It is in exercise of this power conferred upon the State Legislature by Entry No. 34 of List II of VII Schedule, an Act has been enacted by the State Legislature in Karnataka.

12. In order to find out whether the action of the State Government and its authorities in question, as contended by the appellants, impinge upon the power of the Union of India, or in other words, travel beyond the scope and ambit of the Act and Entry No. 34 of List II of VII Schedule, it is necessary to ascertain "pith and substance" or the true nature and character of the Act. For this purpose, we have to examine the contents of the Act, and the object it purports to serve. Therefore, we will now consider the provisions of the Act.

12.1 As per Section 3 of the Act, subject to the provisions of the Act, all lotteries are unlawful. The provisions of the Act provide for granting licence for running lotteries. Section 5 of the Act provides that a lottery promoted as an incident of an entertainment shall not be deemed to be an unlawful lottery, if the promoter thereof has obtained a licence in respect of such lottery. Section 6 provides that a private lottery shall not be deemed to be an unlawful lottery if the promoter thereof has obtained a licence in respect of such lottery. Section 7 also provides that notwithstanding anything to the contrary contained in the Act, the State Government may, in respect of a lottery promoted for the benefit of a charitable, religious or educational institution or organisation, grant a licence, subject to such conditions and on the payment of such fees or taxes as may be specified in the said licence and such lottery shall not be deemed to be an unlawful lottery. The other provisions of the Act, for our purpose, are not necessary except the provisions contained in Section 32 of the Act which provides that the provisions contained in the Act shall not apply to a licence or a person to whom a permit has been granted u/s 4 of the Mysore Race Courses Licensing Act, 1951, or to any entries in respect of any State or bet received by such licensee or person and also to lotteries organised by the Government of India or the Government of a State within the meaning of Entry 40 of List I in the Seventh Schedule to the Constitution of India. Section 4 of the Act, provides for punishment for the contravention of any of the provisions of the Act It provides that subject to the provisions of the said Section (Section 4) every person who in connection, with

any lottery promoted or proposed to be promoted either in the State or elsewhere contravenes the provisions of the said Section shall be punished as stipulated therein.

12.2 Thus, the provisions of the Act, referred to above make it clear that no person other than the Government of any State of the Indian Union or the Union of India can conduct a lottery in the State of Karnataka without obtaining a licence under the provisions of the Act and without satisfying or fulfilling the conditions mentioned in the relevant provisions of the Act.

13. Thus the various provisions of the Act, make it clear that they deal with only Betting and gambling to be conducted in the State of Karnataka and the Act exempts lotteries organised by the Union of India and the Government of any State of the Indian Union.

In the instant case, it is not the case of the appellants that the Royal Bhutan Government has obtained any licence from the State of Karnataka for running a lottery in the name of Royal Bhutan Government. Therefore, there cannot be any dispute that the lotteries that are being organised in the name of the Royal Bhutan Government are opposed to the provisions of the Act.

14. It is contended by the learned Counsel for the appellants that even if it is so, since the lottery is conducted by the Government of a foreign Country with which the Union of India has entered into a free trade agreement and since the relationship between the Royal Bhutan Government and the Union of India are very cordial, and since the Government of India itself has persuaded the State Government to permit the Royal Bhutan Government to organise and conduct the lottery in the name of Royal Bhutan Government in the same manner or with the same status as that a State Lottery, any action taken by the State Government interfering with the running of the said lottery would undoubtedly affect not only the relationship between the two Countries of trade and commerce and it also affects the foreign affairs, as such the State Government is incompetent to take any action in the matter. In this regard, learned Counsel for the appellants has placed reliance on Entries 10 and 41 of List I and also certain Decisions.

14.1 We first refer to these Entries: Entry 10 of List I reads:

"Foreign Affairs: all matters which bring the Union into relation with any foreign country."

Entry 41 of List I reads thus:

"Trade and commerce with foreign countries; import and export across customs frontiers: definition of customs frontiers."

It is no doubt true that the Entries in Lists I, II and III of Seventh Schedule to the Constitution of India have to be interpreted liberally so as to cover all possible aspects of the matters conceived and conceivable, and also matters likely to occur so as to ensure that the power is available to the Parliament and

the Union of India to meet all eventualities which may arise. Therefore, it is contended that though the lottery organised and conducted by Royal Bhutan Government, in the State of Karnataka without obtaining any licence from the State Government, would ordinarily fall under Entry 34 of List II, nevertheless, the action taken by the State Government would trench upon the power of the Parliament and the Union of India. In such an event, the State Government loses its competency and it has to seek the direction from the Central Government in this regard. In support of this contention, reliance is placed on a Decision of the Supreme Court in *FEDERATION OF HOTEL AND RESTAURANT v. UNION OF INDIA AND ORS.* specific reliance is placed on paras 11, 12 and 13 of the Decision. In para 11, the Supreme Court has referred to the various contentions put forth by the learned Attorney General. In para 12, those contentions have, been considered and it has been held as under:

"12. We have bestowed our careful consideration to these rival contentions. The principal question is whether the tax envisaged by the impugned law is within the legislative competence of the Union Parliament. In that sense, the constitutionality of the law becomes essentially a question of power which in a federal constitution, unlike a legally omnipotent legislature like the British Parliament, turns upon the construction of the entries in the legislative lists. If a legislature with limited or qualified jurisdiction transgresses its powers, such transgression may be open, direct and overt or disguised, indirect and covert. The latter kind of trespass is figuratively referred to as "colourable legislation", connoting that although apparently the legislature purports to act within the limits of its own powers yet, in substance and in reality, it encroaches upon a field prohibited to it, requiring an examination, with some strictness, the substance of the legislation for the purpose of determining what is that the legislature was really doing. Wherever legislative powers are distributed between the Union and the States, situations may arise where the two legislative fields might apparently overlap. It is the duty of the Courts, however difficult it may be, to ascertain to what degree and to what extent, the authority to deal with matters falling within these classes of subjects exists in each legislature and to define, in the particular case before them, the limits of the respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two provisions must be read together and the language of one interpreted, and, where necessary modified by that of the other.

The Judicial Committee in 1945 F.C.R. 179 (Federal Court) referred to with approval the following observations of Sir Maurice Gwyer C.J. in *Subrahmanyan Chettiar's case* AIR 1947 FC 47 at page 51);

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the legislature enacting them may appeal

to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee, whereby the impugned statute is examined to ascertain its "pith and substance" or its "true nature and character" for the purpose of determining whether it is legislation with respect to matters in this list or in that."

This necessitates as an "essential of federal Government the role of an impartial body, independent of general and regional Governments", to decide upon the meaning of decision of powers. The Court is this body."

In para 13 it has been held thus:

".....The crucial questions, therefore, are whether the economists' concept of such a tax qualifies and conditions the legislative power and, more importantly whether "expenditure" laid out on what may be assumed to be "luxuries" or on the purchase of goods admits of being isolated and identified as a distinct aspect susceptible of recognition as a distinct field of tax legislation."

After considering the other Authorities on the point, the Supreme Court in para 14 of its Judgment has held thus:

"Indeed, the law "with respect to" a subject might incidentally "affect" another subject in some way; but that is not the same thing as the law being on the latter subject. There might be overlapping; but the overlapping must be in law. The same transaction may involve two or more taxable events in its different aspects. But the fact that there is an overlapping does not detract from the distinctiveness of the aspects...."

15. In the instant case, it is relevant to notice that the Act squarely and properly falls under Entry 34 of List II. In addition to this, Section 32 specifically saves the lotteries organised by the Government of India or the Government of a State within the meaning of Entry 40 of List I of Seventh Schedule to the Constitution of India. Therefore, the whole object of the Act is to ensure that betting and gambling in the State of Karnataka does not take place except in accordance with the provisions of the Act or any other law that might be passed. Hence, the Act in question, cannot be held to be contrary to the proposition laid down in *Federation of Hotel and Restaurant's* case, relied upon by the learned Counsel for the appellants because in pith and substance, it is an Act, dealing with betting and gambling in the State of Karnataka passed in exercise of the legislative power of the State Legislature. It cannot also be considered to be a colourable exercise of legislative power.

16. The next Decision which is relied upon by the learned Counsel for the appellants, is: *Sudhir Chandra Nawn Vs. Wealth-tax Officer, Calcutta and Others*, In this case, Article 246, Entry No. 86 of List I and Entry No. 49 of List II of Schedule VII are considered.

It has been laid down that the power of levy of tax on lands and buildings under Entry No. 49 List II, does not trench upon the power conferred upon the

Parliament by Entry No.86, List I and therefore, the enactment of the Wealth Tax Act by the Parliament is not ultra vires. While dealing with the aforesaid Entries, it has been further elaborately stated thus:

"The tax which is imposed by Entry 86, List I of Seventh Schedule is not directly a tax on lands and buildings. It is a tax imposed on the capital value of the assets of individuals and companies, on the valuation date. The tax is not imposed on the components of the assets of the assessee: it is imposed on the total assets which the assessee owns, and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligations have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligation to discharge any liability out of his assets, it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to a tax on lands and buildings levied on the capital or annual value under Entry 49, List II. But the legislative authority of Parliament is not determined by visualizing the possibility of exceptional cases of taxes under two different heads operating similarity on taxpayers. Again Entry 49, List II of the Seventh Schedule contemplates the levy of tax on lands and buildings or both as units. It is normally not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings is directly imposed on lands and buildings, and bears a definite relation to it. Tax on the capital value of assets bears on definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86, List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II the State Legislature may adopt for determining the incidence of tax the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of the lands and buildings for determining tax liability will not make the fields of legislation under the two entries overlapping.

It has also been further observed by the Supreme Court thus;

"Under Article 246, exclusive power of the State Legislature has to be exercised subject to Clause (1) i.e., the exclusive power which the Parliament in respect of the matter enumerated in List I. Assuming that there is a conflict between Entry 86, List I and Entry 49 List II, which is not capable of reconciliation, the power of Parliament to legislate in respect of a matter which is exclusively entrusted to it must supersede protanto the exercise of power of the State Legislature."

17. Applying the principles laid down in the aforesaid Decision, we may point out that the Act, in question, squarely falls within Entry No. 34 of List II. In J.K. Bharathi's case, it has been laid down by the Supreme Court, that only exception to the law to be made under Entry 34 of List II of VII Schedule is the

organisation of the lotteries by the Union of India and the Government of any State. The Act has specifically exempted these lotteries by making specific provisions in the Act itself. Further none of the provisions of the Act affects such lotteries. Therefore, by any stretch of interpretation it is not possible to hold that the Act trenches upon the legislative field of the Parliament. In this regard it may also be pointed out that so far no Act has been passed by the Parliament with reference to Entry No. 40 of List I of Seventh Schedule.

Therefore, it is not possible to hold that the Decision in Sudhir Chandra Nawan's case will be of any assistance to the appellants.

18. The learned Senior Counsel for the appellants also placed reliance on a Decision of the Supreme Court in Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta and Others,

In this case, a foreigner by name Hans Muller, a West German subject was arrested by the Calcutta Police on 18-9-1954 and was placed under preventive detention. The order was made by the West Bengal Government u/s 3(1) of the Preventive Detention Act of 1950, on the ground that his detention was with a view to making arrangements for his expulsion from India. The contention raised, among other things, was that the detention order was made by the State Government and not the Centre; that the portion of the Section on which the order is based is the part that gives a State Government power to make an order of detention against a foreigner on satisfaction, with a view to making arrangements for his expulsion from India. In the said case it was held that it was well settled that the language of the Entries in the Seventh Schedule must be given the widest scope of which their meaning is fairly capable because they set up a machinery of Government and are not mere Acts of a Legislature subordinate to the Constitution. Giving Entry 9 in List I its widest range it was found impossible to hold that legislation that dealt with the right of a State to keep foreigners under preventive detention without trial did not bring the Union into relation with a foreign Country. It was also further observed thus:

"But in this particular case, the relation is even more direct, for the provision here is for detention with a view to making arrangement for a foreigner's expulsion from India. A foreign State has a very deep interest in knowing where and how its subjects can be forcibly expelled against their will. The legislative competence of Parliament to deal with this question is, we think clear; and this covers not only Section 3(1)(b), Preventive Detention Act but also the Foreigners Act 1946 (Act 31 of 1946) in so far as it deals with the powers of expulsion and the right of the Central Government to restrict the movements of foreigners in India and prescribe the place of their residence and the ambit of their movements in the land."

It was also further observed thus:

"Now the most effective method of preventing a breach of the order and ensuring that it is duly obeyed is by arresting and detaining the person ordered to be

expelled until proper arrangements for the expulsion can be made. Therefore, the right to make arrangements for an expulsion includes the right to make arrangements for preventing any evasion or breach of the order, and the Preventive Detention Act confers the power to use the means of preventive detention as one of the methods of achieving this end. How far it is necessary to take this step in a given case is a matter that must be left to the discretion of the government concerned, but in any event, when criminal charges for offences said to have been committed in this country and abroad are levelled against a person, an apprehension that he is likely to disappear and evade an order of expulsion cannot be called either unfounded or unreasonable. Detention in such circumstances is rightly termed preventive and falls within the ambit of the Preventive Detention Act and is reasonably related to the purpose of the Act.

Ultimately the Supreme Court arrived at the following conclusion:

"Our conclusion is that the Foreigners Act is not governed by the provisions of the Extradition Act. The two are distinct and neither impinges on the other. Even if there is a regulation and a good case for extradition, Government is not bound to accede to the request. It is given an unfettered right to refuse, Section 3(1) of the Extradition Act says:

"the Central Government may, if it thinks fit,"

Therefore, if it chooses not to comply with the request, the person against whom the request is made cannot insist that it should. The right is not his; and the fact that a request has been made does not fetter the discretion of Government to choose the less cumbrous procedure of the Foreigners Act when a foreigner is concerned, provided always, that in that event the person concerned leaves India a free man. If no choice had been left to the Government, the position would have been different but as Government is given the right to choose, no question of want of good faith can arise merely because it exercises the right to choice which the law confers. This line of attack on the good faith of Government fails to the ground."

Hence the Supreme Court dismissed the Petition.

19. Emphasis was laid by the learned Counsel as far as this Decision is concerned on the observations made by the Supreme Court that it brought the Union into relations with a foreign Country even though the Act was well within the power of the State Government. It may be relevant to notice that ultimately the Supreme Court dismissed the Petition which means that merely because the Act is likely to bring the Union of India into a relationship with a foreign Country, as long as it is well within the power of the State it cannot at all be struck down nor it can be held to be ultra vires the power of the State. Therefore, it is not possible to hold in what manner the sustenance can be drawn from the aforesaid Decision by the learned Counsel in support of his contention.

20. The learned Counsel for the appellants, yet placed reliance on another

Decision of the Supreme Court in *Indu Bhushan Bose Vs. Rama Sundari Debi and Another*, The question involved in that case was as to the field of legislation covered by the West Bengal Premises Tenancy Act No. XII of 1956 which was primarily concerned with the control of Rents and Eviction of Tenants and whereas it included in its field the expression "regulation of house accommodation" in cantonment areas, which expression was used in Entry No. 3 of List I of the Union List-I of VII Schedule. The relevant portion of the Judgment as found in Paragraph 12 is as follows:

"We have felt considerable doubt whether the power of legislating on relationship between landlord and tenant in respect of house accommodation or buildings would appropriately fall in Entry 21 of List II of the Seventh Schedule to the Government of India Act, or in the corresponding Entry 18 of List II of the Seventh Schedule to the Constitution. These entries permit legislation in respect of land and explain the scope by equating it with rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents. It is to be noted that the relation of landlord and tenant is mentioned as being included in land tenures and the expression "land tenures" would not, in our opinion, appropriately cover tenancy of buildings or of house accommodation. That expression is only used with reference to relationship between landlord and tenant in respect of vacant lands. In fact, leases in respect of non-agricultural property are dealt with in the Transfer of Property Act and would much more appropriately fall within the scope of Entry 6 of List III in the Seventh Schedule to the Constitution read with Entry 7 in the same List. Leases and all rights governed by leases, including the termination of leases and eviction from property leased, would be covered by the field of transfer of property and contracts relating thereto. However, it is not necessary for us to express any definite opinion in this case on this point because of our view that the relationship of landlord and tenant in respect of house accommodation situated in cantonment areas is clearly covered by the Entries in List I. In the Constitution, the effect of Entry 3 of List I is that Parliament has exclusive power to make laws with respect to the matters contained in that Entry, notwithstanding the fact that a similar power may also be found in any Entry in List II or List III. Article 246 of the Constitution confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I, notwithstanding the concurrent power of Parliament and the State Legislature in Lists III and II respectively. The general power of legislating in respect of relationship between landlord and tenant exercisable by a State Legislature either under Entry 18 of List II or Entries 6 and 7 of List III is subject to the overriding power of Parliament in respect of matters in List I, so that the effect of Entry 3 of List I is that, on the subject of relationship between landlord and tenant insofar as it arises in respect of house accommodation situated in cantonment areas, Parliament alone can legislate and not the State Legislatures. The submission made that this interpretation will lead to a conflict between the powers conferred on the various Legislatures in Lists I, II and III has also no

force, because the reservation of power for Parliament for the limited purpose of legislating in respect of cantonment areas only amounts to exclusion of this part of the legislative power from the general powers conferred on State Legislatures in the other two Lists. This kind of exclusion is not confined only to legislation in respect of house accommodation in cantonment areas. The same Entry gives Parliament jurisdiction to make provision by legislation for local self-government in cantonment areas which is clearly a curtailment of the general power of the State under Entry 5 of List II. That Entry 5 does not specifically exclude cantonment areas and, but for Entry 3 of List I, the State Legislature would be competent to make provision for local government even in cantonment areas. Similarly, power of the State Legislature to legislate in respect of: (i) education, including universities, under Entry 11 of List II is made subject to the provisions of Entries 63, 64, 65 and 66 of List I and Entry 25 of List III; (ii) regulation of mines and mineral development in Entry 23 of List II is made subject to the provisions of List I with respect to regulation and development under the control of the Union; (iii) industries in Entry 24 of List II is made subject to the provisions of Entries 7 and 52 of List II (iv) trade and commerce within the State in Entry 26 of List II is made subject to the provisions of Entry 33 of List III; (v) production, supply and distribution of goods under Entry 27 of List II is made subject to the provisions of Entry 33 of List III; and (vi) theatres and dramatic performances; cinemas in Entry 33 of List II is made subject to the provisions of Entry 60 of List I. Thus the Constitution itself has specifically put down Entries in List II in which the power is expressed in general terms but is made subject to the provisions of Entries in either List I or List III. In these circumstances, no anomaly arises in holding that the exclusive power of Parliament for regulation of house accommodation including control of rents in cantonment areas has the effect of making the legislative powers conferred by Lists II and III subject to this power of Parliament. In this view, we are unable to affirm the decision of the Bombay High Court in *A.C. Patel Vs. Vishwanath Chada*, which is based on the interpretation that Entry 2 in List I of the Seventh Schedule to the Government of India Act only permitted laws to be made for requisitioning of property, acquiring of property and allocation of property only. The same High Court in a subsequent case in *F.E. Darukhanawalla Vs. Khemchand Lalchand*, placed the same interpretation on Entry 3 of List I of the Seventh Schedule to the Constitution. That decision was also based on the same interpretation of the scope of regulation of house accommodation as was accepted by that Court in the earlier case."

Thus from the aforesaid statement of law laid down by the Supreme Court, it is clear that when the subject of legislation lies within the exclusive jurisdiction of the Parliament and the Union of India, the State cannot pass any legislation. In that case there was direct interference or infringement with the legislative power of the Parliament because cantonment areas will come within the control of the Union of India. Therefore, the State Government under the guise of regulation of house accommodation in the State cannot pass a law relating to cantonment

area. Hence it was held that the Act in so far as it covered the cantonment areas was not valid.

21. Such a situation does not arise in the instant case. The Act, as already pointed out, squarely fails within Entry No. 34 of List II of the Seventh Schedule. The Act does not interfere with the legislative power of the Parliament because it specifically excludes the lotteries covered by Entry No. 40 of List I of the Seventh Schedule of the Constitution. Therefore, we are of the view that this Decision also cannot be of any assistance to the appellants.

22. At this stage itself we may also advert to the contention urged by the learned Advocate General and the Decisions cited by him and also by Sri A.G. Holla, learned Counsel appearing for the petitioners in W.P.No. 17227/1992.

It has been contended that the Union of India in exercise of its executive power under Article 73 of the Constitution cannot issue any direction which is either contrary to law or contrary to the provisions of the Constitution. Article 73 of the Constitution reads thus:

73.(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend-

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

Provided that the executive power referred to in Sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

23. The underlined words in Clauses (a) and (b) of Sub-article (1) of Article 73 of the Constitution make it clear that the Union has power in respect of which the Parliament has power to make laws. In the instant case, as already pointed out, power to legislate "Betting" or "Gambling" as contemplated by Entry 34 of List II of Seventh Schedule vests with the State. In respect of any matter coming under that Entry, Parliament has no power to make laws except in so far as it covers Entry No. 40 of List I of Seventh Schedule, viz., the lotteries organised by the Government of India or the Government of a State. Therefore, the Union Government also in exercise of its executive power cannot issue any direction in respect of the matters falling under Entry No. 34 of List II of the Seventh Schedule and as covered by the Act in question.

24. Similarly, it is admitted before us on both sides that the treaty or the agreement of trade and commerce, which is produced as Annexure-C in Writ Petition 14735 of 1992 does not cover the conducting of lotteries by the Royal Government of Bhutan in India, much less in the State of Karnataka. Therefore, exercise of power under Clause (b) of Sub-article (1) of Article 73 of the Constitution is also not available to the Union of India. In addition to this the Proviso thereto specifically states that the executive power referred to in Clause (a) does not extend to matters with respect to which the Legislature of the State has also power to make laws. We have already pointed out that the State Legislature has got power to pass the Act in question as such the matter is covered by the Act. Therefore, no direction can be issued in respect of the matters which are governed or covered by the Act. As such, this is a case in which there is no scope whatsoever for the Union of India to issue any direction of the nature pertaining to the matters covered or governed by the Act.

Realising this, the Union of India has very wisely and advisedly entered into a correspondence with the State Governments for permitting the Royal Government of Bhutan to conduct its lotteries in the respective States and treat it in par with the State Lotteries. In this regard we may also refer to certain correspondence because it is contended before us that those correspondence would lead to a conclusion that the Government of India has issued a direction to the State Governments to permit the Royal Government of Bhutan to conduct the lotteries, therefore interference with the conducting of the lotteries by the Royal Government of Bhutan in disobedience to the direction issued by the Government of India would lead to interfering with the relationship of Royal Government of Bhutan with the Government of India and thereby it affects the foreign affairs and also to a certain extent relationship of trade and commerce between the two Countries.

25. The appellants have produced along with the Writ Petitions certain documents viz., Agreement of Trade and Commerce, Annexure-C; Copy of the letter dated 30th March, 1990 written by the Joint Secretary, Ministry of External Affairs, New Delhi bearing No.E.IV/204/2/87, addressed to the Director, Ministry of Home Affairs, New Delhi, Annexure-D; Telex Message from the Under Secretary to the Government of India/Bharat Sarkar, Ministry of Home Affairs/Griha Mantralaya, New Delhi, bearing No. Ve1011/6/9-SPA IV to the Finance Secretary, Government of Tamil Nadu, Madras regarding sale of lottery tickets organised by the Royal Government of Bhutan at Tamil Nadu, Annexure-E and letter dated 20th May, 1982 bearing No. 6/17/76-GPA. IV by the Director, Government of India (Bharat Sarkar) Ministry of Home Affairs/Grih Mantralaya, New Delhi to the Chief Secretaries of all States and Union Territories, Annexure-G. Annexure-G also refers to the letter of even number dated 27th July, 1976 and it has been stated therein that whole thing is based upon that letter. A copy of the said letter has been placed before us, to which a reference will be made in due course. As the contents of these letters are relevant to determine the contention as to whether the Government of India has issued a direction to the

State Governments to permit Royal Government of Bhutan to run the lottery, we consider it necessary to reproduce them:

ANNEXURE-D

Shyamala B. Cowsik Ministry of External Joint Secretary (North) Affairs, New Delhi No. E.IV/204/2/87 March 30, 1990 Dear Shri Sharma,

I am writing to you in connection with the sale of lottery tickets in India by the Royal Government of Bhutan and the recent problem which has come up due to the banning of such sale in some of the States in India notably, the States of Kerala and Tamilnadu.

2. As you are already aware, the sale of Royal Bhutan Government's lottery tickets in India is basically guided by the letters of your Ministry No. F6/17/76-GPA IV dated 27th July 1976 and letter No. 6/17/76-GPA IV dated 20-5-82. These two letters have set out very clearly that in the matter of sale of the lottery tickets of the Royal Government of Bhutan in India, "Bhutan should be treated as a part of the Indian market and should be given the same facilities in the sale of their lottery tickets in the States of India as the lottery tickets of any State are given." It is also mentioned that having regard to the special and very intimate relations which India enjoys with Bhutan, the Bhutan lottery should be treated at par with the lotteries organised in different States/UTS. The letters also observe that Bhutan has agreed to the sale of lottery tickets of any Indian State or UT. in Bhutan and that they would, in turn, like reciprocal treatment in India.

3. Hence, your Ministry has very clearly emphasized that the lottery of the RGB should be treated as a lottery organized by one of the States/UTS in India and the principle of reciprocity is involved in such matters.

4. It has been brought to our notice in the past as well as recently that some States in India have banned the sale of the lottery tickets of RGB on the pretext that the Bhutan lotteries are private lotteries and as such, are prohibited for sale in their territory or that the lotteries are organised by a foreign Government and that the permission of the Government of India has not been obtained etc. As is evident, the grounds are based on either misreading or ignorance of facts. There is this recent case in the State of Tamil Nadu where M/s. Deccan Agency Group, organisers of Bhutan lotteries in India, had to get an interim injunction from the High Court of Tamil Nadu to restrain the State Government from interfering with the sale of lottery tickets in the State of Tamil Nadu. Just a few days before this, the State of Kerala had also banned such sale.

5. At this point, it is worth mentioning that Article V of the Indo-Bhutan Treaty of 1949 provides for "free trade and Commerce between the territories of the Government of India and Bhutan". This Article has only been strengthened by the various agreements on trade and commerce concluded between India and Bhutan from time to time.

6. Against this background, I am writing to request you to kindly issue at the very earliest a circular letter of the Chief Secretaries of all the States and the Union Territories of India about the Bhutan lotteries. This letter should, first of all, explain clearly the status of the Royal Bhutanese lotteries in India, that is to say the need for them to be treated on par with the lotteries organised by any Indian State or Union Territory. The letter should also emphasise the need for the Governments of the States/Union Territories, not to ban the sale of Royal Bhutanese lottery tickets in their territory on the grounds that this is a private lottery organised by a foreign country. As explained above, this stand is simply not correct and has been clarified by your own Ministry in 1976 and 1982.

7. I would appreciate it greatly if you could have such a letter issued on an urgent basis and kindly endorse a copy of it to us for our information. The Royal Government of Bhutan are very seriously concerned about this problem, which has major financial implications for them and have been raising it with us very frequently at high levels. We would thus appreciate immediate action on this.

Yours sincerely, Sd/- (Shyamala B. Cowsik)

Shri. A.K. Sharma, Director, Ministry of Home Affairs, New Delhi.

Copy for information to Shri V.G. Khanna, Ambassador, E/I Thimp.

Sd/- (SHYAMALA B.COWSIK)

XXX XXX XXX

ANNEXURE-E

FROM: PRESIDENT TAMIL NADU, NEW DELHI.

TO: THE FINANCE SECY. GOVT. OF TAMIL NADU, MADRAS.

...

FOLLOWING IS THE MESG. RECEIVED FROM MRS. L.P. SRIVASTAV, UNDER SECY. TO THE GOVT. OF INDIA/BHARAT SARKAR, MINISTRY OF HOME AFFAIRS/GRIHA MANTRALAYA, NEW DELHI.

No. V21011/6/9/-SPA IV.

Ref: 1. LR.No. 31758/F 1N/RAF.90-91 Dated 22.3.90

FROM GOVT. OF TAMIL NADU.

SALE OF LOTTERIES TICKETS ORGANISED BY THE ROYAL GOVT. OF BHUTAN - REG.

SIR,

WITH REFERENCE TO THE LETTERS CITED ABOVE, I AM DIRECTED TO ENCLOSE A COPY EACH OF GUIDELINES ISSUED BY THIS MINISTRY IN 1976 AND 1982 WHICH STATE THAT LOTTERIES ORGANISED BY ROYAL GOVT. OF BHUTAN MAY

BE TREATED AT PAR WITH LOTTERIES ORGANISED BY DIFFERENT STATES/ UNION TERRITORIES IN INDIA.

2. I AM ALSO RE-DIRECTED TO ENCLOSE A COPY OF D.O. LETTER NO. E. IV/20 RX Dt. C. 30.3.90 FROM THE JOINT " SECY. IN THE MINISTRY OF EXTERNAL AFFAIRS WHICH IS SELF EXPLANATORY FOR NECESSARY ACTION.

3. KINDLY ACKNOWLEDGE RECEIPT OF THE LETTER.

XXX XXX XXX

ANNEXURE-G

No.6/17/76-GPA.IV Government of India (Bharat Sarkar) Ministry of Home Affairs/Grih Mantralaya, New Delhi, the 20th May, 1982

To

The Chief Secretaries of all States and Union Territories.

Sub: Sale of Bhutan Government's Lottery Tickets in Indian States/Union Territories - Proposal Foro.

Sir,

I am directed to refer to this Ministry's letter of even number dated the 27th July, 1976 on the subject mentioned above (copy enclosed for ready reference) and to say that as per the information available, some States and Union Territories including Assam, Karnataka, Madhya Pradesh, Nagaland, Tamil Nadu, Tripura, West Bengal, Chandigarh, Delhi and Pondicherry had agreed to treat the Bhutan lottery at par with lotteries organised by other States and UTs and to give similar considerations in granting permission on reciprocal basis. Subsequently, however, some of these States have reportedly taken action to step the sale of Bhutan lottery tickets in their respective territories.

2. The Ministry of External Affairs have intimated that the Royal Government of Bhutan would like free sale of their lottery tickets all over India and they have no objection whatsoever to the sale of lottery tickets of any State or Union territory in Bhutan and that they are prepared to make reciprocal arrangements with them. The Ministry of External Affairs have recommended that in view of the Treaty between Indian and Bhutan and the 1972 agreement which provide for free trade and commerce between the two countries, Bhutan should be treated as a part of the Indian market and should be given the same facilities for the sale of lottery tickets in the States of India as the lottery tickets of another State are given. Further, since the facilities are to be extended on a Reciprocal basis, there should be no difficulty or objection in their implementation.

3. It is requested that the view of the State Government Union Territory on the proposal contained in the above paragraph may kindly be furnished to this Ministry urgently.

Yours faithfully,

Authorised for issue sd/- sd/- (Ashok Bhatia) Section Officer Director Copy to the Ministry of External Affairs with reference to their D.O.letter No.P.IV/204/5/80 Dated the 26th Feb. 1982.

NO.F.6/17/76-GPA-IV Government of India, Ministry of Home Affairs.

To

The Chief Secretaries of all States and Union Territories. New Delhi, the 27th July, 1976.

Sub: Sale of Bhutan Government's lottery Tickets in Indian States/Union Territories - Proposal for.

Sir,

I am directed to say that the Government of Bhutan have approached the Ministry of External Affairs to ascertain whether it would be possible for Bhutan to sell their Government lottery tickets in Indian States/Union Territories on a reciprocal basis and in exchange allowing similar facilities to Indian State Governments for selling their lottery tickets in Bhutan.

2. The proposal has been examined at this and it is felt that the Bhutan Government lottery would have the status of a private lottery which comes within the purview of the States. But having regard to the special and very intimate relations which India is having with Bhutan, it is desirable that the Bhutan lottery may be treated at par with lotteries organised by different States/Union Territories in Indian and similar considerations may be applied in granting permission for sale of Bhutan lottery tickets on reciprocal basis.

3. It is, however, found that under Ministry of Finance (Department of Revenue and Insurance) Notification No. 76 dated 9.6.62 export of lottery tickets from India is prohibited. This Ministry is therefore approaching the Ministry of Finance for considering necessary amendments to the above notification for excluding Bhutan from the purview of the same.

The Department of Economic Affairs is also being approached for permission to arrange money remittances between the Indian States/Union Territories and Bhutan to facilitate remittances of sale proceeds as well as prize amounts from either direction. The results will be communicated to the State Governments in due course.

4. In the meanwhile, the State Governments/Union Territory Administrations may kindly consider the proposal and furnish their comments immediately along with their suggestions for the procedure to be followed in obtaining/granting authorisation for the sale of lottery tickets in the respective territories.

5. The States/Union Territories who do not have their own lotteries may also please indicate whether and under what circumstances they would like to grant permission for sale of Bhutan Government lottery tickets in their territories.

Yours faithfully, sd/- (C. Chakraborty) Deputy Secretary to the Govt. of India."

26. The letter dated 27th July 1976 reproduced above is treated as the guideline for permitting the Royal Government of Bhutan to conduct its lotteries in India.

A reading of the letter dated 30th March 1990, Annexure-D and also the guidelines dated 27th July 1976 and the telex message and also the letter dated 20th May 1982 would only lead to an inference or inevitable conclusion that the Government of India has been negotiating with the State Governments and has been trying to persuade the State Governments to permit the Royal Government of Bhutan to conduct its lotteries in the States of the Indian Union. It is neither stated in any one of those correspondence nor it is the case pleaded before us by the Union of India in the Statement of Objections and also the affidavit of the Secretary of the Foreign Affairs Ministry, that they have either directed the State Governments to permit the Royal Government of Bhutan to organise the lotteries or that they have decided to organise the lotteries in the name of Royal Government of Bhutan. Therefore, all that can be said is that neither the Union Government has taken any decision in this regard nor it has issued any direction to the State Governments in this regard. It is not the case of the Government of India that it has organised the lotteries in the name of the Royal Government of Bhutan. The documents extracted above are only inter-departmental correspondence of the Government of India. However, Annexure-G and the letter dated 27.7.1976 were addressed to the Chief Secretaries of the States. These communications cannot be considered to be, or do not amount to, a decision of the Government of India.

In *Ghaio Mall and Sons Vs. The State of Delhi and Others*, It has been held that an inter-departmental communication written with reference to the earlier communication made by the Excise Commissioner cannot be treated as an order of the Government so as to amount to granting L.2 licence which was concerned in that case. Similarly, in the instant case, the fact that certain communications were exchanged between the Departments of the Government of India and were also sent to the State Governments by itself did not amount to any decision or order of the Government of India to the effect that the Government of India was organising the lotteries in India in the name of the Royal Government of Bhutan. Such a decision alone would save the organisation of the lotteries by the Royal Government of Bhutan in India because under Entry No. 40 of List of I of the Seventh Schedule, it is open to the Government of India or the Government of any State to organise lotteries anywhere in India. Therefore, it is not possible to hold that the aforesaid letters and the guidelines would amount to any decision so as to attract Entry No. 40 of List I of the Seventh Schedule. We have arrived at this conclusion even on assuming that they can issue such a direction because in the earlier portion of our Judgment, we have held that Article 73 of the

Constitution does not permit issuing of such a direction contrary to the provisions of the Act.

Thus taking into consideration all the aspects of the case, it is not possible to agree with the contention advanced by the learned Senior Counsel appearing for the appellants that these correspondence would amount to giving a direction by the Union of India that the lotteries conducted by the Royal Government of Bhutan in India should be treated as the lotteries conducted by the Union of India or any State Government of the Indian Union. Though the Royal Government of Bhutan is a party to W.P.No. 17227/92, it has not chosen to appear before us. Therefore, we are left with no option but to hold that neither the Government of India has taken a decision to hold or organise a lottery for the Royal Government of Bhutan nor it has issued any such direction to the State Governments. Even the Royal Government of Bhutan has not put forth any such case. Therefore, the attempt on the part of the Royal Government of Bhutan to organise the lotteries in the State of Karnataka is contrary to law as it is in direct violation of the provisions of the Act.

27. At this stage itself, we will consider the contention of Sri. R.N. Narasimha Murthy, learned Senior Counsel for the appellants that running of the lotteries amounts to operating trade and commerce and as such it affects or touches the trade and commerce relationship of the Government of India with a foreign Country, therefore, it falls within the Entry Nos. 10 and 41 of List I of the Seventh Schedule.

28. In this regard, we may point out that running of a lottery cannot at all be considered to be either trade or commerce, as held by the Supreme Court in R.M.D. Chamarbaugwalla Vs. The Union of India (UOI), and in The State of Bombay Vs. R.M.D. Chamarbaugwala,

It is contended that though the Supreme Court has held that gambling activities are not protected either by Article 19(1)(g) or Article 301 of the Constitution, however, the same would fall within the meaning of trade and commerce as understood in common parlance. It is not possible to agree with this contention.

29. In the first Decision - R.M.D. Chamarbaugwalla's case, it has been held that the trade and commerce protected by Article 19(1)(g) and Article 301 are only those activities which could be regarded as lawful trading activities. Gambling is not "trade". It is *res Extra Commercium*. It does not fall within the purview of those Articles. Hence as regards gambling competitions, it is held that no protection under Article 19(1)(g) and Article 301 of the Constitution can be sought. It is therefore, clear that the Decision is rendered with reference to Article 19(1)(g) and Article 301 of the Constitution.

30. In the second Decision in State of Bombay's case, it is held that the 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

the Constitution.

31. Therefore, it is clear that the conducting of the lotteries by the Royal Government of Bhutan is not in accordance with the provisions of the Act, inasmuch as, no licence is obtained by the Royal Government of Bhutan under the Act. It is an illegal activity conducted by the Royal Government of Bhutan in the State of Karnataka and such an activity cannot even be termed either coming under the expression trade or commerce or under the expression covered by Entry No. 10 of List I. We may make it clear that a foreign Government or a foreign national merely because it is a foreign Government or a foreign national is not permitted or is not permissible to him to conduct any activity in India contrary to the law of the Country. If such an activity takes place in any State of the Indian Union, it is open to that State to enforce the law and to take such actions as are permissible in law. In the instant case, the conducting of the lotteries by the Royal Government of Bhutan is opposed to the provisions of the Act and selling of the lottery tickets in the name of Royal Bhutan Government is also opposed to the provisions of the Act. As such the State of Karnataka and its Authorities are bound to take, and are entitled to take action as permissible under the Act, and it is not the case of the appellants that the action taken by the State of Karnataka, and its Authorities, is outside the purview of the Act. However, it is their specific case that the Act itself is not attracted to the activities of Royal Bhutan Government in organising lotteries because it is a foreign Government and it is only the Union of India that has got the power to deal with it. We cannot accept such a contention. It will lead to permitting a foreign Government to carry on its unlawful activities in any manner it likes. Our Constitution does not permit such conduct on the part of any foreign national or any foreign Government. In such a situation, it becomes the bouhden duty of the State Government to take such action as is permissible to it in law.

32. For the reasons stated above, we hold that the Act falls under Entry No. 34 of List II of Seventh Schedule of the Constitution. It does not entrench upon the legislative power of the Parliament, as such the actions of the Authorities of the Government of Karnataka in seizing the lottery tickets of the lottery conducted by the Royal Government of Bhutan are valid and are well within the ambit of the Act, as such the same do not travel beyond the authority of the State and do not infringe or affect the trade and commerce relationship between the Government of India and the Royal Government of Bhutan. There is also no interference with the foreign affairs of the Government of India with the Royal Government of Bhutan. There is no decision of the Government of India, as already pointed out above, to organise the lotteries in India in the name of Royal Government of Bhutan.

33. Accordingly, Point No. 1 is answered as follows:

That the lotteries organised by the appellants and others in the name of Royal Bhutan Government in the State of Karnataka are not permissible in law and it is permissible for the Government of Karnataka to interfere with, and stop selling of

tickets of such lotteries.

Point No.2:

34. In view of the finding recorded on Point No. 1, the order passed by the learned single Judge does not call for interference.

Point No. 3:

35. In the light of the finding recorded on Point No. 1, to avoid further recurrence of the activities of organising the lotteries in the name of Royal Government of Bhutan in Karnataka, it is necessary to issue a declaration. Accordingly Writ Petition No. 17227 of 1992 is entitled to* succeed and a declaration is required to be made to the effect that the lotteries promoted and organised and the tickets of such lotteries sold in the name of the Royal Government of Bhutan in Karnataka are illegal and opposed to the provisions of the Act.

36. For the reasons stated above, Writ Appeals are dismissed. Writ Petition No. 17227 of 1992 is allowed. It is declared that the lotteries promoted and organised in the name of Royal Government of Bhutan in Karnataka and selling of the tickets of such lotteries are illegal and are opposed to the provisions of the Karnataka Lotteries and Prize Competitions Control and Tax Act, 1951 and consequently it is further declared, that it is open to the Government of Karnataka and its Authorities to take such steps as are open to them under the Act and under any other law for the time being in force to prevent promotion and organisation of such lotteries and selling of the tickets of such lotteries in the State of Karnataka.

In the facts and circumstances of the case, we make no order as to costs.

No sooner we pronounced the aforesaid Judgment, Sri K.G. Raghavan, learned Counsel for the appellants, made an oral application for grant of a certificate under Article 134A of the Constitution, on the ground that the case involves a substantial question of law of general importance which needs to be decided by the Supreme Court.

All that we can say is that we have not placed any new interpretation on the law relied upon before us. While considering Entry Nos. 10, 40 and 41 of List I and Entry No. 34 of List II of the Seventh Schedule of the Constitution, We have only followed the Decisions of the Supreme Court in which the aforesaid Entries have been considered. Therefore, we are of the view that our conclusions are in accordance with the Decisions already rendered by the Supreme Court. Hence, we do not consider that this is a case in which the Certificate as prayed for should be granted. Accordingly the Certificate is refused.