(2007) 03 KL CK 0102

In the High Court Of Kerala

Case No : W.A. No. 88 of 2007

John Rose, T. APPELLANT

Vs

State of Kerala and Others RESPONDENT

Date of Decision : 30-03-2007

Acts Referred:

Constitution of India, 1950 — Article 1, 162, 246, 246(3), 253
Kerala Tax on Paper Lotteries Act, 2005 — Section 10(4), 2, 7
Lotteries (Regulation) Act, 1998 — Section 4, 5, 6

Citation : (2007) 03 KL CK 0102

Hon'ble Judges : M.N. Krishnan, J;K.S. Radhakrishnan, J

Bench : Division Bench

Advocate : Nalini Chidambaram and Anil Sivaraman, for the Appellant; C.S. Vaidyanathan and V.V. Ashokan, Spl. Govt. Pleader (Taxes), V.T. Gopalan, Addl. Solicitor General, P. Muraleedhran, Addl. C.G.S.C. and Ajithkrishnan, A.C.G.S.C., for the Respondent

Judgement

K.S. Radhakrishnan, J.—Writ Petitioner is engaged in the sale and distribution of paper lotteries organized and conducted by the Royal Government of Bhutan which is marketing its lotteries in various States in India in terms of Ext. P-1 bilateral agreement entered into between the Government oflndia and the Royal Government of Bhutan. Petitioner was having a certificate of registration issued u/s 7 of the Kerala Tax on Paper Lotteries Act, 2005 for the sale of Bhutan lotteries in the State of Kerala. While so, he was served with Ext. P-13 notice dated 27-10-2006 to show cause why registration granted to the Petitioner be not cancelled on the ground that the Petitioner has violated some of the provisions of Section 4 of the Lotteries (Regulation) Act, 1998. Referring to Clause (j) of Section 2 of the Kerala Tax on Paper Lotteries Act, 2005 it is stated that the paper lotteries conducted in the State of Kerala should comply with the conditions prescribed u/s 4 of the Lotteries (Regulation) Act, 1998 and the promoter should be a person who has been duly appointed by the Royal Government of Bhutan supported by documentary evidence and only those paper lotteries will come under the purview of the Kerala Tax on Paper Lotteries Act, 2005. It was also stated that as per the terms of the agreement between the Royal Government of Bhutan and the Government of India the lottery, tickets could be sold in India subject to the provisions of the relevant laws in force in India, the Lotteries (Regulation) Act, 1998 and the Kerala Tax on Paper Lotteries Act, 2005. Reference was also made to the report of the Director of Vigilance and Anti Corruption Bureau dated 16-10-2006. Further it is stated in the notice that the Petitioner had violated Section 4(b), 4(c), 4(d) and 4(h) of the Lotteries (Regulation) Act, 1998.

2. Petitioner then sent a detailed reply dated 6-11-2006 refuting the various allegations raised in the notice. Petitioner has stated that he is engaged in the sale and distribution of paper lotteries organized and conducted by the Royal Government of Bhutan which is marketing its lotteries in all States in India where sale of lottery tickets is permitted. Petitioner was granted registration after due verification of all the documents produced and was treated as a promoter for the sale of lottery tickets of Bhutan in the State of Kerala. Further it was also pointed out that as per Section 5 of the Central Act, no State Government can prohibit the sale of lottery tickets organized by other State Governments within the State unless such State Government does not organize its own lottery and declares that State is a lottery free zone. Central Government has never thought of taking any action against the sale of lottery tickets of the Royal Government of Bhutan in the State of Kerala on the ground that the Petitioner has violated the provisions of Section 4 of the Lotteries (Regulation) Act, 1998. No order was also passed by the Government of India u/s 6 of the Act holding that the Petitioner is selling lottery tickets of Royal Government of Bhutan in contravention of Section 4 or 5 of the Central Act. It is also stated that the Petitioner was never made known about the enquiry conducted by the Director of Vigilance and Anti Corruption Department. The attempt of the State Government who is a competitor in the business of conducting lotteries is only to see that lottery tickets of Government of Bhutan are not sold in the State of Kerala. Further it is stated that State Government has no power to interfere with the treaty entered into between Royal Government of Bhutan and the Government of India. Petitioner therefore submitted that there is no justification in cancelling the registration granted to him under the Kerala Tax on Paper Lotteries Act. Since the Respondent did not accept the tax to renew the registration Petitioner has approached this Court seeking a declaration that Section 10(4) of the Kerala Tax on Paper Lotteries Act, 2005 in so far as it provides that cancellation of registration of promoters is beyond the legislative powers of the State of Kerala, inconsistent with the provisions of the Lotteries (Regulation) Act, 1998 and is discriminatory and ultra vires the provisions of Article 298 of the Constitution and also for a writ of certiorari to quash Ext. P-13 notice. Direction was also sought for commanding the third Respondent to receive the tax under the Kerala Tax on Paper Lotteries Act, 2005 and also for other consequential reliefs.

3. Learned Single Judge repelled the challenge against Ext. P-13 notice and

stated that since Bhutan is a foreign country and not a State in the Republic of India the provisions of the Central Act are not applicable to lotteries run by the Royal Government of Bhutan. Learned judge took the view that a legislation under Entry 40 of List I of the Seventh Schedule of the Constitution can apply only to lotteries conducted by the Central and the State Governments and the prohibition against the State of Kerala in taking action against other State lotteries has no application whatsoever to the lottery run by the Royal Government of Bhutan. Learned judge took the view that under Ext. P-1 treaty, it can sell the tickets of its lotteries in the various States in India, but its sale shall be subject to the local laws applicable. Learned judge referred to Entry 34 of List II and stated that in the case of foreign lotteries, the State Government can always maintain the stand that the registration can be granted only if they conform to the stipulations contained in Section 4 of the Central Act, the learned judge felt Learned judge also took the view, as far as other State lotteries are concerned, the provisions under the Kerala Act, which have the tendency to prohibit the sale of tickets of lotteries of other States are not enforcible by virtue of the constitutional limitation on the power of the State Legislature. But as far as the foreign lotteries are concerned, there is no necessity to read down the provisions of the Kerala Act.

4. Learned judge also took the view that though the State Government has submitted that the Kerala Act is a piece of legislation under Entry 62 of List II it is also a legislation under Entry 34, List II as far as it concerns regulation of lotteries and hence the regulatory power could be invoked against foreign lotteries, not covered by Entry 40 of List I. Learned judge also referred to the decision of the apex Court in B.R. Enterprises Vs. State of U.P. and Others, and took the view that Bhutan lotteries, as per the treaty signed with the Republic of India have been agreed to be subjugated to the relevant laws in India and hence would be subject to the legislation under Entry 34 of List II of the Seventh Schedule of the Constitution. Learned judge therefore concluded that for the sale of tickets of lotteries of the Bhutan Government in Kerala the provisions of the Kerala Act have to be obeyed and it should run its lotteries in accordance with the provisions of Section 4 of the Central Act. Holding so, learned judge repelled the challenge against Ext. P-13 and disposed of the writ petition accordingly. Petitioner aggrieved by the judgment of the learned Single Judge has preferred the present appeal.

5. Smt. Nalini Chidambaram, Senior Counsel appearing for the Appellant submitted that the reasons stated for cancellation of registration are arbitrary and without any legal justification and not for the purpose for which the Kerala Tax on Paper Lotteries Act was enacted. Counsel submitted that Ext. P-13 is a colourable exercise of power and is without jurisdiction. Senior Counsel submitted that the lotteries of Royal Government of Bhutan are governed by the treaty obligations and by the provisions of the Lotteries (Regulation) Act and only the Central Government alone has the power to examine whether there is any violation of Section 4 of the Act Learned Counsel submitted that the learned

Single Judge has committed a grave error in not properly understanding the principle laid down by the apex Court in B.R. Enterprises'' case (supra). Learned Counsel also referred to Article 253 of the Constitution which is the legislation for giving effect to international agreements and highlighted the effect of the non obstante clause contained in the said Article which takes away the power of the State Government under Article 246. Counsel submitted that State Legislature has no legislative competence to legislate on foreign lotteries under the legislative field of Entry 34 of List II, in which event, there can be no authority for the exercise of the executive powers under Article 162 as well. Counsel submitted that the judgment of the learned Single Judge to the extent it holds that the State Government can regulate Bhutan''s lottery by way of the Kerala Tax on Paper Lotteries Act, 2005 is erroneous in law and contrary to the constitutional scheme.

6. Senior Counsel submitted that the State Government cannot regulate other State organized lotteries and that constitutional limitations will equally apply in the case of Bhutan lotteries also. Counsel submitted that the learned Judge erred in holding that Section 4 of the Central Act be read down only in the case of lotteries organized by other States and not foreign lotteries. Senior Counsel also submitted that the learned Judge has committed an error in holding that the Kerala Tax on Lotteries Act can be traceable not only to Entry 62 of List II but also Entry 34 of List II. In the case of foreign lotteries, learned Counsel also refuted the various reasons stated in Ext. P-13 for refusing registration for the sale of lottery tickets organized by the Royal Government of Bhutan in the State of Koala. Learned Counsel also referred to Section 2(j) of the Kerala Tax on Paper Lotteries Act and submitted that the mere fact that the definition clause refers to the Lotteries (Regulation) Act does not mean that power conferred on the Central Government can be exercised by the officers functioning under the Kerala Tax on Paper Lotteries Act.

7. Sri V.T. Gopalan, Additional Solicitor General appearing for the fifth Respondent submitted that the State Government or its officers have no power to arrogate with the powers conferred on the Central Government or its officers by the Lotteries (Regulation) Act, 1998. Counsel submitted that Central Government is bound to respect the treaty entered into between the Government of India and the Royal Government of Bhutan. Counsel referred to the decision of the apex Court in B.R. Enterprises'' case (supra) and submitted that the apex Court found that Bhutan lottery does not fall within the purview of Entry 40 of List I and there is no law under Entry 10 or 14 of that list governing the treaty with Bhutan, it not being a lottery organized by a State or Centre and therefore the provisions of Lotteries (Regulation) Act, 1998 cannot be extended to Bhutan Lotteries. However, it was submitted that if a State wanted to be a lottery-free State, then the sale of Bhutan lottery tickets would also be subjected to such prohibition enforced in that State. Learned Senior Counsel submitted that the learned Single Judge has completely misunderstood the dictum laid down by the Supreme Court in B.R. Enterprises'' case.

8. Senior counsel also made reference to the decision of the apex Court in Maganbhai Ishwarbhai Patel etc. Vs. Union of India (UOI) and Another, and submitted that 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. Further it is also submitted that it does not seek to circumscribe the extent of the power conferred by Article 73. Senior Counsel also made reference to the decision of the apex Court in Union of India (UOI) and Another Vs. Azadi Bachao Andolan and Another, and submitted that the power of entering into a treaty is an inherent part of the sovereign power of the State. Counsel also made reference to the decision of the apex Court in S. Jagannath Vs. Union of India and others, and submitted that the Central Act has got overriding power over laws made by the State Legislature. Counsel also submitted that the question as to whether executive instructions to permit sale of lottery tickets organized by the Government of Bhutan in India without making a law under Entry 10 and 14 of List I did not come up for consideration either in Anraj''s case or B.R. Enterprises'' case, but counsel submitted that reading Article 73(b) along with Article 253 in the light of the decision of the Supreme Court in Maganbai''s case, it is permissible.

9. Senior counsel also submitted that even though Section 2(j) of Tax on Paper Lotteries Act, 2005 by which paper lottery had been defined as "any lottery other than on line lottery conducted in accordance with the provision contained in Section 4 of the Lotteries (Regulation) Act, 1998 that as such would not confer the authorities of the State to prohibit the lotteries conducted or promoted under the provisions of Section 4 of theiLotteries (Regulation) Act. Counsel also submitted that the provisions of the Kerala Gaming Act, 1960 and the Kerala Gaming (Amendment) Act, 2005 are functioning on different areas cannot be applied to lotteries conducted in accordance with the Central Act. Counsel submitted that Gaming Act has no application. Counsel also submitted that the Gaming Act is not a regulatory Act but a prohibitory Act providing for punishments and the said Act cannot be used to prohibit the lottery of Bhutan alone. Learned Additional Solicitor General also submitted that the Royal Government of Bhutan had declared that the lotteries are organized by the Government of Bhutan in accordance with the conditions stipulated u/s 4 of Lotteries (Regulation) Act, 1998 and as such the authorities under the Kerala Act cannot be allowed to sit in judgment over the stand of the Central Government.

10. Sri P.s. Raman, Senior Counsel appearing for the fourth Respondent took us extensively to the provisions of Ext. P-1 treaty and submitted that the same has the force of law just like law passed by the Parliament. Counsel submitted that Royal Government of Bhutan cann6t be discriminated in view of the treaty. Counsel also referred to several decisions in support of his contention on legislation by incorporation. Counsel also referred to the scope and ambit of

Article 253.

11. The learned Single Judge in our view has not properly appreciated the legal impact of the treaty entered into between the Royal Government of Bhutan and tiie Republic Government of India and wrongly applied the principles laid down by the apex Court in B.R. Enterprises'' case (supra) so as to hold the officers functioning under the Kerala Paper on Lotteries Act can regulate the lotteries organized by the Royal Government of Bhutan. Learned Single Judge, in our view, has committed an error in holding that the lotteries conducted by the State of Sikkim stands on a different footing compared to the lotteries organized by the Royal Government of Bhutan. The treaty entered into between the Government of India and the Royal Government of Bhutan, in our view, has got the status of a law just like any other legislation. Treaty has been entered into between the two countries taking into consideration the age-old ties with a desire to strengthen it. Article V of Ext. P-1 agreement states that all exports and imports of Bhutan to and from countries other than India will be free from and not subject to customs duties and trade restrictions of the Government of the Republic of India and the procedure for such exports and imports and the documentation which are detailed in the protocol to the agreement maybe modified by mutual agreement from time to time. Protocol to the agreement has made specific reference to Article 1 of the Agreement and stated as follows:

For the purpose of this Agreement, the term ''free trade and commerce'' in Article 1 shall be understood to include within its scope sale of Bhutan lottery tickets in India and the sale of Indian Government or State lottery tickets in Bhutan, subject to the relevant laws which may be in force in the territories of the Kingdom of Bhutan and India, as the case may be.

(emphasis added)

Royal Government of Bhutan also issued a certificate on 19-10-2005 wherein it is stated that the Royal Government of Bhutan is organizing and conducting lottery tickets throughout India where the sale of lottery tickets is permissible, keeping in view of the excellent and special relationship enjoyed by fee two countries as reflected in bilateral Agreement of Trade and Commerce signed between the two countries. It was further certified that the Lotteries (Regulation) Act, 1998 and Section 4 thereof is being scrupulously followed. In the said certificate reference was made to Sree Balaji Agencies, the Petitioner herein. Several other communications were sait from Royal Government of Bhutan to Assistant Commissioner, Government of Kerala and others. Registration was granted under the Kerala Tax on Paper Lotteries Act, 2005 to the Petitioner after taking note of all those documents. Assistant Commissioner has no case that Bhutan Lotteries as such cannot be sold in the State of Kerala but it says that the lotteries can be sold subject to the provisions of the Lotteries (Regulation) Act, 1998 and the Kerala Tax on Paper Lotteries Act, 2005. For violation of the provisions of Section 4 of the Lotteries (Regulation) Act, 1998 notices have been issued. Learned Single Judge has already found that the notices issued were with jurisdiction, but took the view that unlike the lotteries organized by the State of Sikkim and other States in India, the lotteries organized by a foreign country like Bhutan stands on a different plane and hence subject to Kerala Tax on Paper Lotteries Act read with Section 4 of the Lotteries (Regulation) Act. We find no reason to discriminate the lottery tickets sold by Royal Government of Bhutan in the State of Kerala to that of the lotteries organized by the State of Sikkim or other States in the State of Kerala. In our view, learned Single Judge has made a distinction which has no legal basis and due to a wrong understanding of the principle laid down by the Supreme Court in B.R. Enterprises'' case (supra). We may in this connection refer to paragraph 76 of the judgment in B.R. Enterprises'' case, as follows:

76. The sale of lottery tickets of Bhutan but for the aforesaid stipulation in the treaty it possibly could have been said it cannot be subjected to the laws of lotteries in India. But once treaty itself stipulates it to be subject to any law in India, then if the sale of Bhutan lottery tickets are not State-organised lotteries, it necessarily falls under other lotteries under Entry 34, List II. There is no other entry pertaining to lottery. Thus, it necessarily follows that its sale within India will be subject to the laws of the State as is applicable under this entry. In other words, if the State prohibits sale within its State not only sale of its own lottery but every other lottery, then the sale of lottery tickets of Bhutan will have to be subjected to the laws of that State. Thus, prohibition to other lotteries will equally be applicable to die sale of Bhutan lottery. In the present case, learned Additional Solicitor General, Mr. Vaidyanathan, also subscribed to this interpretation on behalf of the Union. As we have said, in the absence of law by Parliament, so far as the treaty with the said stipulation is concerned, there could possibly be no other interpretation. This interpretation further eliminates possible discrimination which is the subject of attack in the present case. Thus, the Bhutan lottery could not be said to be privileged or it, in any way, discriminates with other State lotteries.

Apex Court in B.R. Enterprises'' case held that Bhutan lottery does not fall under Entry 40, it not being a lottery organized by a State or Centre and therefore the provisions of the Lotteries (Regulation) Act, 1998 cannot be extended to Bhutan lotteries. The Court also held that once the treaty stipulates it to be subject to any law in India, then if the sale of Bhutan lottery tickets is not State organized lotteries, it necessarily falls under other lotteries under Entry 34 of List II. A priori if a State wanted to be a lottery-free State, then the sale of Bhutan lottery tickets would also be subjected to such prohibition enforced in that State just like any other State organized lottery. Apex Court in B.R. Enterprises'' case was dealing with a situation when State of U.P. was a lottery-free zone. Under such circumstances, a submission was made on behalf of the Government of India that once the treaty stipulates that Bhutan lotteries to be subject to any law in India, it cannot be said to be privileged. It was only in these circumstances the Government oflndia raised a plea that such a Stand cannot be taken to mean that even when a State chooses not to be a lottery-free State, it could prohibit the sale of Bhutan lottery tickets, being a foreign country when lotteries of other

States would be freely sold. The stand of the Government of India in B.R. Enterprises'' case was in the context of Bhutan lottery tickets not being given any special preference when the sale of lottery tickets of other States came to be prohibited in any lottery-free State. The Bhutan lottery tickets alone, in our view, cannot be prohibited since State is not a lottery-free State but it can also be prohibited if the State is a lottery-free zone because the Bhutan lottery cannot claim high status or claim any privilege. Learned Single Judge has therefore committed an error in holding that the Government of Bhutan lottery could be prohibited in the State of Kerala.

12. The reasoning that we have adopted for disposal of W.A. Nos. 101 and 256 of 2007 also would equally apply when we test the validity of Ext. P-13 notice in this case as well. Only Central Government or the officers functioning under the Lotteries (Regulation) Act, 1998 have got power to take action for violation of Section 4 of the Lotteries (Regulation) Act, 1998 and not the State Government or the officers functioning under the Kerala Tax on Paper (Lotteries) Act, 2005. There is no State law under Entry 34, List II prohibiting sale of lottery tickets in the State of Kerala and State of Kerala is not a free-zone. State Legislature, in our view, has no legislative competence to legislate On foreign lotteries under the legislative field of Entry 34 of List II of the Seventh Schedule. By Entry 40 of List I, lotteries organized by the Government of India or the Government of a State have been carved out of Entry 34 List II and included in Entry 40 of List I and hence the State Legislature has no legislative competence to legislate on foreign lotteries under the legislative field of Entry 34, of List II. Above being the legal position, in our view, learned Single Judge has committed an error in holding that the sale oflottery tickets of Royal Government of Bhutan stands on a different footing compared to lotteries organized by other States and the State has got the power to invoke Section 4 of the Central Act.

13. We are of the view, sale of Bhutan lottery tickets is not covered by the Lottery (Regulation) Act, 1998, but well covered by the treaty entered into by the Royal Government of Bhutan and the Government of India and the same has the force of law and to be treated in the same footing as the sale of tickets of other States in India subject to the same limitations and reservations but cannot claim any special privilege not conferred on other State lotteries in India. So long as State of Kerala is not a lottery-free State, sale of lottery tickets of Royal Government of Bhutan and the sale of lottery tickets of Government of Sikkim stands on the same footing and in case any violation of the treaty or agreement or Section 4 of the Central Act it is for the Government of India to take action and not the officers functioning under the Kerala Tax on Paper Lotteries Act. We therefore allow W.A. No. 88 of 2007 and quash Ext P-13 notice and direct the Respondents to receive the tax from the writ Petitioner.