

(1955) 01 BOM CK 0001
In the Bombay High Court
Case No : O.C.J. Appeal No. 72 of 1954

State of Bombay	Vs	APPELLANT
R.M.D. Chamarbaugwalia and Others		RESPONDENT

Date of Decision : 12-01-1955

Acts Referred:

Bombay Lotteries and Prize Competitions Control and Tax (Amendment) Act, 1952 — Section 12A
Bombay Lotteries and Prize Competitions Control and Tax Act, 1948 — Section 1, 12, 12(2), 12A, 15
Bombay Lotteries and Prize Competitions Control and Tax Rules, 1949 — Rule 2, 7
Constitution of India, 1950 — Article 11, 14, 19(1), 19(6), 226
Government of India Act, 1935 — Section 297, 297(1)
Penal Code, 1860 (IPC) — Section 294A

Citation : AIR 1956 Bom 1 : (1955) 57 BOMLR 288 : (1955) ILR (Bom) 680

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : H.M. Seervai and M.P. Amin, General, for the Appellant; M.L. Manekshaw and N.A. Palkhiwala, for the Respondent

Judgement

Chagla, C.J.—Petitioners No. 2 carried on the activity of running a crossword competition in Bombay prior to August 1948. After August 1948, they transferred their activity to the State of Mysore and they carried on that activity after obtaining the necessary license from that State. The registered office of the petitioners is situated in Bangalore. They own and run a weekly newspaper called the Sporting Star.

This paper is printed and published in Bangalore and it contains a crossword prize competition called the R. M. D. C. Crosswords for which entries are received from various parts of India including the State of Bombay. The petitioners have agents and depots in various places in the territory of India, including the State of Bombay, to collect entry forms and fees for being forwarded to the petitioners at Bangalore. The petitioners advertise their crossword prize competition in various publications in various places in India including the State of Bombay.

The Legislature of the State of Bombay passed the Act, being Act 30 of 1952, which amended Act 54 of 1948, by which they purported to tax the gross receipts of petitioners No. 2 from the residents of Bombay who had submitted entries for the crossword competition, and by this Act also the Legislature imposed certain restrictions upon the manner in which petitioners No. 2 should carry on their activity in the State of Bombay.

The petitioners by their petition contended that the provisions in the Act taxing petitioners No. 2 and also "imposing restrictions upon their activity was "ultra vires" of the State Legislature, The petition was heard by Desai J. who held that certain provisions of the Act were "ultra vires". The State of Bombay has now come in appeal.

2. Several questions of the utmost importance both to the citizen and to the State have been agitated at the Bar. It may be that it is possible to dispose of tin's appeal on a very narrow ground, but both Mr. Seervai on behalf of the State of Bombay and Mr. Manekshaw on behalf of the petitioners have asked us to decide the various questions which were raised in the Court below, because both parties are anxious that they should get a final and authoritative opinion on questions of this importance.

We are told that the matter will ultimately be agitated before the Supreme Court and it is desirable that the Supreme Court should have the view of this Court on these various questions that have been discussed before us.

Ordinarily we would have been most reluctant to decide questions which do not directly arise for our determination. A Court like an individual should only cross a hurdle when it reaches it and there is always time enough to decide questions as and when they directly arise for our determination.

But in view, as we said, of the importance of the questions and in view of the desire of both the petitioners and the State, we have departed from the ordinary principle which we follow in these matters and we have heard arguments at some length and we also propose to give our opinion on the various questions raised at the Bar.

3. The first question that arises for our consideration is with regard to the legislative competence of the State Legislature to enact this Act. In our opinion, the correct principle which should be applied in order to ascertain whether the State Legislature is competent to pass an impugned piece of legislation is in the first place to look at the Lists annexed to the Seventh Schedule of the Constitution in order to determine whether the Legislature has legislated upon a topic within its competence. If it has legislated upon a topic not within its competence, then the legislation is clearly "ultra vires" and no further question arises.

But even if it has legislated upon a topic within its competence, the next question that must arise is whether there is a territorial nexus between the subject-matter

and the State. The competence of the State Legislature arises by virtue of the provisions of Article 245 and Article 246(8) of the Constitution, and the State Legislature has the competence to make laws mentioned in the relevant Lists for the whole or any part of the State.

Therefore not only is the legislative competence confined to the topics mentioned in the Lists, but it is also confined to legislating with regard to the whole or any part of the State. If the Legislature legislates in respect of a topic mentioned in the relevant list and the legislation goes beyond the State, then it would not be competent legislation, because then the Legislature is not legislating for the whole or any part of the State but it is legislating beyond its jurisdiction.

If therefore a person affected by the legislation were to challenge it on the ground that he is affected by the legislation, although he or his business or the transaction in which he is engaged has no connection with the State at all, then it would be open to the Court to say that the legislation is extraterritorial in its effect.

If then these two tests are satisfied that the legislation is competent in the sense that it is covered by a topic mentioned in the relevant list and also it is not extra-territorial, then the third question to be considered is whether the Constitution has placed any restrictions upon the power of the Legislature to legislate on that particular topic, because, as we shall presently point out, the scheme of the Constitution is with regard to many topics that after conferring legislative competence upon the State Legislature it has placed certain restrictions upon it contained in various articles of the Constitution.

4. Now, in order to decide the legislative competence with regard to the impugned Act we must first look at the Act itself and consider what the scheme of the Act is and what is the subject-matter with which the Act is dealing.

Perhaps it will be better if we first trace the legislative history of this legislation. The first Bombay Act which dealt with prize competitions was Act 11 of 1939. That Act sought to levy tax on prize competitions and also provided that a prize competition shall not be conducted without a license. But it is pertinent to note that the Act excluded from its ambit a prize competition contained in a newspaper or periodical printed and published outside the Province of Bombay.

Then we have Act 54 of 1948 which is the principal Act under challenge. That Act dealt both with lotteries and prize competitions. But as originally passed it excluded from its ambit, as the Act 11 of 1939 did, a prize competition contained in a newspaper printed and published outside the Province of Bombay. Finally we come to Act 30 of 1952 which extended the ambit of Act. 54 of 1948 to competitions which were printed and published in newspapers outside the Province of Bombay.

5. Turning to the Act as amended, in the definition section, which is Section 2, there is an inclusive definition of "prize competition" and that definition is under

three different heads" The first head consists of crossword prize competition, missing word prize competition, picture prize competition, number prize competition, or any other prize competition for which the solution is or is not prepared beforehand by the promoters or for which the solution is determined by lot or chance.

The second head is, "any competition in which prizes are offered for forecasts of the results either of a future event or of a past event the result of which is not yet ascertained or not yet generally known". The third head is, "any other competition success in which does not depend to a substantial degree upon the exercise of skill." "Promoter" is also defined and it includes a proprietor, manager, organizer or any person having the control or directing the conduct of a lottery or prize competition, and in the case of a lottery or a prize competition conducted through a newspaper, includes the publisher of such newspaper, and with regard to a lottery or prize competition contained in a newspaper or publication printed and published outside the State, the manager or agent of the publisher of such newspaper or publication in charge of its circulation or distribution is deemed to be a promoter of the lottery or prize competition for the purposes of the Act.

Section 3 renders all lotteries and all prize , competitions unlawful subject to the provisions of the Act. Section 4 constitutes an offence the promoting of a lottery or a prize competition which is made unlawful by the provisions of the Act. Section 7 provides that a prize competition shall be deemed to be an unlawful prize competition unless a license in respect of such competition has been obtained by the promoter thereof. Section 8 provides for penalty for contravention of Section 7. Section 9 provides for the license which shall be granted by the Collector on payment of such fees and subject to such conditions and shall be in such form as may be prescribed.

Section 12 deals with the levy of tax on lotteries and prize competitions and the tax provided for prize competition is a tax at the rate of 25 per cent, of the total sum received in respect of such competition. Sub-section (2) of Section 12 provides for a rate higher than 25 per cent., hut not exceeding 50 per cent, and it also gives the power to the State to impose tax at different rates having regard to the total sum received in respect of a competition.

Then conies Section 12A which is the main section challenged by the petitioners, and that deals with the levy of tax on lotteries and prize competitions in newspapers and publications printed and published outside the State, and that section provides for a tax at a rate not exceeding the rate specified in Section 12 and it is on the sums specified in the declaration made u/s 15 by the promoter of the lottery or prize competition as having been received or due in respect of such lottery or prize competition, and it also provides for an alternative form of taxation which is a lump sum having regard to the circulation or distribution of the newspaper or publication in the State.

It is not disputed that having regard to the rules and the forms, the tax u/s 12A

is only payable on the amounts received by petitioners No. 2 in respect of the entries sent by residents of the State of Bombay. In other words, Section 12A levies a tax upon the gross receipts in the hands of petitioners No. 2 from the moneys received as admission fee for entering the crossword competition by the residents- of the State of Bombay. Section 31 empowers the State Government to make rules for the purpose of carrying out the provisions of the Act, and Section 33 repeals Section 294A, Penal Code.

6. The contention of the State is that this w a legislation dealing with betting and gambling, and it falls within entry 34 of List II in the VIIth Schedule of the Constitution. According to the State, the legislation also falls under entry 62 in the same List which deals with taxes on betting and gambling. It may be noticed that the Act in question has two separate and independent aspects. It seeks to control prize competitions and also lotteries and it also seeks to impose tax on both these activities. To the extent that the Act levies a tax, the contention of the State is that its competence to levy this tax arises by reason of entry 62. To the extent that the legislation deals with prize cam-petitions and lotteries, by insisting upon a license and laying down conditions of the license and controlling these activities, the contention of the State is that it is legislation dealing with the topic of betting and gambling in entry 34.

Very learned arguments were advanced before us as to what is the proper connotation of the expression used by the Constituent Assembly in the Constitution in the VIIth Schedule, viz. betting and gambling. It may be pointed out that the parent Act was passed when the Government of India Act was in force and the amending Act was passed when our Constitution had been enacted. But as far as the question of legislative competence is concerned, the language used both in the Government of India Act and .the Constitution is the same, viz., betting and gambling.

7. Mr. Manekshaw has urged that an Act dealing with prize competitions--and we are only concerned here with the provisions relating to prize competitions and not the provisions relating to lotteries--is not an Act which could be said to fall within the topic described in the VIIth Schedule as betting and gambling. Mr. Manekshaw says that these words must receive from us their strict legal connotation, and if we look at the legislative history it would be clear that prize competition is neither betting nor gambling. It is nobody's case that this legislation can be described as legislation dealing with betting, and the only expression which calls for our consideration is the expression "gambling".

Mr. Manekshaw says that we had in Bombay an Act dealing with gambling and that was the Bombay Prevention of Gambling Act, 1887, and we must look at that Act in order to decide what gambling really means in the eye of the law. Mr. Manekshaw is right that if a prize, competition were to be judged by the definition given in Bombay Act IV of 1887, then it would clearly not come within the purview of that Act. But it is rather significant to note that although the Act is called "The Prevention of Gambling Act", "gambling" is nowhere defined in the

Act at all. What is really defined is "gaming " and Section 3 which defines "gaming" expressly provides that gaming will not include a lottery.

Mr. Manekshaw says that even if prize competitions are looked upon as lotteries, they would not come within the ambit of entry 34, because a, lottery is neither betting nor gambling. He points out that the only legislation in India which dealt with lotteries was the Indian Penal Code and Section 294A penalized the drawing of lotteries unless they were authorized by the State. Mr. Manekshaw also says that both Parliament and the Constituent Assembly were familiar with the topic of lottery, because in the Government of India Act in List I to the VIIth Schedule Entry 48 dealt with State Lotteries, and in our own Constitution Entry 40 in List I deals with lotteries organized by the Government of India or the Government of a State. Therefore it is argued that if either Parliament or the Constituent Assembly wanted to confer legislative competence upon the State Legislature with regard to lotteries, there was nothing to prevent them from expressly so providing in the relevant entries. The absence of the expression "lottery" from these entries clearly, according to Mr. Manekshaw, leads to the inference that the State Legislature is not competent to legislate with regard to lotteries.

It is also pointed out that there is good reason why the general topic of lotteries, apart from lotteries organized by the Government of India or the Government of a State, was not dealt with in any of the Lists, and the reason is, as already pointed out, that the subject of lotteries was dealt with by the Indian Penal Code and that could well have been looked upon as a subject of criminal law falling in the Concurrent List. The correct approach for the construction and interpretation of the various entries in the VIIth Schedule has been laid down in a decision of this Court reported in -- *Fram Nusservanji Balsara Vs. State of Bombay and Another*, . The relevant passage is at p- 213 :

".....Now, in construing the various entries in this List, certain basic facts have to be borne" in mind. The Government of India Act gave to India a Federal Constitution with well defined legislative powers for the Centre and the Provinces and also a field of legislation with concurrent powers for both. The Provincial Legislature within the ambit of its own powers was sovereign and the powers conferred were to be construed as plenary powers.

As far as possible an attempt was to be made to reconcile the various entries in the List, and in interpreting any particular entry the widest import was to be given to the language used by Parliament. The attempt of Parliament was to exhaust all spheres of legislative activity by enumerating all conceivable topics of legislation in the three Lists. It was the duty of the Court to make every effort, when a piece of legislation came up before it for consideration to find that powers to legislate had been conferred upon the appropriate Legislature under one or the other entry in one of the three Lists."

Therefore we must give to the expression "gambling" used in entries 34 and C2 of List II the widest interpretation. Both Parliament "and the Constituent

Assembly advisedly used an expression which is strictly not a legal expression but more a popular expression. The object of using this expression was to cover every activity which from every aspect could be considered as gambling.

8. Now, "gambling" has been defined in the latest edition of the Encyclopaedia Britannica to which Mr. Seervai has drawn our attention. At page 11, Vol. X, the learned author points out that the expression "gaming" is archaic except in law and a wager (synonymous with bet) may be promoted by Knowledge, opinion or conjecture as well as by reliance of chance and that unless otherwise qualified, however, these terms all imply gambling which has become the comprehensive term to denote any gaming, wagering or undertaking (whether or not lawful or respectable) whose determination is controlled or influenced by chance or accident and which is undertaken with consciousness of risk.

Therefore if we come across any activity or undertaking whose determination is controlled or influenced by chance or accident and which under-taking is undertaken or activity entered into with consciousness of risk, then the definition of "gambling" would be satisfied.

Therefore "gaming" in the sense used in the Prevention of Gambling Act, or wagering or lottery whether in the sense used in the Indian Penal Code or in the wider sense to which we shall presently refer, all are illustrations of gambling: the element of gambling is present in each one of these activities. The State in the present case was concerned to satisfy the Court below that this particular prize competition with which we are concerned was a lottery.

We are really not strictly concerned whether it is a lottery in the strict sense of the term, nor are we concerned whether it is a lottery in the wider sense in which it has been decided by the English Courts. All that we are concerned with is whether it is gambling in the wide sense in which that expression is used in entry 34.

9. Now, "lottery" has been defined in Halsbury, Vol. XV, page 525. A lottery has been described as a scheme for distributing prizes by lot or chance. Therefore, if there is a scheme under which prizes are to be given and the winner of the prize does "not get it by reason of skill exercised by him, but obtains it merely by chance or by the drawing of lots, then that scheme would be a lottery as understood in the English law and would constitute gambling.

The definition given by Halsbury requires perhaps a slight alteration or amendment as the English authorities themselves point out, with which we shall presently deal. It is not necessary to constitute a scheme a lottery that the prize should be distributed wholly by chance. In order to take the scheme out of the category of lottery it is essential that there must be a substantial element of skill, although that element may not be the preponderating element.

If, as the authorities have pointed out, a mere scintilla of skill is displayed in order to enable the person competing for the prize to obtain the prize, then it

would still be a lottery and would constitute gambling. As far as India is concerned, as we have pointed out, the only legislation with regard to lotteries was the one found in the Indian Penal Code where the definition was the old definition of what one might call a mechanical lottery where lots were drawn and obviously the result was determined by chance.

But the word has progressed since then, or perhaps one might say retrograded since then, and more ingenious devices have been introduced in order to award prizes which on the face of them are not by lots but still the element of chance is the preponderating element, and the English Courts have been concerned in recent years to decide whether these new ingenious schemes introduced did or did not constitute lottery.

It may be pointed out that it is difficult to believe that both Parliament and the Constituent Assembly should have totally - omitted from the VIIth Schedule the subject of lottery as understood by the English Courts. If Mr. Manekshaw's contention were to be accepted, the result would be this that except for the topic of State lotteries, other lotteries were not dealt with either by Parliament Or the Constituent Assembly in the VIIth Schedule.

As we pointed out in the decision just referred to, the Court must always be reluctant to come to the conclusion that a particular topic of legislation has not been dealt with and therefore it falls into the residue.

We are, therefore, of the opinion that the better and the more proper interpretation of the expression "gambling" is that Parliament was given the competence to deal with lotteries organized by the Government of India or the Government of a State under Entry 40 of List I, and with regard to all other types of lotteries competence was conferred upon the State Legislature under entry 34.

Therefore in our opinion the State Legislature, is competent to deal with the subject of lotteries I in the sense in which we have indicated, and if the present legislation with which we are concerned is a legislation dealing with lotteries in that wider sense, then that legislation would be within the competence of the State Legislature.

10. In this connection we might consider" what is a lottery as judicially understood and interpreted. Various cases were referred to at the Bar, but it will be sufficient if we point out the leading cases which have clearly indicated what is the proper test to apply to determine whether a particular scheme is a lottery or not and what are the real elements of a lottery.

(II) the first case is -- "Hall v. Cox" 1899 1 QB 198 (B). That was a case of a prediction of the number of births and deaths in London during a named week, and Smith L. J. in his judgment stated that the result no doubt depended largely on chance, but not entirely, and the cases show that to constitute a lottery it must be a matter depending entirely upon chance. This decision is relied upon in order to contend that if there is any element of skill at all, then the scheme would

not fee a lottery.

To the extent that Smith L. J. suggested that any skill, however trivial or however insubstantial, would be sufficient not to convert a scheme into a lottery although substantially the result would depend upon chance and not skill, the decision does not seem to have been followed or approved in subsequent decisions.

12. The next is a decision reported in - "Scott v. Director of Public Prosecutions" 1914 2 KB 868 (C). That was a case where certain amount of literary skill was involved in the competition, and Lush J. points out (p. 877):

".....The distinction is a very plain one between a person who buys a ticket for a lottery and a person who competes even in a scheme like this. Nothing that the former does or can do can affect the result. He only awaits the result of the drawing of lots."

It is rather interesting to note how perturbed Lush J. was even as far back as 1914 with the growing number of prize competitions, and at page 878 the learned Judge says :

"I wish to add that I have realised that the consequences of these competitions where the sums offered are very large and the degree of skill is very small may be, and probably are, mischievous, and that in many cases the real incentive to the readers of the newspapers to take part in them .is something not far removed from the spirit of gambling." And Atkin J. says (p. 880).

".....I do not agree that literary skill is essential. " Any land of skill or dexterity, whether bodily C(c mental, in which persons can compete would prevent a scheme from being a lottery if the result depended partly upon such skill or dexterity."

13. The third case which is similar to the facts of this case is - "Coles v. Odhams Press Ltd 1936 1 KB 416 (D). That was a case of a cross-word puzzle competition- The puzzle was so constructed that in a number of instances a clue could be satisfied by only one word having no alternative, while in other instances the clue suggested two or more alternative words which might not all be equally appropriate.

The competition editor had prepared before-hand a test solution of the puzzle, and the prize was to be awarded to the competitor whose solution happened to correspond most closely to that of the competition editor, although, if all the solutions sent in were examined and compared on their merits, the solution of that competitor might not be found to be intrinsically the best; and the English Court of Appeal held that this crossword puzzle competition was a lottery.

Lord Hewart C, J. compared this case with the case of -- "Scott v. Director of Public Prosecutions (C)", and he says (p. 424) :

".It seems to me that there is all the difference in the world between a case

where persons engaged in a literary competition allow somebody else to pick out the best of their efforts and agree to abide by his decision, and a case where persons undertake to make a series of shots at "something already decided behind their backs, not on the terms that anybody shall exercise judgment in deciding which is the best and most skilful of the competitors" efforts, but on the terms that somebody shall perform the task of deciding which comes nearest to a secretly fixed standard."

At page 426 the Lord Chief Justice observes :

".....The solution which is to be adjudged to be correct is not to be picked out of the efforts of the competitors in competition with each other. It is to be the solution that is found, on examination, to coincide most nearly with a set of words chosen beforehand by somebody not known by a method, if any, not stated, that person being perfectly at liberty to act in an arbitrary, capricious, or even mischievous spirit. In other words, the* , competitors are invited to pay a certain number of pence to have the opportunity of taking blind shots at a hidden target."

And Humphreys, J. went to the length of suggesting in his judgment that if the Judges who decided "Scott v. Director of Public Prosecutions (C)", had the knowledge gained from cases which, have been decided since that case, they might have come to a different conclusion, and the passage at page 429 is rather significant and also pertinent having regard to the facts of the present case to which we shall advert:

".....When there are alternative solutions of such a puzzle as this the difficulty arises that the competitor who is the person to be considered, is invited to decide which of two or more alternative solutions will be selected by some person whom he does not know, and by some method which is not indicated."

And again at the same page the learned Judge says that the competition was an invitation to persons to guess what will be the view of some unknown person who is called the competition editor as to the correct answer to give to a question connected with a crossword puzzle.

14. Finally, there is the decision in -- "Moore v. Elphick" 1945 2 All ER 155 (E). That was a case of a football pool and the appellant helped the competitors to enter the competition for forecasting the result of football matches. The appellant, who had carefully studied the result of football matches for a number of years, selected out of a total of twelve matches played in a particular week, four teams which he considered to be likely winners. For the remaining eight teams he made varying entries, worked out on a mathematical basis " of permutation and combination; and it was held that as far as the forecast with regard to the result of the four matches was concerned, the appellant undoubtedly used his skill.

Humphreys J., in his judgment at .page 156 deals with the case of "Scott v.

Director of Public Prosecutions (C)", and quotes the judgment of Lush J. (p. (874) :

".. . If merit or skill plays any part in determining the distribution, there has been no lottery and there is no offence."

And the learned Judge goes on to say (p. 156):

"... To that definition, I think, should be added that the merit or skill must be real skill which has some effect. It must be something more than a scintilla of skill, so that it can fairly be said that the distribution of the prize, the allocation of the prize, in the particular case, was due to two causes, not one cause with possibly a scintilla of some other "cause added to it, but two separate causes, one being skill and the other being chance."

It is also necessary to observe what the learned Judge says that the Court will not merely look on the face, of the scheme, but will go deeper than that into the real scheme as it emerges from a close examination. And Humphreys J. winds up his judgment by putting this question: "Does the skill, if skill is proved, really affect the result?" And that according to the learned Judge is the real test which must be applied in order to determine whether prize was given by chance or by skill. Cassels J. in a brief judgment points out (p. 162) :

".... .A scheme must be looked at as a whole. If chance predominates and is the one outstanding feature, then it comes within the definition of a lottery as laid down by the cases. For instance, it has been decided that it is mere chance that a person will solve a puzzle, of which there are several solutions, in exactly the same way that someone else has already solved it."

15. It is in the light of these judgments that we have, in the first place, to consider whether the impugned legislation deals with lotteries, and in the next place to consider whether on the facts of this particular case the scheme promoted by the petitioner is a lottery. Turning to the Act for this purpose, what is urged by Mr. Manckshaw is that even in its wider sense this legislation does not merely deal with gambling, but it also deals with activities which in no sense of the term could be characterized as gambling, and our attention is drawn to the definition of "prize competition".

As we have already pointed out, the definition consists of three categories, and what is urged is that as far as the first category is concerned, in which the case of the petitioners fall, viz., crossword prize competition, the Legislature has not indicated at all that in such a competition the prize must necessarily be one by chance and not by the display of skill.

Mr. Seervai relies on the third category which deals with any other competition, success in which does not depend to a substantial degree upon the exercise of skill, and Mr. Seervai wants us to import into the first category the qualifications of the competition laid down in the third category. Mr. Seervai says that everyone of the competitions referred to in the first category must be a competition in

which success does not depend to a substantial degree upon the exercise of skill.

We find it rather difficult as a pure matter of construction to accept Mr. Seervai's submission. The third category is obviously an "ejusdem generis" clause and it deals with competitions not dealt with in the first and second categories. It may be that the competition referred to in the third category must be of the same genus as referred to in the first and second categories.

But it will be contrary to all canons of construction to import from the "ejusdem generis" clause the qualifications laid down in that clause into the clauses which precede the "ejusdem generis" clause. The proper canon of construction is the opposite. In construing the expression "other" one must look to the characteristics or qualifications contained in the earlier clauses to decide what the Legislature was thinking of in using the expression "other" in the "ejusdem generis" clause.

Therefore it is clear that as a matter of pure construction in the first category we have all cross-word prize competitions, whether they involve skill or not, and similarly all the other competitions mentioned in that category would be the same, and it is only in the third category that the Legislature, having enumerated certain competitions in the first and second categories, resorted to the "ejusdem generis" phraseology in order to deal with those competitions which it has not already dealt with, and with regard to these competitions the Legislature qualified them by saying that in those competitions, in order that they should come within the definition of "prize competition", success should not depend to a substantial degree upon the exercise of skill.

In construing an Act of the Legislature, there is another important principle which must constantly be kept in mind. Not only must the Court be extremely reluctant to invalidate an Act, but the Court must always presume that a Legislature knows what its legislative competence is and what are the limitations upon its competence.

It is only if there are clear unequivocal words in the statute which go to show that the Legislature has over-stepped its competence or has travelled outside the limitations laid down in the Constitution that the Court will pronounce a legislation to be "ultra vires".

16. This principle was considered and applied by us in -- *The State of Bombay Vs. Heman Santlal Alreja*, . In that case Bombay Act II of 1950 dealt with requisitioning for any purpose, and on a plain construction of the Act that purpose would include both the purpose of the State and of the Union. If the Legislature attempted to legislate with regard to the purposes of the Union, the legislation would have been clearly "ultra vires", and therefore in construing that expression "purpose" we limited it to the purpose of the State and not to the purpose of the Union, and at page 826 the Court observed :

". .. It must always be presumed that a Legislature knows the limits of its

competence and that it is acting within the limits set up by the Constitution and not outside those limits. If possible a construction should be placed upon a statute which would put it within the limits of the competence of the Legislature rather than outside those limits." And in this judgment we referred to the well known decision of Sir Maurice Gwyer on the Hindu Women's Rights to Property Act (Hindu Women's Rights to Property Act, 1937, In the matter of AIR 1941 72 (Federal Court) ") where a limited construction was placed upon the expression "property" in order to bring it within the competence of the Legislature, and the learned Chief Justice observes in that judgment (p. 75) :

"... ,The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the legislature which enacted the Act was competent to legislate; that is to say property other than agricultural land."

17. Now, if we were to accept the construction suggested by Mr. Manekshaw, the result would be that to the extent that the Legislature has legislated with regard to prize competitions which are riot lotteries or do not constitute gambling, they have not dealt with the topic of gambling at all, and Mr. Manekshaw seems to be right when he suggests that to that extent the legislation is with regard to the topic of trade and commerce mentioned in entry 26 of List II of the Seventh Schedule, & it is therefore that Mr. Manekshaw is in a position to argue that the Competence of the State Legislature with regard to trade and commerce is confined to trade and commerce within the State, and if it legislates with regard to trade and commerce outside the State, it has over-stepped its limits, because inter-State trade and commerce is within the competence of Parliament as provided by Entry 42 of List I.

Mr. Manekshaw has sought to draw a distinction between the case we have before/us and the case on the Hindu Women's Rights to Property Act. Mr. Manekshaw says that in that case if Sir Maurice Gwyer had not given a limited interpretation to the expression "property", then the legislation could not have fallen under any other entry, and it was because of that and to bring the legislation within the only topic which was possible that Sir Maurice Gwyer put a rather strained construction upon the expression "property".

Mr. Manekshaw says no such difficulty arises in this case because if the crossword competition does not constitute gambling as defined by the Legislature, although the legislation may not fall under Entry 34, it would still fall under Entry 26.

In our opinion the distinction drawn by Mr. Manekshaw is not one of substance, because although the legislation may fall under Entry 26, it could only fall to the extent that the Legislature is dealing with trade and commerce within the State. To the extent that it is dealing with trade and commerce outside the State, it would not fall within the competence of the legislature under any entry in List II

of the Seventh Schedule.

Therefore the principle laid down by Sir Maurice Gwyer in the case of the Hindu Women's Rights to Property Act and re-affirmed and reasserted in "State of Bombay v. Heman Alreja (F)", is that we must presume against a Legislature legislating on a topic which is not within its competence, nor must we assume that the Legislature puts upon the statute-book a piece of legislation which is "ultra vires".

In this case the Legislature had already passed Act 54 of 1948 which did not deal with prize competitions outside the State. It is only by the amending Act 30 of 1952 that prize competitions outside the State were brought within the ambit of the Act. We are therefore asked to presume that the Legislature when it passed Act 30 of 1952 advisedly legislated on trade and commerce outside the State.

Now, if it is possible to avoid such a conclusion and if it is possible to acquit the Legislature of ignorance of its own powers and limitations, we should do so. In our opinion, the prize competitions included in the first category of the definition are competitions which may either involve skill or may not substantially involve skill, and we must interpret and construe the competitions referred to in the first category of Section 2(1)(d) as only those competitions, the success in which does not depend to a substantial degree upon the exercise of skill. In other words, we must presume that the Legislature was legislating under the topic "gambling" and not under the topic "trade -and commerce".

18. Mr. Manekshaw has relied on the English Act, the Betting and Lotteries Act of 1934, and he has pointed out that the scheme of that Act was very different from the Act in question. That Act dealt separately with betting and lotteries, and Section 21 made all lotteries subject to the provisions of Part II unlawful. When we come to the prize competitions, they are not defined by that Act as our Act defines them, but Section 26 provides that:

"It shall be unlawful to conduct in or through any newspaper, or in connection with any trade or business or the sale of any article to the public--

(a) any competition in which prizes are offered for forecasts of the result either of a future event, or of a past event the result of which is not yet ascertained or not yet generally known;

(b) any other competition success in which does not depend to a substantial degree upon the exercise of skill."

Mr. Manekshaw says and rightly that our Legislature has given a much wider definition of prize competitions", that they have not confined prize competitions to competitions in which success does not depend to a substantial degree upon the exercise of skill, and therefore it would be erroneous to consider our Act as in "pari materia" with the Betting and Lotteries Act.

As we said before, if the matter really rested upon the construction of our Act

and no question of the constitutionality of the Act arose, then very likely we would have been inclined to accept the construction suggested by Mr. Manekshaw. But not only are we- construing our Act but construing it so as to determine its constitutionality, and as we have already observed, different considerations and vitally different considerations arise when the question is merely of construction of an Act independently of its constitutionality and when the question is of the construction of an Act which involves its constitutionality.

19. The next question to be considered is whether the scheme promoted by the petitioners comes within the ambit of the Act and whether it satisfies the definition of a prize competition as just construed by us. In order that the Act should apply to the petitioners, it must be established that the scheme which they have promoted is a lottery as understood by the English decisions or it constitutes gambling within the meaning of the expression used in the Constitution.

In Order to decide this question, we must briefly point out what are the essential elements of the scheme. Certain rules have been framed by the petitioners for regulating this scheme and we will point out the material rules- Rule 2(a) describes the nature of this competition :

"The Entry Forms in this competition comprise a form which will have 13 or more clues and two given answers for each clue- each answer is indicated by figure 1 or 2. Below the form of clues and answers is another form made up of 40 vertical columns of small squares numerically indicated to correspond with the 13 or more clues and their answers. A competitor is required to mark in each small square, corresponding to the numerical number of the clue, one of the figures indicating the answers he considers the most apt that will agree with the official all correct solution, that is, a solution which in the opinion of the Adjudication Committee, contains the most apt answer to the clue."

Then Rule 7(a) proudly proclaims that :

"This contest is a test of skill and knowledge. The official solution will be determined by an Adjudication Committee appointed by the promoters. the official all correct solution will be that solution which, in the opinion of the majority of the members of the Adjudication Committee, present at the meeting contains the best set of answers to the clues. / Aptness and accuracy form the sole standard of their judgment."

Then Sub-rule (b) says :

"(b) For the purpose of the prize award, entries will be checked on the error basis and not on the points basis- Every answer submitted by a competitor to any particular clue which differs from that of the winning line will count as one error, whether or not the incorrect answer for that clue is marked 1 or 2." Then Sub-rule (c) says :

"(c) The first prize will be awarded to the-competitor who enters a solution which

agrees with the official all correct solution. Failing an all correct entry, the first prize will be awarded to the nearest correct entry."

20. Now, the evidence in our opinion clearly establishes that the two clues furnished to the competitors are in most cases equally apt and equally appropriate. It seems to us- and we hope we are not being unfair to the petitioners that the whole object of this competition is to make the clues so apt and so appropriate that the competitor should be induced to send in as many entries as possible. It is because the competitor realises that one or the other solution is equally possible that he must take his chance to win the prize by submitting as many entries as possible.

It is said that the solution is not previously prepared, that the solution is not arrived at by any chance, but the solution is the result of the careful deliberations of an adjudication committee. Not only the adjudication committee gives the solution, but subsequently publishes its reasons for arriving at those solutions, and therefore it is said that the competitor is expected to exercise his skill in order to satisfy the solution ultimately given by the adjudication committee which adjudication is based upon judgment and not merely upon chance.

We have very carefully considered this argument, but it seems to us that the adjudication committee is nothing else than a facade. What we have to look at is the structure behind the facade, and if we are satisfied that the main structure is based upon chance and not upon skill, the mere presence of a facade which suggests skill will not take the scheme out of the category of a lottery.

It may be pointed out that the rules do not suggest who the members of the adjudication committee would be, but it was also said that the evidence shows that it was open to any competitor on application to know the names of the members of the adjudication committee, and we are prepared to assume- and there is no reason not so to assume--that the members of the adjudication committee are able, competent and honest men, and we are also prepared to assume that the decisions given by them are given after careful consideration and are the best according to their own lights.

But having looked at some of these solutions we must say that however impressive the reasoning might be of the adjudication committee in coming to a particular solution, equally impressive reasoning could have been put forward for arriving at the alternative solution. Therefore, the position on the facts is this.

The competitor ordinarily does not know the constitution of the adjudication committee, he does not know the reasons which will guide the adjudication committee in coming to one or the other of the two equally adequate and appropriate solutions. Therefore, in our opinion, what the competitor does is to take his chance that the solution which he mentions in the entry is the solution which will conform to the decision given by the adjudication committee.

What he does is exactly what Hewart C. J. said in "Coles v. Odhams Press Ltd. (D)", that he will be taking a blind shot at a hidden target. The target in that case might have been a result prepared by the competition editor beforehand. The hidden target here is the decision that the adjudication committee will give subsequently even though after considering the matter and giving reasons for its decision.

But what is apt to be overlooked is that the skill that is contemplated according to the decisions is not the skill of the members of the adjudication committee, but the skill displayed by the competitor or the entrant, and the question that we have to consider is whether any skill is displayed or can be displayed looking to the nature of this scheme.

It may also be pointed out that even though the competitor may exercise skill in the sense that he may look at dictionaries and he may study encyclopaedias in order to decide which of the two alternatives is the proper alternative, that skill displayed by him is not ultimately tested by the adjudication committee, nor does it in any way contribute to the result which is the awarding of tie prize.

Mr. Palkhivala said that even in the case of the football competition the skill of the appellant who prepared the forecasts with regard to four matches did not contribute to the result in the sense that the matches were not won or lost by reason of the skill exercised by the appellant.

But that is not the meaning of the skill affecting the result. What is meant by that expression is that if a competitor exercises skill he would have a better chance of winning the prize than a person who does not exercise skill or who exercises less skill. In the football case the appellant who had knowledge of football matches and who worked at the result of the four matches had a better chance of giving a correct forecast of the results than a person who did not have either the competence, the knowledge, or the skill.

21. Therefore, what we have to consider is whether if the candidate exercised skill he would be in a better position of winning the prize than another who did not show any skill at all or showed less skill. In our opinion the skill of the Candidate will have no bearing whatsoever on the awarding of the prize. He is really probing into the dark trying to hope for the best that his solution will ultimately conform to the hidden target.

No amount of research, no amount of ratiocination, no amount of the knowledge of the subtleness of the English language or English idiom will help the competitor to decide how the adjudication committee will consider the matter or what result they might arrive at.

It is precisely because of this that all that the competitor has got to do is to put in No. 1 or 2. He does not even write the word. It is said that this is merely done for the sake of convenience and to avoid words being written out in thousands of entries. But on the other hand it is also possible for a completely uneducated

person whose knowledge is confined to the knowledge of numerals to enter this competition and just put in 1 or 2 and take his chance of winning the prize.

The very fact that a competitor can send in an entry indicating permutations in various items, the very fact that free coupons are allowed if the competitor submits certain number of entries, all go to show that the basis of the competition is that a large number of entries should be submitted by the competitor in order to have any chance whatsoever of winning the prize.

As Mr. Justice Humphreys said in the case referred to we must not look at the face of the scheme. The face of the scheme is very pleasant. As we said before, it sets up an adjudication committee; it requires the committee to give a judgment and award prizes in accordance with those results. This may bring about an honest and bona fide result and may make dishonesty or chicanery impossible. But we are not concerned in this case with deciding whether the scheme is honest. What we are concerned in deciding is whether the scheme is a lottery; and a lottery may be an honest lottery and yet be hit by the law.

Mr. Palkhivala urged that not only are the reasons given for the solutions by the adjudication committee, but these reasons are published so that a competitor could study the process of the mind of the members of the adjudication committee and seek guidance and enlightenment from the reasons. We find it difficult to understand how the reasoning applied by the adjudication committee with regard to the solution of a particular clue can be of much help in the solution of an entirely different clue.

The competitor would be as much groping in the dark with regard to the solution of an entirely new puzzle, whether he had the benefit of the reasons of the adjudication committee with regard to a previous solution or he had no such benefit.

22. There is one other feature of this competition which should be pointed out. It seems from the evidence that in order to determine who should get the first prize a procedure is followed which is not mentioned in the rules at all, and that procedure has been deposed to by Mr. McDonald, the competition editor of the petitioners. Now, unless a person is an expert in prize competitions, which we do not claim to be, it is rather difficult to follow the intricacies of this evidence.

But what emerges broadly from what Mr. McDonald has said with regard to this aspect of the matter is that in selecting the winner for the first prize the adjudication committee first decides which are the most obvious and the only possible answers with regard to nine of the thirteen or more clues and then a scrutiny is made of the entries submitted by all the competitors and out of these competitors only those are selected who have given correct answers to these nine clues- The rest are eliminated for the purpose of the first prize.

Then with regard to the persons so selected a table of permutation and combination is prepared and this table shows what answers each one of these

selected candidates has given to the other clues, and if it is found that no competitor out of these selected has given a particular answer with regard to a particular clue, then in giving its solution the adjudication committee rules out that answer altogether.

In other words, if it is found with regard to the remaining six or eight clues that none of the persons selected for the consideration of the first prize has taken the view that a particular solution is a possible solution, then in that sense the adjudication committee surrenders its judgment to the judgment of these persons selected for consideration of the first prize.

It may be that this does not happen very often and it may be also, as the evidence suggests, that subsequently the committee points out that a particular solution was arrived at and not the other one because no selected competitor had given the other solution. But even so those who compete for the first prize do not know from the rules published that this particular method would be resorted to in order to determine who is to win the first prize, and it seems to us that the petitioners should make it clear in their rules what procedure they are going to follow so that a person takes his chance at least with his eyes open.

Not only have we carefully considered the arguments advanced by Mr. Palkhivala on this question, but we have also considered the view of the learned Judge below who has taken the view that it is not a lottery. With respect to the learned Judge, we are unable to come to the conclusion that a substantial element of skill is required from the competitors in order to enable them to win a prize in this competition.

In our opinion the result must largely and substantially turn upon chance and the element of this chance in this case is not the mechanical element of drawing lots but is the chance of a particular competitor giving solutions which conform to the ultimate decision of the adjudication committee more than other competitors.

23. Therefore, in our opinion, the impugned legislation deals with lotteries, and the scheme promoted by the petitioners is a lottery, and therefore the Act is applicable to them.

24. In this view of the case perhaps it would be unnecessary to consider the alternative submissions made by Mr. Seervai that even if the topic of legislation was not betting and gambling, it was entertainment or amusement or in the further alternative luxuries. If we are wrong in the view that we take that this legislation deals with the topic of betting and gambling, then we are not prepared to accept the contention of Mr. Seervai that this legislation deals with entertainment and amusement or with luxuries.

The entertainment and amusement contemplated by entry 33 of List II with regard to legislation and entry 62 of List II with regard to taxes is not the subjective entertainment or amusement which a person may receive by solving a crossword puzzle or by indulging in any other mental or intellectual pleasure.

The entertainment or amusement contemplated is something objective outside the person amused or . entertained, and with regard to the tax on entertainment and amusement, the tax also is on the spectator who witnesses some amusement or entertainment. Therefore, although it may be said that a person who solves a crossword puzzle is amusing himself or entertaining himself, this is not the amusement which the Constitution contemplates in placing the topic of entertainments and amusements in the relevant entries.

With regard to luxuries it is significant to note that the plural and not the singular is used, and the luxuries in respect of which a tax can be imposed under entry 62 is a tax on goods or articles which constitute luxuries, and it is again significant to note that the topic of luxuries only is to be found in entry 62 in the taxation power and not in either entry 33 or 34. That clearly shows that, what was contemplated was a tax on certain articles or goods constituting luxuries and not legislation controlling, art activity which may not be a necessary activity but may be necessary and in that sense a luxury.

25. But the more important and serious question that arises with regard to the tax imposed, by the Act u/s 12A is what is the nature of that tax, and in order to justify this tax the State contends that this is a tax on gambling and falls within entry 62. On the other hand, the petitioners' case is that this is not a tax on betting and gambling, but it is a tax on trade and calling falling within entry 60. Now, a tax on betting and gambling must in its very nature be a tax which is imposed upon the person who bets or gambles. The revenue which the State derives under this tax is from the activity of the bettor or the gambler.

If this scheme of the petitioners is a lottery or gambling, as we have held it to be, there are two aspects to it. The person who bets or gambles is the competitor who pays four annas as entrance fee. It is not suggested that the petitioners bet or gamble. As far as they are concerned, they are carrying on an activity or doing a business-and we will use that expression here without- for the moment considering whether the business is a legal business or not. Therefore, in order to fall within entry 62 the Legislature must, tax the activity of the competitor and not the business or trade of the petitioners.

The nature of the tax imposed u/s 10A is a tax on the gross receipts from the entry fees paid by the people in the State of Bombay. It is suggested by Mr. Seervai that the mode of collection of a tax cannot affect the nature of the tax. In making that submission he is perfectly right. It would be open to the Legislature to impose a gambling or betting tax and to provide a particular mode for its collection. For instance, it would be open to the Legislature to tax the competitor and to provide that that tax should be collected not from him but from the petitioners, and what Mr. Seervai says is that in effect and in substance what Section 12A does is that instead of asking the competitor to pay the tax, the tax is paid by the petitioners on the gross return.

When we analyse the nature of this tax, it is impossible for us to accept the

contention that the tax is on the betting or on the person who lays the bet, and the petitioners merely act as the collecting agents of the State. If the legislation had provided that each competitor shall pay a certain percentage of his entrance fee as tax or that he shall pay so much amount as tax per entry, and if the legislation had further provided that the tax shall be collected from the petitioners, then undoubtedly it would have been a tax on betting and gambling and the petitioners would merely have been collecting it for Government. But what is taxed here is openly and obviously the gross proceeds in the hands of the petitioners. What is taxed is what the petitioners have realised in the course of their business as a result of their activity.

At one stage it was suggested by Mr. Seervai that this tax could be passed on by the petitioners to the competitors. If that could have been done, perhaps we would have taken the view that the tax was really on the competitors and on the betting and not on the business of the petitioners. But it is difficult to understand how this tax could be passed on to the competitors, because if the competitors were to be asked to pay more by the petitioners, the tax would be levied not upon the original entrance fee but the tax would be levied on the entrance fee plus the tax which would be passed on to the competitor.

This very fact clearly establishes that the tax is not upon the bettor or the gambler, that the tax is not on, betting or gambling; but the tax is on the gross earnings of the petitioners, which earnings are the result of their business activity.

26. Now, it need hardly be said that the expression "trade and calling" used in entry 60 must be given the widest import, and any activity for the purpose of earning profit, which activity is permitted by law, would be a trade or calling within the meaning of this entry, and therefore it is undoubtedly true that what the petitioners are doing is carrying on the trade of promoting crossword prize competition. Mr. Seervai has further contended that in no view of the case could it possibly be said that this is a tax on a trade.

He says that the nature of the tax on trade, profession, calling or employment contemplated by entry 60 is the tax paid for carrying on a profession or a trade and it is paid by each practitioner or each trader and is paid irrespective of whether he earns profit or not. In other words, it is really a tax for the license given by the State to practice a profession or carrying on a trade, and Mr. Seervai says that when they tax gross receipts of a trader or a business man, it cannot possibly be considered a tax on a trade.

A tax on a profession or a trade may be imposed in various ways. Let us take the case of a profession. A lawyer may be charged a certain fixed sum every year because he is carrying on a profession, and it is correct that he may have to pay this tax whether he receives any briefs and whether he has any income or, not.

But he may also be charged on the amount of fees that he receives without taking into consideration his expenditure, his outgoings, etc., and that this is so

is made amply clear by the limitation that the Constitution has put upon the power of the State Legislature to impose a tax under entry 60, which limitation is to be found in Article 276(2). But before we come to that limitation,, it is necessary to look at Article 276(1) which makes it clear what the nature of this tax is, and that article provides:

Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income."

It is precisely because the Constituent Assembly wished to give power to the State Legislature to tax the income arising out of a trade or profession that it made clear under Article 276(1) that the validity of that tax should not be called into question merely on the "ground that it is a tax on income because it is Parliament which has been given the exclusive power to impose tax on income. And Article 276(3) again makes the position clear and this is in relation to the power of the Legislature. It says:

"The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, calling* and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings and employments."

But for this article it might have been argued that if the State Legislature has imposed a tax on income in respect of a particular trade or business. Parliament could not tax income arising out of the same profession or trade. But if both the State Legislature and Parliament could tax the income of a profession or a business, difficult as the position of any practitioner or tradesman already is, it would become more difficult, and therefore a limitation upon the power of the State Legislature has been imposed by Article 276(2) which prescribes the total amount of tax which can be imposed upon any profession, trade, calling or employment, and that limit is Rs. 250, per annum.

Therefore when Mr. Seervai suggests, that a small amount is usually charged to a practitioner under this power of taxation, the smallness is not due to any incapacity arising by reason of entry 60, but the smallness is due to the incapacity arising out of Article 276(2), and it is because only Rs. 250 can be charged that the Legislature does not obviously attempt to impose any tax on the income of any trade or profession.

But strictly constitutionally, there should be no difficulty in the Legislature saying that a tax of so much per cent, shall be charged on the income of a particular trade or profession so as not to exceed Rs. 250. That will be perfectly within the competence of the Legislature so long as the amount of Rs. 250 is not exceeded.

27. It is then suggested by Mr- Seervai that the tax on income referred to in Article 276(1) and (3) can never be taxed on gross income, but must be taxed on net income. It is perfectly true that the Income Tax which a resident in India pays is tax on income as computed according to the, provisions of the Income Tax Act But that does not mean that if Parliament so thought fit - and we sincerely hope it will never so think fit - to tax gross income, it would not have the competence to do so.

Mr. Seervai says that-it would be ultra vires the Parliament and also of the State Legislature to tax gross income, and therefore he wants us to infer that what is taxed in the hands of the petitioners is not gross income, but it at all it is a tax on net income. As it happens, the petitioners have pointed out in this case that they are paying 15 per cent, tax to the Mysore State, and that if they were to pay 25 per cent, tax as imposed by Section 12A, they would have to suffer a loss.

Therefore in that sense the State is taxing the gross income in the hands of the petitioners irrespective of what their expenses may be, what their outgoings may be and whether they make profits or not.

28. Therefore, in our opinion, the tax imposed by the. State under S- 12A is not a tax on betting or gambling. It is a tax on the business of the petitioners, and if it is tax on the business of the petitioners, it is bad on the ground that it contravenes the provisions of Article 276(2).

29. Assuming we are in error on this aspect of the case and assuming this is a tax on betting am gambling, it is urged by the petitioners that even so the tax is "ultra vires" the State Legislature in that it contravenes the provisions contained in Part XIII of the Constitution with regard to trade, commerce and intercourse within the territory of India-

Before we deal with Part XIII we must dispose of another contention urged by the State, and that contention is that the provisions of Part XIII cannot apply to the activity of the petitioners because it is an activity which is against public policy and therefore it is not a business-of which the Constitution would take any cognisance.

It is undoubtedly true that who one can claim any rights with regard to his business which is against public policy. He cannot assert any fundamental rights, he cannot complain that his business is being interfered with by the .Legislature of any State, contrary to the provisions of Part XIII.

All" the fundamental rights which can be claimed with regard to a business must be with regard to an activity which is not against public policy, and therefore, if we may repeat, under the definition we suggested earlier, only that activity can be considered to be a business which can claim any rights under the Constitution which is an activity carried on for the purpose of earning profit and which is permitted by law.

For a moment we thought that the proper expression would be not "prohibited by

law", but Mr. Seervai rightly pointed out that there may be cases where a Legislature may find itself helpless and may not prohibit it but yet it may look upon it with disfavour, although without actually prohibiting it. But where an activity is actually permitted by the Legislature, then it is difficult to understand why such activity should not claim the rights which are guaranteed to a business under the Constitution.

30. Now, it is said that gambling is a very evil thing, that the petitioners induce poor people to part with their hard earned money and to run after the will-o'-the-wisp of a highly doubtful prize which they may get, and the larger the amount of the prize advertised the greater the temptation and the more waste of hard earned money on the part of the poor people.

These are all very proper submissions and we are entirely with Mr. Seervai in taking the view that the State would be perfectly justified in saving the poor people from themselves, safeguarding their hard earned money, and preventing temptations being offered to them to make easy money without any work.

If the Legislature had prohibited this particular business of lotteries or made it illegal, then we could have understood the righteous indignation of Mr. Seervai. But it hardly lies in his mouth to take up his moral attitude, when the Legislature by this Act not only legalises the business, not only permits the business to be run, but actually wishes to make money out of that business. It is true that Section 3 of the Act says :

"Subject to the provisions of this Act, all lotteries and all prize competitions are unlawful." But if the prize competitions comply with the provisions of the Act, if they obtain a license, if they carry out the conditions of the license, and they pay the tax imposed by the provisions of the Act, then the State, far from looking with disfavour upon this type of activity, permits it and, as we said before, makes money out of it. How it could possibly be alleged that an activity is against public policy which the Legislature not only tolerates but expressly permits, it is difficult to understand.

31. Mr. Seervai relied on an Australian case, reported in - "The King of Connare; Ex parte Wawn" (1939) 61 CLR 596 (H), where Evatt. J. at page 622 cites with approval the judgment of the Supreme Court of the United States in - "Douglas v. Commonwealth of Kentucky" (1897) 168 US 488 (I):

"This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous when placed in contrast with the widespread pestilence of lotteries; that the former were confined to a few persons and places, while the latter infested the whole community, entered every dwelling, reached every class, preyed upon the hard earnings of the poor, and plundered the ignorant and simple.

Is a State forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous

results? Can the legislature of a state contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries?"

And at page 628 the same learned Judge dealing with lottery tickets says:

"...If they are goods or commodities they belong to a very special category, so special that in the interests of its citizens the State may legitimately exile them from the realm of trade, commerce or business. The indiscriminate sale of such tickets may be regarded as causing business disturbance and loss which, on general grounds of policy, the State is entitled to prevent or at least minimise."

Now, these are very noble sentiments and very ably given expression to, but they must be read and appreciated in the context of the decision on which reliance is placed. The Act impugned, prohibited selling or offering of foreign lottery and the Act was challenged on the ground that it contravened the provisions of Section 92 of the Australian Constitution on the ground that it interfered with trade and commerce.

Therefore, when the learned Judges protected this legislation on the ground of public policy and on the ground that the State Legislature was putting down an evil, the law they were considering did not permit the business of lotteries nor did the State attempt to make revenue out of lotteries. Therefore these sentiments and these opinions can have no bearing on a legislation which permits and Anr. particular business. Indeed, -it would be wrong on our part to take a view contrary to the view which the Legislature has taken that this particular activity is not against public policy.

32. Therefore, we must grant to the petitioners" business all the rights to which they are entitled under the Constitution as much as to any other business. No distinction can be made between the business of the petitioners because it is a business of promoting lotteries and any other business which has the attributes of a more correct and virtuous activity.

33. Now, what is contended by the petitioners is that in imposing a tax, even assuming it is as ambling tax, and in imposing restrictions upon their activities, the Legislature has contravened the provisions of Article 301 of the Constitution which provides :

"Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

It is: not disputed by the State that the activities of the petitioners do constitute intercourse between the State of Mysore and the State of Bombay because, as we pointed out, the business of the petitioners is situated in Mysore and they invite entries in Bombay and they collect moneys in Bombay for the purpose of their business which is carried on in Mysore. Before we deal with Article 301 and the other provisions in Part XIII, we might in the first place dispose of one particular aspect of this case.

We have already dealt with the question of territorial nexus and we pointed out that for the competence of a legislation not only it must fall within one of the topics in the relevant List, but it also must not be extra-territorial. In this case there can be no doubt that the legislation is not extra-territorial.

What the Legislature has sought to tax are moneys received in Bombay or moneys paid by the residents of the State of Bombay, and it is difficult to understand how it could possibly be contended that there is no nexus whatsoever between the tax and the subject-matter of the tax, and even with regard to the other aspect of the legislation with regard to the restrictions imposed by the Legislature upon the particular activity carried on by the petitioners, there is clearly a territorial nexus because the residents of the State of Bombay are involved in those activities and it is at least avowedly for the purpose of protecting those residents that restrictions have been put upon the business of the petitioners.

But as we pointed out before, even though there may be territorial nexus, the question still remains whether there is any restriction imposed by the Constitution upon the legislative competence of the State Legislature, and it is from that point of view that we must now turn to Part XIII of the Constitution.

34. It is suggested by Mr. Seervai that Article 301 is merely a declaration by the Constitution makers and that it does not constitute any restriction upon the legislative competence of the Legislature. According to him the restriction is to be found in Article 303 alone and not under any other article. We refuse to look upon Article 301 as merely declaratory. If Article 301 was intended to be merely a directive for the guidance of Parliament and the State Legislature, then it would have found a place in Part IV which contains various directive principles of State policy which are not justiciable.

Apart from articles which fall in Part IV, every other article in the Constitution must be given its legal and constitutional effect. Every other article is justiciable, and if any right flows under any article other than the articles in Part IV, the Court must give effect to that right and grant adequate relief to the person who is entitled to that right.

Therefore, whatever the proper interpretation of Article 301 may be, in our opinion it is entirely untenable to suggest that it was inserted by the Constituent Assembly in the Constitution as merely a pious resolution not intended to be given effect to. "

Therefore, if it is intended to be given effect to it constitutes a clear restriction upon the legislative competence both of Parliament and of the State Legislature, because it should be noted that Article 301 is only made subject to the other provisions of this Part, which is Part XIII, and not subject to the other provisions of the other Parts of the Constitution. Therefore the legislative competence of Parliament and the State Legislature must be read subject to Article 301.

In other words, neither Parliament nor the State Legislature can legislate so as to interfere with the freedom of trade, commerce and Intercourse throughout India. It is a clear error to suggest that Article 301 is a restriction on any one or other entry in the Seventh Schedule. Article 301 is perfectly general and every legislation under whichever topic it may fall must be subjected to the overriding provisions of Article 301 which makes trade, commerce and intercourse throughout the territory of India free.

35. Then we come to Article 302 which provides : .

"Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest."

Therefore, having placed an absolute limitation or restriction upon the powers both of the State Legislature and of Parliament, Article 302 relaxes that restriction "qua" Parliament to the extent contained in this article, and power is given to Parliament to impose restrictions on freedom of trade provided the restrictions are in public interest,

Then we come to Article 303 and it may straightaway be stated, with all respect to the fathers of the Constitution, that it may have been better drafted, because although the non-obstantat clause refers to Art, 302 which as pointed out only deals with the power of Parliament, Article 303 deals both with Parliament and a State Legislature,- and what Article 303(1) provides is :

"Notwithstanding anything in article 302, neither Parliament nor the Legislature of a State shall have power to make any law giving, or authorising the giving of, any preference to one State over another, or making, or authorising the making of, any discrimination between" one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule".

Therefore, having relaxed the restriction in respect of Parliament under Article 302 a restriction is put upon that relaxation to the effect that Parliament shall not have the power of discriminating, as it were, between one State and another or giving preference to one State or another. Now, in Article 303(1) a ban having been put upon Parliament, perhaps the Constituent Assembly felt, lest it should be suggested that there was no such ban on the State Legislature, that the Legislature of a State should also be included in Article 303(1).

Article 303(2) again carves out an exception to the restriction placed under Article 303(1) and that empowers Parliament to give preference or to discriminate between State and State if it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India. This exception only applies to Parliament and there is no exception to the restriction put upon the State Legislature under Article 303(1).

Then comes Article. 304 which is non-obstantat clause both to Article 301 and Article 303 and it empowers the Legislature of a State under clause (a) to.

impose on goods imported from other States any tax to which similar goods manufactured or produced in that State are subject so, however, as not to discriminate between goods so imported and goods so manufactured or produced, and under clause (b) to impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within the State as may be required "in the public interest.

There is a proviso to Clause (b) and that proviso is that no Bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

36. Now, "the first contention of Mr. Seervai with which we must deal is that even assigning Article 303 is not merely a declaration as he suggests, the freedom of trade and commerce and intercourse with which it deals has nothing whatever to do with taxation. Mr. Seervai, says that Article 301 deals with restrictions other than taxation and taxation does not fall within the ambit of Article 301 at all.

We find it rather difficult to understand how it could be said that trade or commerce is free between Bombay and the State of Mysore if Bombay imposes tax on the goods coming from Mysore* or on any other activity carried on in Mysore with the residents of Bombay. It seems to us that implicit in the conception of free trade is freedom from taxation.

Fortunately it is not entirely a matter of first impression because although the question has not yet directly arisen before any other High Court or the Supreme Court, there are observations in the judgment of the Supreme Court in the Sales Tax Act case which clearly suggest that Article 301 is an overriding article both with regard to restrictions and- taxation.

In -- The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, , the Supreme Court was considering the competence of the State Legislature to impose sales tax, and what the Supreme Court held was that under the Explanation to Article 286(1) a sale which was inter-State sale and which could not have been legislated upon by the State Legislature, by a legal fiction created by the Explanation was converted into an intra-State sale with regard to which the Legislature had competence to impose a tax. It is in relation to this decision and the view taken by the Supreme Court that the observations in the judgment of the learned Chief Justice should be looked at. At-page 259 the learned Chief Justice Patanjali Sastri says :

". . .As we have seen," in our Constitution the principle of freedom of inter-State trade and commerce is made to give way before the State-power of imposing non-discriminatory, taxes on goods imported from other States."

Then he refers to Article 286(2) and says (p. 259):

"....Now, Article 286(2) is but one phase of the protection accorded to inter-State trade and commerce from the fettering power of State taxation."

Now, if Article 301 did not deal with taxation at all and freedom of inter-State trade and commerce did not imply freedom from taxation, then it is difficult to understand how the learned Chief Justice could have said that the principle of freedom of inter-State trade and commerce was made to give way before the State power of imposing non-discriminative taxes.

37. It is next contended by Mr. Seervai that the provisions of Part XIII are identical with the provisions of Section 297 of the Government of India Act, and it has been held that those provisions only constitute a restriction with regard to the entry in the Seventh Schedule relating to trade and commerce and does not constitute a restriction in respect of any other entry.

In other words, Mr. Seervai contends, that if the Legislature is legislating under entry 90 and imposing a tax on gambling, the inter-State trade and commerce provisions of the Constitution do not constitute a restriction on the legislative activity of the State Legislature. ?

It is only when the subject-matter of the legislation is trade and commerce that Part XIII constitutes a restriction just as Section 297 of the Government of India Act. In our opinion" Section 297 of the Government of India Act was much narrower in its application than the provisions contained in Part XIII of the Constitution, and the Government of India Act did not enact freedom of trade throughout the territory of India. Turning to that section, it in terms imposes a restriction on a Provincial Legislature or Government and it provides:

(1) No Provincial Legislature or Government shall

(a) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description; or

(b) by- virtue of anything in this Act have power to impose any tax, cess, toll, or duty which, is between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality."

It is pointed out that with regard to Section 297(1)(a) the Federal Court in - "Bhola Prasad v. Emperor" AIR 1942 FC 17 (K), and in - "Miss Kishori Shetty v. The King" AIR 1950 FC 69 (L), have "construed Section 297(1)(a) to mean that the restriction contained in that sub-section only relates to the entry of trade and commerce or production, supply and distribution of commodities, and this view has been taken by the Federal Court by reason of the fact that Section 297(1)(a) expressly refers to those entries and uses the expression "by virtue of", and the Federal Court took the view that if the State Legislature was dealing with

"excise", any restriction that it may impose against any State would not come within the mischief of Section 297(l)(a), because it was not dealing with trade or commerce.

This decision is requisitioned in order to support the argument that there is no general restriction embodied in Part XIII of the Constitution, but the restriction is only with regard to certain topics of legislation. That submission is obviously untenable because there is no provision in the Government of India Act corresponding to Article 301. If our view is right as to the interpretation of Article 301, then a new, additional and important! right has been conferred by the Constitution, which right did not exist in the Government of India Act, and that right is the right of trade, commerce and intercourse throughout the territory of India being free.

Therefore it is erroneous to suggest that in construing Article 301 we should look to the language of Section 287 of the Government of India Act which is in entirely different language. It is equally erroneous to suggest that we must construe Article 301; in the light of Section 297 of the Government of India Act, when we must bear in mind, as we said before, that Section 297 was of a limited application whereas Article 301 deals with a very important and wide subject, viz., freedom of trade.

38. It is next urged by Mr. Seervai that the only article which we must look at for the purpose of determining what are the restrictions upon the legislative competence of the Legislature is Article 303 and that article merely prevents the State Legislature from passing any law of a discriminatory or preferential character. In our opinion, to accept that submission would be totally to ignore Article 301.

It would also be to ignore Article 304 because. Article 304 partly removes the restriction imposed upon the competence of the State Legislature by Article 301. It was rather faintly suggested that Article 304 was merely enacted "ex majore cautela". Undoubtedly there are articles in the Constitution which the Constituent Assembly may well have thought of enacting for greater caution, but looking to the language of Article 304 it is impossible to accept that contention.

Article 304 in terms deals with Article 301 and constitutes a non-obstantat provision to Article 301. It is also important to note that Article 304 is not a restriction upon the legislative competence of the Legislature strictly understood. The language of Article 304, which empowers the Legislature of a State to make laws falling under Clause (a) or (b), clearly shows that power having been taken away by Article 301 a limited power is then conferred under Article 304.

Therefore we must really construe Article 304 in order to decide whether the present legislation comes within the provisions of Article 304, because in our opinion unless the legislation falls "under Art 304 it would be prohibited under Article 301.

39. Now, the power conferred upon the State Legislature under Article 304, Clause (a) is to impose tax on goods imported from other States. This power is also a conditional power and it is limited by the following conditions; The goods on which tax is imposed must be goods of a kind similar to which are also manufactured or produced in the taxing State, and the nature of the tax must be such as not to discriminate between goods manufactured or produced in the taxing State and the goods imported.

In other words, the principle underlying Article 304(a) is that goods imported from outside the State should not receive better treatment or preferential treatment to the goods in the State itself. And the power conferred upon the State Legislature under Clause (b) is to impose reasonable restrictions which may be required in the public interest. But these restrictions can only operate provided the previous sanction of the President has been obtained.

It was contended by Mr. Seervai that Article 304(a) is the only limitation upon the taxing power of the State and which only operates when goods are produced or manufactured in the State and similar goods are imported from another State, and says Mr. Seervai that the taxing power of the State is unaffected if similar goods are not manufactured or produced in the State and goods are imported from another State. To accept that contention would again involve our reading Article 304 as containing a restriction upon the legislative competence of the Legislature.

If that were the correct reading of Article 304, then Mr. Seervai would be right. But as we have already pointed out we look upon Article 301 as the main and principal restriction and Article 304(a) as an exception which expressly empowers the State Legislature to pass laws limited to the case coming under Article 304(a). Mr. Seervai, expressed some surprise that the Constitution makers should have prevented a State Legislature from imposing tax on goods imported from other States where no question of discrimination or preference arose and where similar goods were not manufactured or produced in the State itself.

If the underlying principle of the Constitution is free trade, then States should be prevented from raising, as it were, custom barriers preventing goods from other parts of India coming into the State.

One must not overlook the fundamental feature of our Constitution which emphasises the unity of India, and nothing is more conducive to unity than free trade and the absence of custom barriers. If goods are made or produced in a State, then the State is perfectly competent to levy tax in order to raise revenue. If then other goods come within the State, then it is clear that the reason for permitting the State Legislature to impose tax on those goods also is, as pointed out, to prevent undue preference to the imported goods.

But if the State were to tax goods coming from all over India in order to raise revenue, then the doctrine of free trade would be reduced to a mockery and

different States i" India would not be constituent parts of India but would be in the position of independent foreign States dealing with goods coming from other States as if they were coming from foreign countries.

Turning to Clause (b) of Article 304, the question has been agitated as to what is the proper meaning to be attached to the expression "reasonable restrictions". Mr. Manekshaw suggested that the (restrictions contemplated by Clause (b) were restrictions other than taxation. In our opinion, looking to the scheme of the whole part, it is impossible to accept that contention.

If Mr. Manekshaw is right that tax is a restriction on free trade, then there is no reason why a different meaning should be given to the expression "restriction" in Article 304(b). Therefore, whereas Article 304(a) is limited to one subject-matter only, viz., tax on imported goods under the conditions laid down in that clause, Clause (b) is much wider and refers to any restriction that the State Legislature may impose upon freedom of trade provided three conditions are satisfied, viz. the restrictions must be reasonable, they must be in public interest, and they must receive the previous sanction of the President.

In the case before us the State Legislature has both imposed tax which is a tax which does not fall under Article 304(a) and it has also imposed restrictions attempting to control the business of the petitioners. Those restrictions could only be justified under Article 304(b). With regard to the tax, the imposition of the tax is by the Act itself and the amending Act, although it did not receive, the , previous sanction of the President, did receive his subsequent assent after it was passed on November 11, 1952.

It has been urged by Mr. Manekshaw that the proviso requires the previous sanction and not the subsequent assent. The object of the proviso is that the President, who has to look after the interest of India as a whole, must apply his mind to any restriction imposed, by a Legislature- of an individual State upon freedom of trade.

But even assuming the previous sanction was not given by the President, if the Act is again submitted to him for his assent, it would still be open to him to consider the provisions of the Act. But the matter is set at rest by the express provision in the Constitution contained in Article 255 which provides ;

"No Act of Parliament or of the Legislature of a State specified in Part A or Part B of the First Schedule, and no provision in any such Act, shall be invalid by reason only that some recommendation or previous sanction required by this Constitution was not given, if assent to that Act was given

(a) ...by the President."

Mr. Manekshaw has drawn our attention to- a recent decision of the Supreme Court reported in - Saghir Ahmad Vs. The State of U.P. and Others, Mukherjea J., as he then was, points out in considering the impugned Act, which was in that case the U. P. State Road Transport Act, that .the, question of reasonable

restrictions could not also arise in the case, as the bill was not introduced with the previous sanction of the President as required by the proviso to Article 304(b). Then the learned Judge adds (p. 742):

"...It is true that the consent, of the President was taken subsequently but the proviso expressly insists on "the sanction being taken previous to- the introduction of the bill."

Now, with very great-respect to the learned Judge, the provisions of Article 255 were overlooked and they have not been considered at all. Mr- Justice Mukherjea makes it clear in the- last paragraph of his judgment that the Court has only indicated! the points that could be raised and _ the possible views that could be taken, but they did not desire- to express any final opinion on the points as it was unnecessary for the purpose of the case, because this was not a final or considered view of the Supreme Court, and again with very great respect it is difficult to understand .how that view could be maintained in view of the provisions of Article 255.

40. The next question then is whether the tax can be looked upon as a reasonable restriction in public interest. It was pointed out in the case to which reference has just been made, when the Supreme Court was dealing with Article 19(6), that the burden is upon the State to satisfy the Court that a case falls under Article 19(6). In other words, it is for the State to justify the restriction and to establish that the restriction is reasonable and in, public interest.

What is true of Article 19(6) is equally true of Article 304(b), and therefore if the State "Legislature imposed restrictions upon free trade, it would be for the State to satisfy us that those restrictions are reasonable and in public interest.

No attempt has been made by the State to justify this tax as a reasonable restriction in public interest except by pointing out that the tax is for the- purpose of raising revenue, that the revenue is raised for the public of the State of Bombay, and that every imposition of tax is "per se" in public interest. If that contention were to be accepted, then it would be impossible to state that under "Article 801 the State cannot restrict free trade by imposition of tax.

If a tax was always justifiable on the ground that it is in public interest and is a reasonable restriction, then Article 301 must be read to mean that the freedom of trade contemplated by Article 301 is a freedom apart from imposition of taxation by the State Legislature. We have already pointed: out that we are unable to take that view of Article 301, and if we are right in the view we take of Article 301-, then a tax cannot be justified "per se" but it must be justified on some other ground than the ground of raising of revenue.

As the State; as we have pointed out, failed to" point out any consideration justifying the tax in the sense in which we have indicated, we must hold that the impugned Act does not satisfy the conditions laid down in Article 304(b).

41. Turning to the other restrictions, they are to be found in Form H which has"

been prepared under the Rules framed under the Act, and this Form lays down the conditions which a licensee has _to satisfy, and the main conditions are :

1. That the licensee, shall not offer in respect of any one prize competition prizes .of the total value exceeding Rs. 30,000 in the. State of Bombay;
2. the licensee shall not hold more than one prize competition during the period of two weeks and in the aggregate lie shall not bold more than 17 such-competitions in a year in the State of Bombay; and
3. the licensee shall not offer or allow any free coupons. These are the main conditions which arc complained of by the petitioners.

41A. The Supreme Court in two cases has laid down what is the test of a reasonable restriction. In - Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another, , the Supreme Court held the restrictions not to be reasonable which were imposed by the by-laws dealing with sale or purchase of vegetable or fruit on the ground that they brought about a total prohibition of the business in a commercial sense and from a practical point of view. In - Chintaman Rao Vs. The State of Madhya Pradesh, , Mr. Justice Mahajan, as he then was, says "(P- H9) :

"The phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the "right should not be arbitrary or of an excessive nature, beyond what is required in , the interest of the public. The word "reasonable" implies intelligent care and deliberation, that is the choice of a course which reason dictates.

Legislation which arbitrarily or excessively in vades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(I)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality."

Therefore, the attempt of our Constitution is nod only to protect freedom of the individual, but also to advance the interest of society by empowering; the Legislature to restrict individual freedom if that restriction constituted social control for the benefit -of the public, and it is from this point of view that we must look at the restrictions imposed by the State.

42. Now, we refuse to accede to Mr. Manekshaw"s argument that because the business of the petitioners is interfered with, or that because it may be extremely inconvenient Or difficult for him to carry on his business if he were to comply with these conditions imposed by the State, the restrictions are unreasonable although these restrictions may be in the interest of the public and may have been imposed in order to protect the public from the evil effects of temptation to indulge in gambling on a large scab.

We have carefully looked at these restrictions and! we are satisfied that these

restrictions are necessary to protect the poor man who may be induced to part with his hard earned income in pursuit of a remote and hypothetical gain. Take the first restriction. As far as Bombay is concerned, the petitioners cannot give a prize exceeding Rs. 30,000. This seems to us to be very necessary because if large prizes are advertised, the temptation to gamble is all the greater.

A human being is so credulous that he will not be deterred by the difficulties in his way if he has some chance of becoming rich quickly and without effort, and there will be less temptation to enter into a competition if the prize is a small one than if it is a large one. It is only from this point of view that the State has imposed this restriction and we see no reason why the State should not impose it.

With regard to limitation upon holding prize competitions, it is again imposed from the same point of view. If there was no such restriction, there would be nothing to prevent the petitioners from having a crossword competition every day of the year. Every day thousands of people may take their chance of earning large prize.-;

The third restriction with regard to prohibition of free coupons is again intended to prevent competitors from spending money on many entries in order to earn a few free entry coupons- Therefore, looking at all these three restrictions, the common intention seems to be that the interest of the poor man who enters this competition should be protected and that he should not be induced to spend any large amount.

43. Even though we may look upon these restrictions as reasonable and in the public interest, there is a serious difficulty in the way of the State, and Mr. Seervai has fairly conceded that if we take the view of Article 301 and Article 304 that we are taking, then it is not possible for him to get over that difficulty. As we have pointed out, Article 304(b) is subject to the proviso.

Therefore there must not only be a legislative fiat with regard to these restrictions, but there must also be a Presidential fiat. Not only the Legislature must apply its mind, but also the President. These restrictions were introduced by rules which came into force on December 8, 1952, after the President had given his assent to Act 30 of 1952. Therefore it is clear, that the President never gave either his previous sanction or his subsequent assent to these rules or to Form H which contains the restrictions.

It is also clear that the Legislature never gave its fiat to these restrictions because these restrictions do not form part of the Act itself. We do not suggest that in every case the Legislature must frame all the rules and cannot delegate the rule-making power to Government. But if the Legislature had indicated its policy and given a mandate to Government and pursuant to that mandate the Government had framed its rules, then it could have been said that the President had already applied his mind to the policy-underlying the rules.

But when we turn to the Act, all that Section 31(1) provides is that the State

Government may, by notification in the Official Gazette make rules for the purposes of carrying put the provisions of this Act; and Sub-section (2) deals with the subjects which may be dealt with under these rules, and Clause (i) of that Sub-section is:

"the form of licence and the fees on payment of which and the conditions subject to which a licence-shall be granted u/s 9-"

But there is no indication anywhere in the Act as to what the conditions should be subject to which the license should be granted. Therefore, these restrictions, although in our opinion they fall under Article 304(b) and are reasonable and in public interest, suffer from the infirmity of not having been assent-, ed to by the President. Under the circumstances we! must come to the conclusion that Form H and the restrictions complained of arcs ultra vires of the Legislature.

44. The next question to which -we must turn our attention - and it is also a question of considerable importance and of on little difficulty - is the position of a corporation qua fundamental rights. If the case falls under Article 304(b) no difficulty arises, but it has been argued iii the alternative by Mr. Manekshaw that even if Article 304(b) does not apply the petitioners are entitled to complain of these restrictions under Article 19(1)(g), and what is urged is that the petitioners are entitled to carry on their do or business and that these restrictions are not such as fall within the ambit of Article 19(6). Now, as we have pointed out, petitioners No. 2 are a limited company.

Petitioner No. 1 is the managing director of petitioner No. 2 company. Petitioner No. 1 is a citizen, but Mr. Manekshaw admits that the rights which are claimed are by the corporation, and the mere fact that petitioner No. 1 is on the record and happens to be a citizen cannot affect the question as to whether petitioner No. 2 corporation can claim fundamental rights under Article 19(1)(g).

Our Constitution makes a distinction between fundamental rights guaranteed to all persons, whether they are citizens or not, and only to citizens, and Article 19(1) is one of those articles by which the rights enumerated in it are guaranteed only to citizens. Therefore it is clear that a person who is not a citizen cannot claim the benefit of Article 19(1).

The question therefore is, can it be said in the first place that a corporation can ever be under any circumstances a citizen, and if it can be so said, what must be the constitution of the corporation before it could be said that it is a citizen? "Citizen", has not been defined by the Constitution and the! only provision which is relevant is the provision! contained in Article 5.

But that article only deals with the citizenship: at the commencement of the Constitution and it lays, down who was a citizen at the commencement of the Constitution. Every person domiciled in India and I who satisfied any one of the three conditions can be a citizen.

He should have been born in the territory of India, or whose parents were born

in the territory of India, or who was ordinarily resident in the territory of India for not less than five years immediately preceding the commencement of the Constitution. It is a curious omission in the Constitution! that no provision is made as to citizenship after the commencement of the Constitution. Article 11 provides:

"Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship."

But Mr. Seervai has informed us that Parliament has not passed any legislation under this article-We agree with Mr. Seervai that although domicile is a question of private international law, rights and acquisition of citizenship is a creation of municipal law, and it is only Parliament by municipal law that can determine who is a citizen. It would be perfectly competent to Parliament, by legislation to provide that a corporation, satisfying certain conditions should be deemed to be a citizen for the purpose of Article 19(1), but Parliament has not done so.

But the very curious anomaly that arises is that when we turn to some of the provisions of Article 19(1) it is impossible to contend that it could ever have been the intention of the Constituent Assembly that the rights guaranteed by those provisions were not to apply to corporations but only to individual citizens.

Take two of the rights guaranteed under Article 19(1) and (g). Can it be suggested that a corporation which, let us assume, is Indian in every sense of its term-its shareholders are Indians, its directors are Indians, its capital is Indian - that such a corporation should not have the right under Clause (1) to acquire, hold and dispose of property, or under Clause (g) to practise any occupation, trade or business? Mr. Seervai says that it is an unfortunate omission, but we are not_ legislating and we ought not to make good the omissions in the Constitution or the omissions resulting from failure on the part of Parliament to pass the necessary legislation under Article 11.

The temptation on the part of Courts to legislate is always very great, but great as the temptation is, it ought to be not given effect to and should be controlled. But without attempting ,to legislate it would be our duty if we could do so, even at the risk of straining the language, not to create a situation which would insult in grave injustice and hardship to Indian corporations.

45. Now, in this case petitioners No. 2 are a private limited company and all the shareholders are citizens. That fact is not disputed. Therefore, every one of these shareholders, if he was carrying on business, would be protected by Article 19(1) (g). But the contention is that if these individual citizens choose to form a company and get it incorporated, the rights which each one of them had are lost by reason of the incorporation.

Mr. Seervai is perfectly right in enunciating the legal proposition that a shareholder is distinct from the company that the company is a legal persona,

and that legal persona should not be confused with the shareholders. He is equally right that the position of a company is very different from that of a partnership which is merely a compendious expression describing the partners who carry on the business. But at one stage of the development of the law in the United States, the Supreme Court was confronted with the same difficulty and it got over the difficulty with a certain amount of courage and boldness.

As pointed out in *Willis*, a case arose in 1809 in which all the stockholders of a corporation were citizens of the same State where the corporation was incorporated and the plaintiff was a citizen of another State, and the question was with regard to diversity of citizenship and the jurisdiction of the Federal Court, and the Supreme Court looked behind the corporate veil to the stockholders and held that the Federal Court had jurisdiction.

And what Mr. Manekshaw asked is to do is to tear apart the corporate veil and to look behind it and to notice the fact that all the shareholders of this corporation are citizens and not to deny to this corporation the fundamental rights which each of the shareholders undoubtedly has under Article 19(1)(g).

46. Mr. Manekshaw also relies on *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, . In the judgment of Mukherjea J- at p. 52 the learned Judge says:

"....the fundamental rights guaranteed by the Constitution are available not merely to individual citizens but to corporate bodies as well except where the language of the provision or the nature of the right compels the inference that they are applicable only to natural persons."

It is true that the Supreme Court was not dealing with the question we are considering, but we are unable to accept Mr. Seervai's suggestion that Mukherjea J, was only thinking of those fundamental rights which are guaranteed to every person and not fundamental rights which are guaranteed to a citizen. What Mukherjea J. emphasises is that we must look at the content of the fundamental right and if you find that the nature of that right is such that it is not possible to confine, it merely to natural persons then the Court must come to the conclusion that a corporation is as much entitled to that right as an individual citizen.

If that be the true test, as we have already pointed out, the content of the freedom contained in Article 19(1)(f) and (g) far from inducing us to come to the conclusion that this freedom can only be enjoyed by natural persons, leads us to the conclusion that (this is a freedom which can be enjoyed as much by a corporation as by a natural person.

47. Therefore, in our opinion, the fundamental right guaranteed to every citizen under Article 19(1)(f) and (g) is guaranteed as much to a citizen as to a corporation. We are conscious of the difficulty to which Mr. Seervai has very rightly drawn our attention as to the constitution of a corporation and under what circumstances and in which cases we would hold that a corporation is a citizen

and a corporation is not a citizen. Sufficient unto the day is the constitutional difficulty thereof, and I think it is sufficient to decide this case on the facts before us where all the share-holders are Indian citizens, and all the directors are Indian citizens.

If a case arises where the share-holders are not citizens or the directors are not citizens, then the Court may well consider whether the particular corporation is a citizen or not.

48. There are one or two minor matters to which reference might be made. The provisions of Section 12A were also challenged under Article 14 and the challenge arises in this way. As the section stands, it would be open to the State Legislature to impose a tax higher than the tax u/s 12. In other words, a resident of Bombay may in conceivable cases pay a smaller tax than a nonresident.

Mr. Seervai has pointed out that in the notification issued the same rate of tax has been imposed both u/s 12 & Section 12A, & Mr. Seervai concedes that if the State were to exercise its power, to impose a higher tax u/s 12A, such higher tax " would not be justified and would fall within the mischief of Article 14.

Section 12A also empowers the State Legislature, instead of imposing a tax at a particular rate, to impose a tax in _a lump sum having regard to the circulation or distribution of the newspaper or publication in the State. This tax would be different from the tax imposed u/s 12 because there is no provision in Section 12 for the imposition of a lump sum taxation, and here again Mr. Seervai with his usual fairness has admitted that such a lump sum taxation would offend against Article 14.

Of course, Mr. Seervai says that the object of this Legislature in providing this alternative was for the benefit of the petitioners themselves. But the petitioners are wrong headed enough not to appreciate the advantage conferred upon them and have challenged this provision. It offends against Article 14, then it is clear that the State cannot exercise the power under this part by Section 12A.

As the power has in fact not been exercised, no question of our issuing any writ or order or direction in respect of this arises.

49. The learned Judge has also held in his judgment that Section 12 of" the impugned Act is ultra vires of the State Legislature. That section deals with business within the State and the petitioners are in no way affected by that section. Whether as a result to this judgment Section 12 can be looked upon as having been properly or competently! enacted is another matter.

But the challenge to Section 12 cannot be made by the petitioners who are in no way affected by it, The Court does not express academic opinion when nobody is aggrieved by any action on the part of the Legislature or the executive, and therefore with respect to the learned Judge it was unnecessary for him to have pronounced upon the validity of Section 12.

50. Mr. Seervai wanted us to make a note in the judgment that he wanted to rely on the report of the Indian Taxation Committee 1924-25, Vol. I, for the purpose of satisfying us that the impugned tax u/s 12A was a tax on gambling and not a tax on business. We do not understand how we can be helped or guided in construing the provisions of the Act by the import of the Indian Taxation Committee.

We are always prepared to be helped and guided. To the extent that anybody can help us or guide us our burden becomes less onerous. But after all guidance and help can only come from authorities whom the law permits to guide a Court of law; and we are not aware of any principle laid down by any Court which makes the opinion of a Taxation Committee relevant in construing whether a particular tax falls in a particular category or in a different category.

The farthest the Supreme Court has gone is that when you are considering the reasonableness of a legislation you may look at the statement of aims and objects, you may even look at the speeches made in the Legislature, because the statement of aims and objects and the speeches may furnish material upon which the Court can decide whether a particular legislation is reasonable or not.

But here we are not dealing with the reasonableness of any legislation, and even if we were dealing with it, the only relevant materials would be what transpired in the Legislature itself. The mere opinion of a committee may or may not prevail with the Legislature. The Legislature may accept that opinion or it may take the view that the opinion was not worth anything, and therefore we have not permitted Mr. Seervai to rely on this report.

51. The result therefore is that we must differ from the learned Judge below, with respect, on the view that he has taken that there is no legislative competence in the Legislature to enact this legislation. We have held that the topic of legislation is gambling and the Legislature is competent to legislate under entry 34 of the State List. We have agreed with the learned Judge that the tax u/s 12A is not a tax on gambling, but it is a tax which falls under entry 60.

There is legislative competence in the Legislature to impose that tax, but as we have pointed out, the tax is bad because it does not comply with the restrictions contained in Article 276(2) of the Constitution, and we have also taken the view that the tax, even assuming it is a tax on betting, cannot be justified because it does not fall under Article 304(b).

We have differed, with respect, from the learned Judge when he finds as a fact that the scheme in question is not a lottery, and therefore we have come to the conclusion that the Act applies to the scheme promoted by the petitioners. But the petitioners have, succeeded in challenging the impugned provisions because, as already pointed out, the restrictions contained in the Act controlling the business cannot be justified because they do not satisfy the proviso to Article 304(b) and the tax imposed on them cannot be justified on the grounds already indicated.

We have agreed with the learned Judge that the petitioners' business is a business which is entitled to the rights guaranteed to them under the Constitution and also the view that he has taken with regard to the provisions contained in Part XIII of the Constitution. The learned Judge has taken the view that if the petitioners' business or activity was a lottery, then the provisions of Part XIII would not apply to this activity.

We have pointed out that although the activity of the petitioners is a lottery, it is not an activity which is against public interest and therefore the provisions of Part XIII apply to their business.

52. Therefore the result that we must come to, although in some respect's on different grounds from those accepted by the learned Judge, is that the State of Bombay must be prevented from enforcing this Act against the petitioners. The result is that the appeal fails and must be dismissed.

53. With regard to costs, the petitioners have won substantially both in the Court below and before us. Therefore as far as the costs of the petition are concerned they will be entitled to the general costs of the petition. But Mr. Seervai points out that a specific issue of fact arose as to whether the scheme promoted by the petitioners was a lottery or not and on that issue, although they succeeded in the Court below, they have failed here.

Therefore in our opinion the fairest order to make with regard to costs of the petition would be that the petitioners would be entitled to general costs of the petition less the costs of the issue with regard to the question as to whether the scheme promoted by the petitioners was a lottery or not.

54. With regard to the costs of the appeal, various points were agitated and it is true that the petitioners have succeeded in getting the order of the trial Court confirming and getting the order they sought against the State of Bombay. But it is equally true that on some important questions the State of Bombay has succeeded. Mr. Manekshaw is right that it is difficult to apportion time between various arguments advanced by counsel.

If the appellant has succeeded on some of his contentions it is not unusual for the Court of appeal to apportion costs of the appeal. We think, in our opinion, that the fairest order to make with regard to costs of the appeal would be that the State of Bombay should pay to the petitioners three-fourths of the costs of the appeal.

55. Liberty to the respondents' attorneys to withdraw the sum deposited in Court for security of costs.