

(1978) 02 GUJ CK 0011
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Mohandas Manumal and Others

RESPONDENT

Date of Decision : 27-02-1978

Acts Referred:

Bombay Lotteries (Control and Tax) and Prize Competitions (Tax) Act, 1958 — Section 4(1)(a), 4(1)(c), 4(1)(d), 4(D)(a), 4(D)(a)
Bombay Race-courses Licensing Act, 1912 — Section 4

Citation : (1979) 1 GLR 226

Hon'ble Judges : M.K. Shah, J;D.P. Desai, J

Bench : Division Bench

Judgement

D.P. Desai, J.—The four respondents in Criminal Appeal No. 383 of 1975 were charged before the learned Metropolitan Magistrate, Ahmedabad in Summary Case No. 2957 of 1974 with an offence punishable under Sections 4(D)(a), (b), (c) and (d) of the Bombay Lotteries (Control and Tax) and Prize Competitions (Tax) Act, 1958 (the Act). All the respondents are Directors of a private limited company known as Mohan Benefit Private Limited. The activity of this Company is to open schemes and enroll certain number of members or subscribers to the scheme, Each scheme is also known as a Group; and the number of subscribers is limited to a particular number. Each subscriber has to deposit or subscribe every month a particular amount for a particular number of months. The group in question, as disclosed from the advertisement at Exh. 6 is described as Peoples' Own Group. It is to consist of 2000 members, each member subscribing a monthly subscription of Rs. 20/- for 60 months. Each member is to get a Pass-book allotted to him. 34 Chits will be drawn every month; and the first two lucky members will get Rs. 1,200/- each. Thereafter they have not to pay any installment with the result that they cease to be the members of the group, the remaining 32 chits drawn, each lucky member gets Rs. 50/- as bonus, with this difference that he continues in the group and has to continue to subscribe Rs. 20/- per month in order to enable him to earn the prize of Rs. 1,200/-. These type of draws are repeated every month. Every five months there are two extra

bonus draws of Rs. 1,200/- each. After one year a member becomes eligible for a loan not exceeding 75 per cent of the subscribed amount on interest at the rate of 12 per cent per annum without any security. He becomes eligible for this loan four times of the entire period of the scheme i.e. 60 months. Those who have not received any gift i.e. bonus, nor taken any help of loan would get bonus of 10% on the subscribed amount payable at the end of the period of the scheme i.e. 60 months. The advertisement or pamphlet at Exh. 6 is in four languages including English and Gujarati. As regards return of the subscribed amount at the end of the scheme with bonus at the rate of 10%, the English version of the advertisement uses the word "gift" or "loan" whereas Gujarati version uses the word "bonus" or "-loan". This scheme, if held to be a lottery as contemplated by the Act, would squarely fall u/s 4(1)(a),(c) and (d) of the Act. The contention before the trial Court, however, was that this scheme would not fall within the meaning of "lottery". The learned Magistrate stated that looking to the work done by the company it appeared that the company was doing the Sarafi business; that the deposit of any member was not at stake in any case, but there was an additional benefit to the members either for winning a prize or a bonus prize; that there was an element of chance for winning a prize, but thereby there was no loss of any kind to the member; that the prizes were being declared only as incentive to attract the members to deposit money in the Company and that the company was primarily doing the business of banking and prize declaration was meant for incentive for the promotion of the business of the Company.

2. It must at once be said that there was no evidence worth the name to suggest that the business of the Company was of banking. On the contrary, the specimen pass-book produced at Exh. 7 shows, the object of the Company, as under:

Our Company has come forward with the altogether and novel bonus draw scheme, aimed at solving various economical problems of public in general by cultivating the habits of thrift and by way to Association, we invite you to join us, see and experience how we help you to overcome your financial handicaps.

The finding of the learned Magistrate, therefore, that the business of this company primarily consists of banking is without any evidence and cannot be accepted. On behalf of the respondents also it was not shown how this finding could be supported. There was no evidence to suggest that the company was doing Sarafi business. On the contrary, the object mentioned above in the pass-book shows that the primary and main object of the company was to provide draw schemes. The view of the aforesaid findings, the learned Magistrate acquitted the accused. The State came in appeal against the said order of acquittal. M.P. Thakkar, J. sitting singly referred the matter to the Division Bench. That is how, this matter has come up before us. We will deal with the facts of the companion appeal a little later in this judgment. The following features stand out as main features of the scheme in question:

1. The member who gets either a loan or bonus prize is not paid interest on his deposit. Others who do not receive bonus or do not take loan from the company

are paid 10 percent interest on their deposit at the end of the period of 60 months.

2. Prizes are distributed depending upon mere chance and drawing of lots. It is nobody's case that any skill is involved.

3. The drawing of prizes including bonus prizes was limited to the members of a particular group.

4. It may be stated in view of certain decisions of the Madras High Court that after the prescribed number of members for each group, as for instance, 2000 members for the present group, was complete, the public was not invited to contribute to this group.

These are the four features of the scheme in question; and we are now called upon to find out whether the scheme viewed as a whole amounts to a lottery as contemplated by the Act. The object of the Act is inter alia, to control and tax lotteries. Section 3 says "Save as provided by this Act, all lotteries are unlawful." Section 4 prescribes offences and the punishment for such offences. Sections 5 and 6 thereafter carve out two exceptions to the ban contained in Section 3. In both these exceptions however, licence from the Collector was necessary. According to Section 5, a lottery promoted as an incident of an entertainment shall be deemed to be an unlawful lottery, unless the promoter thereof has obtained a licence in respect of such lottery. According to Section 6, a private lottery also if it is not licensed, is deemed to be an unlawful lottery. Explanation to Section 6 defines what is private lottery, and it reads as under:

Explanation:- For the purposes of this section:

(a) the expression "private lottery" means a lottery in the State which is promoted for, and in which the sale of tickets or chances by the promoters is confined to, either:

(i) members of one society established and conducted for purposes not connected with gaming, wagering or lotteries, or

(ii) persons all of whom work on the same premises, or

(iii) persons all of whom reside on the same premises, and which is promoted by persons each of whom is a person to whom under the foregoing provisions tickets or chances may be sold by the promoters and, in the case of a lottery promoted for the members of a society, is a person authorised in writing by the governing body of the society to promote the lottery; and

(b) the expression "society" includes a club, institution, organisation or other association of persons by whatever name called, and each local or affiliated branch or section of a society shall be regarded as a separate and distinct society.

Section 7 confers power on the Collector to grant licence on payment of such fees and subject to such conditions and in such form as may be prescribed.

Section 32 laid down that nothing in the Act shall apply to:

- (a) the owner, see or occupier of any race course to whom a licence has been granted for horse racing on a race course u/s 4 of the Bombay Race-courses Licensing Act, 1912,
- (b) a lottery organised by the Central Government or a State Government;
- (c) a lottery specially authorised by the State Government.

It is thus clear that if a scheme does not amount to a lottery as contemplated by Sections 5 and 6, it cannot even be licenced by the Collector. The said lottery has to be specially authorised by the State Government u/s 32(c) in order to be excluded from the application of the Act. The Act also repeals the provisions of Section 294A of the Indian Penal Code as applicable to the territories to which the Act extends. The said provision made certain types of acts concerned with lotteries punishable.

3. The first question to be determined as has been argued before us on behalf of both the sides and also by the learned advocates at the bar who intervened with the permission of the Court was, what is the connotation of the word "lottery" occurring in the Act. It may be stated that neither the Indian Penal Code nor the Act defines lottery. But certain decisions in England and India make it clear what is meant by this term. In Halsbury's Laws of England, Third Edition, Volume 18 at page 238 (paragraph 460), following observations occur:

460. Ganerally. A lottery has been described as a scheme for distributing prizes by lot or chance. In its simplest form the adventurers contribute to a fund which they agree among themselves shall be unequally divided upon the happening of an agreed event. The organiser of such a scheme may or may not himself be an adventurer, and, in considering whether a lottery is set up or maintained, it is unnecessary to consider whether or not the organiser is to make a profit out of the subscriptions. As between the adventurers, the agreement, when the lottery takes this simple form, seems to contain an element of gambling, for all stand to lose the amount of their subscriptions in favour of the winner. This gambling element does not appear ever to be wholly absent, but it need not be common to all the adventurers; it is enough that some of them stand to lose. Therefore, if some of the adventures have, however, indirectly contributed to the fund out of which the prizes are to be paid, they risk the amount of their contributions, and in such a case it is immaterial that others who have contributed nothing may win the prize.

Conversely, it is not essential that the fund out of which the prizes are provided should consist only or at all of sums contributed by the adventurers; nor does the fact that every adventurer in any event obtains some or even full value for his subscription prevent the scheme from being a lottery. It seems, however, that when the chances of a prize are obtained wholly gratuitously, and when, therefore, none of the adventurers risks any thing, the scheme would not be a

lottery.

There can be no dispute about the proposition that a lottery is a scheme for distributing prizes by lots or chance. In England, however, cases arose in which at the bar a particular feature of a scheme was emphasised in order to show that even though the element of chance is present, the scheme would not be a lottery. It is not necessary to refer to all English cases on this point in detail as most of them have been referred to in Madras judgment where schemes of chit fund known as Kauri prevail since decades and the question arose both under civil as well as criminal sides, whether this Kauri scheme could be said to be a lottery. On civil side the question arose because the illegality of a transaction was pleaded by one of the parties on the basis that a particular Kauri scheme was a lottery which having been prohibited by Section 294-A of the Indian Penal Code, no obligation to fulfill the promise arose under such an illegal scheme. In *Shanmugha Mudali Vs. Kumaraswami Mudali*, we find in the judgment of Venkatsubba Rao, J. reference to an earliest decision of the House of Lords in *Wallingsford v. Mutual Society* (1849) 2Ph. 801. In that case there was a mutual society with an object to accumulate capital by means of monthly subscriptions from members to advance such capital to the members in rotatkevin and ultimately to divide among the members, all the profits that had been made. An appropriation certificate was issued to every member, on his entering the society and certified his title to receive an advance out of the funds of the society and to participate in its profits. The appropriations of advances were to be made in two ways; firstly in the first and every fourth month thereafter by drawing of lots free of any premium or interest, and secondly, the intermediate appropriations were to be allotted to the members tendering the highest premium for the same. The appellant before the House of Lords obtained an Appropriation Certificate and also obtained advances, but did not make the requirement payments. In the action brought against him he pleaded that the constitution of the society itself was illegal as its promised benefits were to be given to the members by drawings, which made the society unlawful, under the Lottery Acts. The Lord Chancellor (Lord Selborne) observed that one of the acts relied upon had reference to gambling transactions only and the transaction before the House was not a gambling transaction and the other act relied on had reference to the persons who kept lottery officers at which the public were invited to pay for lottery tickets and that act could have no application to the facts of the case. About three years thereafter a discordant note was struck by Jessel, M.R. in *Sykes v. Beaden* (1852) 12 C.B 469. In the case there was a combination formed on the principle of investing the subscriptions of the members and dividing the capital fund and profits, by means of certificates convertible by annual drawings by lot into preference divided bonds bearing interest with bonus. The learned Master of the Rolls in his characteristic style observed:

If that is not a lottery, it is very difficult, at all events, to my mind, to understand what a lottery is. It is called a division by lot which means lottery. It says that the selections of certificates shall be by lot and that has to be done, in the

ordinary way by chance and the benefits, as I said before, are unequal.

Basing itself on the observations of the Lord Chancellor in Wallingsford's case (supra) that the other Lottery Act relied upon in defence had reference to the persons who kept lottery offices at which the public were invited to pay for lottery tickets, could have no application to the case, it was contended before the Madras High Court that after the group is closed by the total number of members of the group being fulfilled, there was no invitation to the public to join the draws of lots. This argument did appeal to Ramesam, J. in Shanmugha's case (supra). He reproduced the observations as aforesaid and stated:

If by the time a society of this kind became known to the public, all its members were ascertained and there is no invitation to any member of the public to join it, it cannot be said that any person keeps a lottery office, at which the public were invited to join and to pay, within the meaning of the English Acts or Section 294A of the Indian Penal Code. In other words it is not that every lottery constitutes an offence but the keeping of a lottery office, which is a standing invitation to the public, that constitutes the offence....

It is on account of this view, that the last and the fourth feature in the present scheme has been mentioned above.

4. Venkatasubba Rao, J. another member of the Bench in Shanmugha's case (supra) took it on a different basis. He conceded that the chance determines the disposal of the interest earned, but there was absolute certainty with reference to the distribution of the capital fund itself. Therefore, in his opinion, there is a small element of chance that tempts some persons to join the fund, the dominant feature of the transaction was that it enabled a large number of persons to gradually lay by money and receive their savings in a lump sum and the scheme was in their case an incentive to thrift. The learned Judge did find that a view different from what he was disposed to take was no doubt taken in an earlier decision of Madras High Court in Sundaram Pillai Vs. Ramasamia Pillai and Others, But he found that the respondent in that case was unrepresented and the attention of the Court was not drawn to the decision of the House of Lords in Wallingsford's case (supra). There is another decision of the Division Bench of the Madras High Court rendered prior to the aforesaid decision. It is reported as Nagappa Pillai Vs. Arunachalam Chetty, . There, it was held that a chit fund with arrangement for payment of prize every month by casting lots, was a lottery. Venkatasubba Rao, J. did refer to this Division Bench decision, but said nothing about it.

5. In a subsequent decision in Durga Venkatramana (deceased) and Others Vs. Kedari Setti Sanyasayya and Another, , Ramesam, J. sitting singly acting upon his earlier observation took the view that there being no scope for an invitation to the public inviting them to join the scheme as the whole transaction started with a definite number of ascertained persons, there was no scope for an offence, though there might be an element of chance and in that sense the

scheme might amount to a lottery. This view of his, however, came to be dissented from, and, therefore, overruled by a Division Bench of the same High Court in *Public Prosecutor Vs. M. Munisami Naidu*, There, the scheme under which several persons made monthly payments but the person whose name or ticket was drawn in the monthly drawings got a prize and he was not required to make any further payments and the unsuccessful persons had to continue to make payments, was held to be a scheme merely depending upon a chance and as such a lottery. Following observations of Basely, C.J. bear repetition as bearing upon the question before us:

The result of this is that those whose names or numbers were drawn earlier derived a far greater benefit than those whose names or numbers were drawn later, The successful subscriber whose name or number happened to be drawn in the first month would get for his Rs. 3 either a cycle or a gramophone and thereafter contribute nothing towards the scheme, whereas the unsuccessful ones continued to subscribe. There therefore was provided for a very substantial gain to a subscriber, which gain was dependent purely upon chance, that is to say, upon his name or number being drawn at any one of the monthly drawings. In our opinion this was clearly a lottery and....

This angle that to the first successful subscriber in the first month the amount of the prize is a wind-fall, must also be kept in mind while deciding the question referred to us in the present case.

6. The question ultimately came up before a Full Bench consisting of five Judges of the Madras High Court in *Sesha Ayyar v. Krishna Ayyar* AIR 1936 Mad 225. In that case, there was a kauri chit fund started with the object of collecting a fund for a temple. The chit fund consisted of 626 subscribers, each subscriber agreeing to pay at the rate of Rs. 3 per month for 50 months i.e. a total amount of Rs. 150/- per ticket. On the 25th of every English month one ticket was to be drawn out of the 625 tickets and the winning ticket was to be paid a prize of Rs. 150/- without any liability to pay for future installments. 50 such tickets were to be drawn in 50 months and at the end of the 51st month 575 subscribers, who have not obtained prizes were to be repaid without interest, the total amount of their subscription, viz. Rs. 150/-. A person took two tickets in such kauri fund and had subscribed Rs. 270/- representing 45 monthly installments on both the tickets when the chit fund came to an end. He brought a suit to recover Rs. 270/- against the promoters of the kauri; and the promoters of the kauri raised a defence that kauri chit fund was a lottery within the meaning of Section 294A of the; Indian Penal Code, and not being authorised by Government no claim arising under the contract entered into by the plaintiff could be legally enforced. Cornish, J. pointed out at page 228 that the contention tint it is an element of a lottery that some of the competitors must stand to lose, seemed to be founded upon a misconception of the passage in Halsbury, Vol. 15, p. 525. Having reproduced the passage, the learned Judge; said that the passage was a commentary on an earlier decision of Kings Bench. He then said:

It gives no warrant for the theory that a lottery is not a lottery unless it fulfils one of the essential conditions of a wager. A lottery and a wagering contract are two distinct things. A scheme may amount to a lottery though none of the competitors is a loser, as in 10 Cox C C 352...11 Q B D 207 (the packets of tea case) is another illustration.

The learned Judge over-ruled need for element of risk of loss as a necessary element in a lottery. This element was always present in his opinion in case of wagering. But a lottery and a wagering contract according to the learned Judge were two distinct things. The majority in that Full Bench (Venkataramana Rao, J. contra.) held that the chit fund amounted to a lottery. Cornish, J. in the course of his judgment also observed relying on Archibold's Criminal Pleadings, 7th Edition, page 1345 that a lottery has been defined as the distribution of prizes by lot or chance without the use of any skill. The learned Judge also stated in the alternative that if it was necessary he would hold that the subscribers to this kauri whose tickets had not been drawn had suffered loss to the extent of their contribution to the extent of Rs. 150/- taken by the prize-winner.

7. Varadachariar, J. made following instructive observations on the question while concurring with the majority view:

The result of the authorities seems to me to be that a scheme may fairly be regarded as a lottery if it is clear that whatever other benefit the subscriber or competitor may get in return for his money, the chance of his getting the prize was also part of the bargain and must have entered into his calculation. It is the fact of the prize and not the source from which it is paid that I think is the deciding factor.

The learned Judge again said with regard to one of the features of the kauri scheme in that case which is also common feature here, as under:

Here again, the position may be different if their good fortune in the matter of the draw merely meant an early repayment, subject to their liability to continue payment of their subscriptions to the end; but the spirit of speculation suggested a further attraction in the form of the provision that as to on as any subscriber draws the prize his liability to pay subscriptions will cease.

In our case also there is a feature that after obtaining the prize of Rs. 1,200/- liability of the successful subscriber to contribute future subscription ceased. Wardsworth, J. in his concurring judgment agreed with Cornish, J. that loss is not an essential part of the definition of lottery. The learned Judge said "In the view that I take that, though the risk of loss is usually found in any lottery scheme it is not an essential part of the definition of a lottery, it is strictly unnecessary to consider the correctness of the dictum in 50 Mad. 696(6) and other cases similar to it that loss of interest is not strictly speaking a loss." Lakshmana Rao, J. in his concurring judgment said "...and in my opinion the crucial test is whether or not the chance of winning a prize by lot enters into the bargain. If it does, the subscribers would necessarily be risking something, and it is not essential that

the fund out of which the prizes are provided should consist only or at all, of sums contributed by them. That every one of them would in any event obtain full value for his subscription would not prevent the scheme from being a lottery and it is only when the chances of a prize are obtained wholly gratuitously that the schema would not be a lottery." Venkataramana Rao, J. in his dissenting judgment observed at page 240 that where the dominant feature of the transaction was the promotion of mutual thrift and co-operation and the object was for a beneficial purpose and not for the purpose of gaming or speculation, the fact that certain matters are determined by lot will not constitute it a lottery and that risk of loss is a necessary element. He further observed at page 239 that the following four elements appeared to be essential to constitute a lottery:

1. A prize or some advantage in the nature of a prize; (2) distribution by chance;
3. Consideration paid or promised; (4) risk or (of?) loss.

No exception can be taken to the first three of these essential elements. The controversy in the present case is with regard to the 4th element only; and in the Full Bench decision, two of the learned Judges said that risk of loss was not an essential element.

8. Cases have arisen in England where a purchaser paying real worth of goods also gets a chance of a prize while purchasing the goods. In that case, the contention that the purchaser got a real worth of goods and therefore, lost nothing and the chance of prize was wholly gratuitous, stood negatived. In *Taylor v. Smetten* (1883) 11 Q.B D. 207 (known as Tea packet case), the appellant sold tea packets each containing a pound of tea at 2s.6d. a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the appellant before the sale, but the purchasers did not know until after the sale what prizes they were entitled to; and the prizes varied in character and value. It was found that the tea was good and worth the money paid for it. Still, it was held that what the appellant did constituted a lottery within the meaning of the statute. Hawkins, J. made following observations at page 211.

There can be no doubt that the appellant in enclosing and announcing the enclosure of the coupon in the packet of tea, did so with a view to induce persons to become purchasers and realize a profit to himself; and, although it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices charged and obtained for the packages did not include the aggregate prices of the tea and the prizes. Nor can it be doubted that in buying a package, the purchaser treated and considered it as a purchase of the tea and the coupon, whatever its value might turn out to be. In other words he bought the tea coupled with the chance of getting something of value by way of a prize but without the least idea what that prize might be.... To us it seems utterly immaterial whether a specific article was or was not conjoined with the chance, and as the subject-matter of the sale.

Another English case is to be found referred to in a decision of the Division Bench

of the Bombay High Court in *Vazirally v. Emperor* AIR 1928 Bom 550. That case is *Hunt v. Williams* (1888) 52 J.P. 821. In that case (as found from the Bombay judgment) a person kept a sweet stuff shop and sold penny packets of American caramel of which several packets contained a half penny in addition to a fair penny worth of sweets, it was held that amounted to an offence of keeping a lottery.

9. In *Vazirally's* case (*supra*) before the Division Bench of the Bombay High Court, the accused, who was a dealer in cigarettes published several handbills advertising a prize of Rs. 5/- which could automatically be obtained by purchasers the Park Drive Cigarettes. Ten currency notes of Rs. 51- each were sent to the manufacturers of these cigarettes at Belfast, who put one note in each of the ten packets at random. Those ten packets were mixed with other packets. The result was that some lucky purchasers would purchase one of those ten packets containing five rupees note. The Division Bench of the Bombay High Court following the aforesaid two English decisions held that the scheme was a lottery.

10. In *Dhana v. Emperor* AIR 1934 Sind 69, Judicial Commissioner's Court (as it then was), a shopkeeper gave out that the purchaser of every packet of sweets for half anna was entitled to a separate ticket and each ticket meant a separate chance in a lottery. It was held that what was purchased by each customer of the accused was not only the packet of sweets but also a chance in the lottery, that the customers collectively contributed towards a certain fund out of which the accused was able to give away prizes; and that the transaction was a lottery, A Division Bench of the same Court in *O.D. Harder v. Emperor* AIR 1934 Sind 149 held that every person who purchased a ticket at the entrance of a show was contributing to the common fund from which the prizes were to be drawn by lots. The prize being 400 times the price of the ticket, it was held that the scheme was a lottery.

11. The majority judgment of the Full Bench of the Madras High Court has held the scheme to be a lottery notwithstanding its feature that the remaining unsuccessful subscribers at the end of the 51st month are repaid the amount of their subscription, of course without interest. Two of the learned Judges in terms said that the risk of loss was not an essential element of the concept of a lottery. This view, in our opinion, is unassailable in view of the English decisions in the Tea Packet case and the American caramel's case wherein the purchaser in both the cases got full value for the price he paid and also the decision of the Division Bench of the Bombay High Court in *Vazirally's* case (*supra*). The crucial test as *Varadachariar and Lakshmana Rao, JJ.* stated in the Full Bench case of the Madras High Court is whether the chance of winning a prize is part of the bargain or enters into a bargain ? If, therefore, there is a subscriber, a subscription paid by him and winning of a prize by mere chance, the scheme to which the subscriber subscribes can well be said to be a lottery. The risk of loss may or may not be involved. This, to us, appears to be the correct connotation of the

term lottery which has not been defined either under the English statutes or under the Indian Statutes.

12. The object of the Act was, inter alia, to control lotteries; and save as provided by the Act all lotteries were declared unlawful by Section 3 of the Act. Thus, the Legislature while enacting the Act in question and repealing Section 294-A of the Indian Penal Code was conscious of the limited operation of Section 294-A. Therefore, it wanted to provide for a wider range of the field for the purpose of making several acts connected with lotteries or schemes which can be termed as lotteries punishable. Section 4() of the Act is definitely wider in operation than Section 294-A of the Indian Penal Code. We are of the opinion that this piece of legislation has also a social purpose to fulfil. But for this provision trade activities which would not satisfy the limited requirements of Section 294-A of the Indian Penal Code could have been carried on successfully exploiting weakness of the masses to have a chance of winning a prize and becoming rich by a short cut. The Legislature so far as the licensing of the lottery by the Collector was concerned, carved out only two exceptions contained in Sections 5 and 6. In respect of other lotteries the ban created by Section 3 was an all pervading ban. It was then left to the State or the Central Government to organize a lottery, or to the State Government to specially authorise a lottery so that the said lottery is taken out of the purview of the Act u/s 32. Therefore, keeping the provisions of Sections 3, 5, 6 and 32 of the Act in mind we must avoid any interpretation which on the basis of a supposed uncertain element would take the scheme out of the concept of a lottery. The English and Indian cases were very much before the Legislature when it proceeded to impose - so to say - a blanket ban on all lotteries except those licensed under Sections 5 and 6 or those saved by Section 32 of the Act. The Legislature did not provide for any exception in favour of the schemes to promote so-called thrift or to provide full value for the subscription or the goods purchased. Even the definition of private lottery contained in the Explanation to Section 6 shows that the term was given, a restricted meaning to cover three categories of cases mentioned in that Explanation. This would ex-facie show that the private lottery and falling within these three specified categories of cases were all banned and declared unlawful u/s 3 of the Act. Keeping in mind these features we feel no hesitation in coming to the conclusion that risk of loss is not a necessary element of a lottery as understood in the context of English and Indian cases as well as the recent Legislation viz. the Act. We, however, find that A.D. Desai, J. sitting singly in *State v. Jayantilal Bhimjibhai* 9 G.L.R. 603 considered risk of loss also as one of the four essential elements. He based himself upon the following observations in Halsbury's Laws of England contained in paragraph 460:

Therefore, if some of the adventurers have, however, indirectly, contributed to the fund out of which the prizes are to be paid they risk the amount of their contributions, and in such a case it is immaterial that others who have contributed nothing may win the prize. Conversely, it is not essential that the fund out of which the prizes are provided should consist only or at all of sums

contributed by the adventurers; nor does the fact that every adventurer in any event obtains some or even full value for his subscription prevent scheme from being a lottery. It seems, how ever, that when the chances of a prize are obtained wholly gratuitously, and when therefore, none of the adventurers risks anything, the scheme would not be a lottery, it seems that the substantial object of the whole scheme will be looked at in order (sic) ascertain whether it is a lottery. Where the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lottery will not vitiate the scheme.

The absence of risk referred to by the learned Judge there, is in the context of offering a prize wholly gratuitously. In that case, it can be said that the person who gets the prize wholly gratuitously risked nothing. But that does not lead us to a conclusion that in a scheme where distribution of prizes is made unequally depending on mere chance, the fact that the subscriber gets at the end of the scheme what he has contributed and therefore, does not risk anything, would not be a lottery. The decided cases referred to earlier and the object of the legislature lead us to the conclusion that the risk of loss though it may be present in a great variety of cases, is not a necessary element of lottery. Halsbury also has said in the aforesaid quotation as under:

nor does the fact that every adventurer obtains some or even full value for his subscription prevent scheme from being lottery.

13. So far as the present scheme is concerned, it is clear by applying the aforesaid standards that it is a lottery. We do not want to be deceived into believing that the main object of this scheme is to encourage thrift. That, in our opinion, was no concern of the respondents. In fact, to promote thrift amongst citizens is more or less a concern of the State and not private individuals who embark upon attractive schemes with the eye upon the amount that they may be able to pocket if the scheme runs through. It may not be out of place to state that as we are informed, there are 26 chit fund companies in liquidation or facing liquidation proceedings in this Court out of the total 51 companies in liquidation. This would demonstrate the mischief which such chit fund companies or benefit or finance companies are capable of generating in the public at large. In view of the object of the Legislature behind this Act to control seemingly innocent trade of offering prizes byway of chance under the clock of chit funds or benefit funds, such activities should be put an end to with heavy band. With great respect, we do not agree with A.D. Desai, J. as regards the fact that the risk of loss is a necessary element in the concept of a lottery.

14. In any case, we find that in the present case, risk of loss is demonstrated as it was demonstrated by Cornish, J. in the following words in the Full Bench decision in Sesha Ayyar's case (supra):

But if it were necessary I would hold that the subscribers to this kauri whose tickets had not been drawn had suffered loss to the extent of their contributions

to the Rs. 150/- taken by the prize-winner.

In addition to this, we also find another risk of loss involved in the present scheme. As has been pointed out earlier, one of the features of the scheme was that those subscribers who at the end of the scheme do not get any bonus or take loan only were entitled to 10 per cent bonus on their subscription amount. Thus, it follows that those members who, at one point of time, had obtained bonus or loan but were unsuccessful in obtaining prize of Rs. 1,200/- would only get back their amount without interest. In their case they would suffer loss of interest. We can also conceive of a case where a member who had not obtained bonus or loan but who succeeds at the 59th draw, is a loser. To be exact, by that time he had invested Rs. 1, 180/-; he gets back Rs. 1,200/- and he would not be entitled to 10 per cent bonus because in the 60th draw he ceases to compete. Such a person, if he has not obtained bonus or loan, would pray that at the 59th and 60th draws he may not win the prize, because in that event he will get 10 per cent bonus on his contribution on Rs. 1.200/-.

15. If the aforesaid interpretation of the word "lottery" is correct, it is not disputed in this case that the scheme in question is a lottery and that offences u/s 4(1)(a), (c) and (d) of the Act take place. The whole case has been argued on the interpretation of the word "lottery" alone. It is, therefore, clear that conviction must follow in the present case.

16. Before parting we must say that our attention was invited to an unreported judgment in Criminal Appeal No. 744 of 1975 with Criminal Revision Application No. 53 of 1976 decided by B.K. Mehta, J. on October 31, 1976 (*State of Gujarat v. Vijay Finance Corporation and Ors.*). The learned Judge in that case made it clear after reproducing the four elements from *Jivanlal's* case (*supra*) that he did not think it necessary for the purpose of disposal of the two matters before him to go into the larger question whether the activity in question before him constituted a lottery or not, because it was possible for him to dispose of the matters before him on the narrow question whether the same falls within the terms of Section 6 of the Act. It seems, however, to have been argued before the learned Judge that even assuming without admitting "that the activity of the accused was in the nature of business of lottery, it must be unlawful within the terms of Section 5 or Section 6 of the aforesaid Act." Though this argument has not been accepted by the learned Judge, in our opinion, there is inherent fallacy underlying this argument. It is not as if the lotteries mentioned in Sections 5 and 6 of the Act alone are made unlawful by the Legislature. Section 3 of the Act makes all lotteries unlawful save as provided by the Act. Therefore, Sections 5 and 6 only carve out two exceptions wherein the activity mentioned in those sections can be licensed as a lottery and which activity in the absence of a licence is deemed to be unlawful lottery. It is not correct, therefore, to contend that a lottery must be unlawful within the terms of Sections 5 and 6 of the Act only. Even a lottery which does not fall within Section 5 or Section 6 as in the case before us, would be covered by Section 3 and would be unlawful. Such a

lottery would also be covered by the penal provisions contained in Section 4 of the Act. We do not, therefore, think that Vijay Finance Corporation's case is an authority for the proposition that only unlicensed lotteries as contemplated by Sections 5 and 6 are unlawful and rest of the lotteries" are not hit by the Act. Vijay Finance Corporation's case was decided on the facts of that case; and nowhere such a proposition has been laid down. It was, however, urged by Mr. D.K. Shah on the basis of the aforesaid judgment in Vijay Finance Corporation's case that the activity of the respondents may be considered to be a private lottery and, therefore, the offence, if any, would fall u/s 6 of the Act. It was urged on the basis of the aforesaid judgment that in the present case also the prosecution has not established that an association of persons in this group must have established and conducted its activity for the purposes not connected with gaming, wagering or lotteries as contemplated by Sub-clause (i) of Clause (a) of the Explanation to Section 6 of the Act. The argument was that the prosecution having failed to establish that, on a parity of reasoning adopted by the learned Single Judge we must acquit the accused. We do not think, we can countenance this argument. No precedent could be cited as a binding decision on facts. However, we would like to point out the fallacy underlying this argument. If, as argued before us, the prosecution has failed to establish that the members of the present scheme fall under Explanation (a)(i) and (b) to Section 6 of the Act, the scheme would not be a private lottery. This is because the explanation in terms defines what is a private lottery. In such case, the scheme can still be held to be a lottery banned, not by Section 6, but by Section 3 of the Act. In Criminal Appeal No. 744 of 1975 (supra) this aspect was not brought to the notice of the Court; and the learned Public Prosecutor in that case, it seems, had relied upon Section 6 of the Act alone. It is also not understood how there can be a scope for such an argument in the present case, because assuming that the activity in question is a private lottery, it is not the case of the respondents -and that is admitted before us-that a licence has been obtained for this activity from the Collector u/s 7 of the Act. Therefore, the aforesaid decision cannot help the respondents.

17. As regards the finding of the learned Magistrate that the Company was primarily doing the business of Banking and the prize declared were meant for incentive for the promotion of the business of the company, we may observe that the Division Bench of the Bombay High Court in Vazirally's case (supra) stated, after referring to Taylor's case (1883) 11 Q.B 207, that it makes no difference that the distribution is part of a genuine mercantile transaction. Therefore, the finding of the learned Magistrate as regards the nature of the business conducted by the respondents would not help the respondents in this case. That finding as stated earlier, is not supported by evidence on record.

18. Thus, it is clear that the present respondents are guilty u/s 4(1)(a), (c) and (d) of the Act. They have not been able to prove that their case is covered by Section 4(2) of the Act which reads as under:

4(2). In any proceedings instituted under Sub-section (1), an accused person shall not be deemed to be guilty if he proves that the lottery to which the proceedings relate was such a lottery as is not deemed to be unlawful u/s 5 or 6 as the case may be, and that at the date of the alleged offence the accused believed and had reasonable ground for believing that none of the conditions required by Section 5 or 6 to be observed in connection with the promotion and conduct of the lottery had been broken.

19. In the result, the appeal is allowed. The respondents are convicted u/s 4(1) (a), (c) and (d) of the Act; and each of them is sentenced to pay a fine of Rs. 800/- (Rupees eight hundred only), in default of payment of fine, the defaulting accused will undergo simple imprisonment for one month.

20. Mr. D.K. Shah for the respondents-accused prays for a certificate under Article 134(1)(c) of the Constitution. There can be no doubt that the question is of general importance; and the question which has been raised and decided in this case is a substantial question of law. The question would cover so many concerns running chit fund schemes. We, therefore, certify the following question under Article 134(1)(c):

Whether a chit fund or a benefit fund consisting of a specified number of subscribers for a specified period and giving away during this period prizes to one or a few of the subscribers by way of chance, such as drawing of lots and in which prize winner ceases to subscribe further installments, would be a lottery even if there is no risk or loss involved to the subscriber on the assumption that the unsuccessful subscriber gets the total amount of his subscription back on the expiration of the specified period, with or without interest?

This certificate is granted on condition that each of the respondents pays up the amount of fine within a period of three weeks from today.

21. In Criminal Appeal No. 626 of 1975, the offence punishable u/s 4(1) would be made out on the following facts applying the interpretation of the word "lottery" as contained in the preceding part of this judgment. There, the two respondents are managing directors of Kavita Benefit Private Limited. About this, there is no dispute. The company floated schemes known as groups A to E consisting of different number of members for each group and covering different periods of subscription. Thus, group A consists of 300 members; each has to subscribe Rs. 10/- per month and the duration of the group is 30 months. In groups B and C there are 500 members; each member has to subscribe Rs. 10/- per month and the duration is 50 months. In Groups D and E there are 1000 members; each has to subscribe Rs. 10/- per month for sixty months. The benefits are prizes. As stated by the learned Magistrate, the facts are not in dispute; and in fact, the written statement of the accused at Exh. 24 also brings out those facts. The salient features are that the company accepts deposits from the members of each group in the amount stated against each group as above for the period of duration of the group. During this period of duration lots are

drawn every month and the winner is to get a specified prize much in excess of the monthly amount of his subscription. The successful subscriber ceases to be a member of the group and is not required to pay further installments. At the end of the duration the moneys of the members are returned without interest. It is also not in dispute that the prizes are distributed from the amounts collected by way of subscription from the members. The contention of the respondents was that by accepting deposits and not giving interest to the members, the company makes some profit and out of this profit prizes are distributed amongst members. It is said that these prizes are given as a means to attract members; and the company deals in chit funds and collects deposits i.e. it is doing business of collecting deposits. The learned Magistrate found the following features.

1. There is certainty with regard to the return of the capital paid by the member.
2. The member is to get an article as prize and every month there is draw of the prizes amongst members. This according to the learned Magistrate, was only incidental to the scheme.
3. The distribution of prizes is only for the benefit of the company and as such an incentive to attract members.
4. The main business of the company appears to collect deposits or accept deposits. The learned Magistrate on these features observing that there was no loss of deposits given by the members, acquitted both the respondents.

22. In view of the reasons given by us in our judgment as aforesaid, none of these features can prevent the scheme from being a lottery under the Act. In view of our interpretation of that term as above, it is clear that the respondents are guilty u/s 4(1)(a), (c) and (d) of the Act, The order of acquittal will have, therefore, to be set aside. In the result, the appeal is allowed. Each of the respondents is convicted of the offence u/s 4(1)(a), (c) and (d) of the Act; and each is sentenced to pay a fine of Rs 800/- (Rupees eight hundred only) with simple imprisonment for one month in case of default. Mr. D.K. Shah for the respondents prays for a certificate under Article 134(1)(c) of the Constitution. As we have given a certificate in the companion matter under that provision and set out the substantial question of law involved, we grant a certificate in this matter also on the condition that the amount of fine is paid into the trial Court by the respondents within three weeks from today.