R

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 11TH DAY OF MAY 2023

BEFORE

THE HON'BLE MR.JUSTICE S.R.KRISHNA KUMAR

WRIT PETITION No. 19570 OF 2022 C/W
WRIT PETITION Nos. 22010 OF 2021, 18304 OF 2022
19561 OF 2022, 20119 OF 2022 AND 20120 OF 2022
(T-RES)

IN W.P. No. 19570 / 2022

BETWEEN:

GAMESKRAFT TECHNOLOGIES PRIVATE LIMITED
REPRESENTED BY RAMESH PRABHU
CHIEF FINANCIAL OFFICERM M/S. GAMESKRAFT
TECHNOLOGIES PRIVATE LIMITED
B-304, VICTORY HARMONY APRTMENTS
SSA ROAD, HEBBELL, BENGALURU.

…PETITIONER

(BY SRI. DR. ABHISHEK MANU SINGVI, SENIOR COUNSEL AND
SRI. UDAYA HOLLA, SENIOR COUNSEL A/W
SRI. SIDDHARTHA H.M., & SRI. SUHAAN MUKERJI,
SRI. NIKHIL PARIKSHITH
SRI. ABHISHEK MANCHANDA &
SRI. CHANDAN PRAKASH PANDEY &
SRI. L. NIDHIRAM SHARMA
SRI. VYASAKIRAN UPADHYA & SRI. MANJUNATH B,
SRI. VARUN THOMAS MATHEW ,
SRI. ONKAR SHARMA, ADVOCATES)

AND:

1. DIRECTORATE GENERAL OF GOODS
SERVICES TAX INTELLIGENCE (HEADQUARTERS)
WEST BLOCK 8, WING 3, 1ST FLOOR
SECTOR I, R.K. PURAM
DELHI – 110 066.

2. ADDITIONAL DIRECTOR GENERAL DIRECTOR
GENERAL OF GOODS OF SERVICES
INTELLIGENCE (HEADQUARTERS)
WEST BLOCK -8, WING NO.6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

3. ADDITIONAL DIRECTOR
DIRECTOR GENERAL OF
GOODS AND SERVICES INTELLIGENCE
(HEADQUARTERS)
WEST BLOCK – 8, WING NO. 6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

4. SENIOR INTELLIGENCE OFFICER
DIRECTORATE GENERAL OF
GOODS AND SERVICES
INTELLIGENCE (HEADQUARTERS)
WEST BLOKC-8, WING NO.6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

…RESPONDENTS

(BY SRI. N.VENKATARAMAN, ADDITIONAL SOLICITOR GENERAL A/W
SRI. JEEVAN J NEERALAGI, ADVOCATE
SRI. MUKUL ROHTGI, SENIOR COUNSEL A/W
SRI. PRADEEP NAYAK & SMT. ANUPAMA HEBBAR
SRI. SANKEERTH VITTAL AND SRI. KARAN GUPTA, ADVOCATES
FOR IMPLEADING APPLICANT ON IA 1/2022
SRI. ARAVIND DATAR AND SRI. SAJJAN POOVAYYA, SENIOR
COUNSEL A/W MISS, RAKSHA AGARWAL
SRI. SAMEER SIGH AND SRI. RAVI RAGHAVAN, ADVOCARTES FOR
IMPLEADING APPLICANT ON IA 2/2022)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASHING AND SETTING ASIDE THE SHOW CAUSE NOTICE BEARING DGGI F. NO. 413/INT/DGGI/HQ/2021/1329 AND BEARING DIN CC20220900000000B732 DATED: 23.09.2022 VIDE ANNEXURE-A AND THE PROCEEDINGS THEREUNDER AND ETC.

IN W.P. No. 22010/2021

BETWEEN:

GAMESKRAFT TECHNOLOGIES PRIVATE LIMITED
REPRESENTED THROUGH ITS
CHIEF FINANCIAL OFFICER
MR. RAMESH PRABHU
1ST AND 2ND FLOOR
NO. 26/1, IBIS HOTEL, HOSUR ROAD
BOMMANAHALLI, BANGALORE
KARNATAKA – 560 068

…PETITIONER

(BY SRI. DR. ABHISHEK MANU SINGVI, SENIOR COUNSEL AND
SRI. UDAYA HOLLA, SENIOR COUNSEL A/W
SRI. SIDDHARTHA H.M., & SRI. SUHAAN MUKERJI,
SRI. NIKHIL PARIKSHITH
SRI. ABHISHEK MANCHANDA &
SRI. CHANDAN PRAKASH PANDEY &
SRI. L. NIDHIRAM SHARMA
SRI. VYASAKIRAN UPADHYA & SRI. MANJUNATH B,
SRI. VARUN THOMAS MATHEW ,
SRI. ONKAR SHARMA, ADVOCATES)

AND:

1. DIRECTORATE GENERAL OF GOODS
SERVICES TAX INTELLIGENCE (HEADQUARTERS)
WEST BLOCK 8, WING 3, 1ST FLOOR
SECTOR I, R.K. PURAM
DELHI – 110 066.

2. PRINCIPAL ADDITIONAL DIRECTOR GENERAL
DIRECTORATE GENERAL OF GOODS AND SERVICES
INTELLIGENCE (HEAD QUARTERS)
WEST BLOCK – I, WING NO. 6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

3. CENTRAL BOARD OF INDIRECT TAXES & CUSTOMS
NORTH BLOCK, DEPARTMENT OF REVENUE
MINISTRY OF FINANCE, GOVERNMENT OF INDIA
DELHI – 110 001
REP BY MANAGER.

4. ICICI BANK
420, 27TH MIAN ROAD, SECTOR 2
1ST SECTOR, HSR LAYOUT
BENGALURU, KARNATAKA – 560 102.

5. HDFC BANK LIMITED
POST BOX 5106
SHANKARNARAYAN BUILDING
25/1, M.G. ROAD
BANGALORE – 560 001.
REP. BY MANAGER.

6. YES BANK LIMITED
GROUND FLOOR
PRESTIGE OBELISK
MUNICIPAL, NO. 3, KASTURBA ROAD
BENGALURU – 560 001.
REP BY MANAGER.

7. RBL BANK
NO.8, SBI COLONY
7TH MAIN, 3RD BLOKC
KORAMANGALA,
BANGALORE – 560 037
REP BY MANAGER.

8. IDFC BANK
GROUND FLOOR
SIRE NO. 4 & 5, 27TH MAIN
1ST SECTOR, HSR LAYOUT
BENGALURU – 560 102
REP BY MANAGER.

…RESPONDENTS

(BY SRI. N. VENKATARAMAN, ADDITIONAL SOLICITOR GENERAL A/W SRI. AMIT ANAND DESHPANDE, ADVOCATE FOR R-1 TO R-3, SMT. JAI M. PATIL, ADVOCATE FOR R-4)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE INDIAN CONSTITUTION OF INDIA PRAYING TO QUASH THE ORDER DTD: 30.11.2021 HAVING CBIC DIN 202111CC00000000E6D3 ANNEXED AT ANNEXURE-A WHEREBY THE R-2 HAS UPHELD THE IMPUGNED PROVISIONAL ATTACHMENT ORDERS AND HAS

REFUSED TO LIFT THE ATTACHMENT OF THE BANK ACCOUNTS HELD AND MAINTAINED BY THE PETITIONER AND ETC.

IN W.P. No. 18304 / 2022

BETWEEN:

GAMESKRAFT TECHNOLOGIES PRIVATE LIMITED
REPRESENTED THROUGH ITS
CHIEF FINANCIAL OFFICER
MR. RAMESH PRABHU
1ST AND 2ND FLOOR
NO. 26/1, IBIS HOTEL, HOSUR ROAD
BOMMANAHALLI, BANGALORE
KARNATAKA – 560 068

…PETITIONER

(BY SRI. DR. ABHISHEK MANU SINGVI, SENIOR COUNSEL AND
SRI. UDAYA HOLLA, SENIOR COUNSEL A/W
SRI. SIDDHARTHA H.M., & SRI. SUHAAN MUKERJI,
SRI. NIKHIL PARIKSHITH
SRI. ABHISHEK MANCHANDA &
SRI. CHANDAN PRAKASH PANDEY &
SRI. L. NIDHIRAM SHARMA
SRI. VYASAKIRAN UPADHYA & SRI. MANJUNATH B,
SRI. VARUN THOMAS MATHEW ,
SRI. ONKAR SHARMA, ADVOCATES)

AND:

1. DIRECTORATE GENERAL OF GOODS
SERVICES TAX INTELLIGENCE (HEADQUARTERS)
WEST BLOCK 8, WING 3, 1ST FLOOR
SECTOR I, R.K. PURAM, DELHI – 110 066.

2. ADDITIONAL DIRECTOR GENERAL DIRECTOR
GENERAL OF GOODS OF SERVICES
INTELLIGENCE (HEADQUARTERS)
WEST BLOCK -8, WING NO.6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

…RESPONDENTS

(BY SRI. N.VENKATARAMAN, ADDITIONAL SOLICITOR GENERAL A/W
SRI. JEEVAN J NEERALAGI, ADVOCATE)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH AND SET ASIDE THE INTIMATION NOTICE ISSUED IN FORM GST -1A BEARING CASE ID 413/INT/DGGI/H1/2021/943 DTD: 8 SEPTEMBER 2022 AND ETC.

IN W.P. No. 19561/2022

BETWEEN:

RAMESH PRABHU
AGED 43 YEARS
CHIEF FINANCIAL OFFICER
M/S. GAMESKRACT TECHNOLOGIES PRIVATE LIMITED
B-304, VICTORY HARMONY APARTMENTS
SSA ROAD, HEBBEL, BENGALURU.

…PETITIONER

(BY SRI. DR. ABHISHEK MANU SINGVI, SENIOR COUNSEL AND
SRI. UDAYA HOLLA, SENIOR COUNSEL A/W
SRI. SIDDHARTHA H.M., & SRI. SUHAAN MUKERJI,
SRI. NIKHIL PARIKSHITH
SRI. ABHISHEK MANCHANDA &
SRI. CHANDAN PRAKASH PANDEY &
SRI. L. NIDHIRAM SHARMA
SRI. VYASAKIRAN UPADHYA & SRI. MANJUNATH B,
SRI. VARUN THOMAS MATHEW ,
SRI. ONKAR SHARMA, ADVOCATES)

AND:

1. DIRECTORATE GENERAL OF GOODS AND SERVICES TAX
INTELLIGENCE (HEADQUARTERS)
WEST BLOCK 8, WING 3, 1ST FLOOR
SECTOR I, R. K PURAM
DELHI – 110 066.

2. ADDITIONAL DIRECTOR GENERAL DIRECTORATE
GENERAL OF GOODS AND SERVICES
INTELLIGENCE (HEAD QUARTERS)
WEST BLOCK- 8, WING NO. 6
2ND FLOOR, R.K. PURAM
DELHI – 110 006.

3. ADDITIONAL DIRECTOR
DIRECTORATE GENERAL OF GOODS AND SERVICES
INTELLIGENCE (HEADQUARTERS)
WEST BLOCK – 8, WING NO. 6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

4. SENIOR INTELLIGENCE OFFICER
DIRECTORATE GENERAL OF GOODS AND SERVICES
INTELLIGENCE (HEADQUARTERS)
WEST BLOCK – I, WING NO. 6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

…RESPONDENTS

(BY SRI. N.VENKATARAMAN, ADDITIONAL SOLICITOR GENERAL A/W
SRI. JEEVAN J NEERALAGI, ADVOCATE)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH AND SETTING ASIDE THE SHOW CAUSE NOTICE BEARING DGGI F NO. 413/INT.DGGI/HQ/2021/1324 AND BEARING DIN NO. CC20220900000000B732 DTD: 23.09.2022 ANNEXURE-A AND THE PROCEEDINGS AND ISSUED BY R-1 AND ETC.

IN W.P. No. 20119/2022

BETWEEN:

1. MR. PRITHVI RAJ SINGH
AGED ABOUT 38 YEARS
S/O SRI. DIWN SINGH MAHAR
CHIEF EXECUTIVE OFFICER
EXISTING BUSINESS & FOUNDER OF
M/S. GAMESKFRAFT TECHNOLOGIES
PRIVATE LIMITED
J-203, BREN UNITY, CHINNAPPANAHLLI
MAIN ROAD, MARATHAHALLI
BENGALURU – 560 037.

2. MR. DEEPAK SINGH
AGED ABOUT 36 YEARS
S/O SRI. GAJENDRA SINGH
FOUNDER – DIRECTOR OF

M/S. GAMESKRAFT TECHNOLOGIES
PRIVATE LIMITED, 9134, EMBASSY
PRISTINE, BELLANDUR
BENGALURU – 560 103.

…PETITIONERS

(BY SRI. DR. ABHISHEK MANU SINGVI, SENIOR COUNSEL AND
SRI. UDAYA HOLLA, SENIOR COUNSEL A/W
SRI. SIDDHARTHA H.M., & SRI. SUHAAN MUKERJI,
SRI. NIKHIL PARIKSHITH, SRI. ABHISHEK MANCHANDA &
SRI. CHANDAN PRAKASH PANDEY & SRI. L. NIDHIRAM
SHARMA, SRI. VYASAKIRAN UPADHYA & SRI. MANJUNATH B,
SRI. VARUN THOMAS MATHEW,
SRI. ONKAR SHARMA, ADVOCATES)

AND:

1. DIRECTORATE GENERAL OF GOODS
SERVICES TAX INTELLIGENCE (HEADQUARTERS)
WEST BLOCK 8, WING 3, 1ST FLOOR
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DELHI – 110 066.

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GENERAL OF GOODS OF SERVICES
INTELLIGENCE (HEADQUARTERS)
WEST BLOCK -8, WING NO.6
2ND FLOOR, R.K. PURAM, DELHI – 110 066.

3. ADDITIONAL DIRECTOR
DIRECTORATE GENERAL OF
GOODS AND SERVICES INTELLIGENCE
(HEADQUARTERS), WEST BLOCK – 8, WING NO. 6
2ND FLOOR, R.K. PURAM, DELHI – 110 066.

4. SENIOR INTELLIGENCE OFFICER
DIRECTORATE GENERAL OF
GOODS AND SERVICES
INTELLIGENCE (HEADQUARTERS)
WEST BLOKC-8, WING NO.6
2ND FLOOR, R.K. PURAM, DELHI – 110 066.

…RESPONDENTS

(BY SRI. N.VENKATARAMAN, ADDITIONAL SOLICITOR GENERAL A/W
SRI. JEEVAN J NEERALAGI, ADVOCATE)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH AND SET ASIDE THE SHOW CAUSE NOTICE BEARING DGGI F. NO. 413/INT/DGGI/HQ/2021/1324 AND BEARING DIN CC20220900000000B 732 DATED: 23.09.2022 VIDE ANNEXURE-A AND THE PROCEEDINGS THEREUNDER AND ETC.

IN W.P. No. 20120/2022

BETWEEN:

1. MR. VIKAS TANJEA
AGED ABOUT 39 YEARS
S/O RAJ KUMAR TANEJA
DIRECTOR & CHIEF EXECUTIVE OFFICER
& FOUNDER, M/S. GAMESKRAFT
TECHNOLOGIES PRIVATE LIMITED
2083, PRESTIGE PINEWOOD APRTMENTS
KORAMANGALA 1ST BLOCK, BENGALURU .

2. MR. DEEPAK JHA
AGED ABOUT 40 YEARS
S/O SRI. AMAR NATH JHA
CHIEF EXECUTIVE OFFICER
NEW BUSINESS & FOUNDER
M/S. GAMESKRAFT TECHNOLOGIES
PRIVATE LIMITED, 1304, PURVA
VANTAGE APARTMENTS
25TH CROSS, 19TH MAIN, HSR LAYOUT
SECTOR -2, BENGALURU – 560 102.

…PETITIONERS

(BY SRI. DR. ABHISHEK MANU SINGVI, SENIOR COUNSEL AND
SRI. UDAYA HOLLA, SENIOR COUNSEL A/W
SRI. SIDDHARTHA H.M., & SRI. SUHAAN MUKERJI,
SRI. NIKHIL PARIKSHITH, SRI. ABHISHEK MANCHANDA &
SRI. CHANDAN PRAKASH PANDEY &
SRI. L. NIDHIRAM SHARMA, SRI. VYASAKIRAN UPADHYA &
SRI. MANJUNATH B, SRI. VARUN THOMAS MATHEW ,
SRI. ONKAR SHARMA, ADVOCATES)

AND:

1. DIRECTORATE GENERAL OF GOODS
SERVICES TAX INTELLIGENCE (HEADQUARTERS)

WEST BLOCK 8, WING 3, 1ST FLOOR
SECTOR I, R.K. PURAM
DELHI – 110 066.

2. ADDITIONAL DIRECTOR GENERAL DIRECTOR
GENERAL OF GOODS OF SERVICES
INTELLIGENCE (HEADQUARTERS)
WEST BLOCK -8, WING NO.6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

3. ADDITIONAL DIRECTOR
DIRECTORATE GENERAL OF
GOODS AND SERVICES INTELLIGENCE
(HEADQUARTERS)
WEST BLOCK – 8, WING NO. 6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

4. SENIOR INTELLIGENCE OFFICER
DIRECTORATE GENERAL OF
GOODS AND SERVICES
INTELLIGENCE (HEADQUARTERS)
WEST BLOKC-8, WING NO.6
2ND FLOOR, R.K. PURAM
DELHI – 110 066.

…RESPONDENTS

(BY SRI. N.VENKATARAMAN, ADDITIONAL SOLICITOR GENERAL A/W
SRI. JEEVAN J NEERALAGI, ADVOCATE)

THIS W.P. IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH AND SET ASIDE THE SHOW CAUSE NOTICE BEARING DGGI F. NO. 413/INT/DGGI/HQ/2021/1324 AND BEARING DIN CC20220900000000B 732 DATED: 23.09.2022 VIDE ANNEXURE-A AND THE PROCEEDINGS THEREUNDER AND ETC.

THESE PETITIONS ARE BEING HEARD AND RESERVED ON 17.11.2022 COMING ON FOR PRONOUNCEMENT OF ORDERS THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The main question/issue that arises for consideration in these petitions is, whether offline/online games such as Rummy which are mainly/preponderantly/substantially based on skill and not on chance, whether played with/without stakes tantamount to 'gambling or betting' as contemplated in Entry 6 of Schedule III of the Goods and Services Act, 2017.

I. FACTUAL MATRIX

M/s.Gameskraft Technologies Pvt. Ltd., (for short 'the GTPL') claims to be an Online Intermediary Company incorporated in June 2017, who runs technology platforms that allow users to play skill based online games against each other. Petitioner - GTPL contends that it has over 10 lakh users from across India and is headquartered in Bangalore and registered under the Central Goods and Services Tax Act, 2017 (for short ' the CGST Act') and the Karnataka Goods and Services Tax Act, 2017 (for short 'the KGST Act'). It is contended that the said company is a legally compliant

company, who has been duly filing GST returns and has paid GST and is a bonafide tax payer having paid tax returns on a timely basis and has paid substantial tax to the tune of Rs.1,600/- crores under GST and Income Tax Laws upto June 2022.

2. During the period between 11.11.2021 and 13.11.2021, the respondents – Revenue undertook search and seizure operations of the premises of GTPL, during which, various documents and devices were seized and panchanamas were issued. On 17.11.2021, respondents passed Provisional Attachment Orders attaching the Bank accounts of GTPL under Section 83 of the CGST Act, to which, objections were filed by GTPL, pursuant to which, respondents passed an Attachment Confirmation order dated 30.11.2021.

3. W.P.No.22010/2021 is preferred by GTPL challenging the aforesaid attachment orders and on 03.12.2021, this Court passed an interim order permitting the

petitioner to operate the Bank accounts for limited purposes mentioned in the said order.

4. Meanwhile, the officials / founders / employees of GTPL were summoned by the respondents for recording of statements and the same continued upto August, 2022. On 02.08.2022, in addition to the interim order passed earlier in W.P.No.22010/2021, this Court directed that no precipitative action be taken against the petitioner – GTPL and the matter was heard finally and reserved for orders on 07.09.2022 by continuing the interim orders / directions.

5. Subsequently, on 08.09.2022, respondents issued Intimation Notice under Section 74(5) of the CGST Act, calling upon GTPL to deposit a sum of Rs.2,09,89,31,31,501/- along with interest and penalty by 16.09.2022. The said Notice is challenged in W.P.No.18304/2022, in which, this Court passed an interim order of stay dated 23.09.2022.

6. Immediately thereafter, the respondents issued the impugned Show Cause Notice under Section 74(1) of the CGST Act to the petitioner – GTPL as well as its Founders,

CEOs and CFOs, who have preferred W.P.No.19570/2022, W.P.No.19561/2022, W.P.No.20119/2022 and W.P.No.20120/2022. Accordingly, the details of the instant writ petitions are as under:

(a) W.P.No.22010/2021 has been preferred by GTPL challenging the Attachment orders dated 17.11.2021 and 30.11.2021;

(b) W.P.No.18304/2022 is preferred by GTPL against the Intimation Notice dated 08.09.2022 issued under Section 74(5) of the CGST Act;

(c) W.P.No.19570/2022 is filed by GTPL assailing the impugned Show Cause Notice (SCN) dated 23.09.2022;

(d) W.P.No.19561/2022 is preferred by the Chief Financial Officer of GTPL challenging the impugned SCN dated 23.09.2022;

(e) W.P.No.20119/2022 is preferred by the Founders of GTPL challenging the impugned SCN dated 23.09.2022;

(f) W.P.No.20120/2022 is preferred by the Chief Executive Officers of GTPL challenging the impugned SCN dated 23.09.2022;

7. At the outset, it is relevant to state that the impugned Attachment orders having been passed on 17.11.2021 and 30.11.2021, the period of one year prescribed in Section 83 of the CGST Act having expired during the pendency of the subsequent petitions challenging the impugned SCN, this Court while reserving the petitions on 17.11.2022 directed that the said Attachment orders would continue till disposal of these petitions. Further, the impugned Intimation dated 08.09.2022 issued under Section 74(5) of the CGST Act having been subsumed by issuance of the impugned SCN dated 23.09.2022, the legality, validity and correctness of the impugned SCN is the core / main issue to be adjudicated upon in these petitions.

8. It is significant to state that in W.P.No.19570/2022 preferred by GTPL, Intervention Applications have been filed

by the Intervenors i.e., All India Gaming Federation and E-Gaming Federation, who are also supporting the petitioners and are aggrieved by the actions of the respondents. The said Intervention Applications have also been heard along with these petitions.

II. SUMMARY OF PLEADINGS OF PETITIONERS AND INTERVENORS

(i) It is contended that the basic construct of an online skill-based game facilitated by the Petitioner is that the Petitioner has no role/ influence insofar as the playing of the games are concerned. The users/players choose the games based on the amount they want to stake to match their skills against other players who want to play for a similar amount. The Petitioner merely hosts the games and the discretion to play a game and the stake for which it is to be played entire lies with the players with no role of the Petitioner, who seeks to demonstrate the same by the following illustration:

Assuming that 'A' and 'B' have downloaded the mobile application of the Petitioner and intend to play a game of rummy against each other by using the Petitioner's online platform/mobile application. As per the construct of the game, 'A' and 'B' has to deposit INR 200 each for participation in the game. The winner at the end of the game gets INR 360 as winnings. Further, for allowing 'A' and 'B' to use its platform for participating in the game of rummy hosted by the Petitioner, it would charge INR 20 each from 'A' and 'B'. Therefore while 'A' and 'B' deposit INR 200 each, the winner gets INR 360 and INR 40 is retained by the Petitioner as its 'platform fee'. During the course of the game, INR 360 is held by the Petitioner in a designated account and on this amount, the Petitioner has no lien or right. The money is transferred back to the winner at the end of the game. Therefore, what the Petitioner retains is INR 40 which is its consideration for facilitation of the game play and on which the Petitioner has been depositing GST.

(ii) It is contended that the Respondents have issued the Impugned SCN whereby it has been alleged that the Petitioner is involved in 'betting/gambling' and supplies 'actionable claims' and that the petitioner is guilty of evasion of GST by misclassifying their supply as services under SAC 998439 instead of actionable claims which are goods and mis-declaring their taxable value, though the

activities undertaken by the petitioner were in the form of betting/gambling which is an actionable claim and not a service.

(iii) It is contended that the Impugned SCN is completely fallacious, perverse, and without jurisdiction or authority of law and the same is vitiated with malice and deserves to be quashed for the following grounds:

- It is an undisputed fact that more than 96% of the game played on the platform of the Petitioner is 'Rummy' which a 'game of skill' and is Constitutionally protected as established by judgments of the Apex Court, this Court and other High Courts and the said position has remained unchanged even till today. It is also settled law that the character of rummy being a game of skill does not change when it is played online and consequently, the allegation that the Petitioner is involved in betting/gambling is liable to be rejected.
- The Impugned SCN has grossly erred in understanding the actual business practice of the

Petitioner. The only set of service provided by the Petitioner is the facilitation service as an online intermediary. Going by the logic and the allegations raised, every form of intermediary service will be required to deposit GST not on the revenue earned by them but on the gross amount of transactions undertaken on their platform. The Impugned SCN has alleged that the Petitioner has made a windfall profit and to allege the same has portrayed a scenario wherein the entire 'buy-in' amount of more than INR 70,000 Crores is shown to be the revenue of the Petitioner. This is entirely misleading and a malicious attempt on part of the Respondents to mischievously and maliciously inflate the figure. The 'buy-in' amounts are not the property of the Petitioner. The Petitioner has no lien or right over such money and the same has to be disbursed to the winning players once the game is over. The Respondents with a view to mislead this Hon'ble Court is trying to portray an inflated figure, which in reality is not even the income of the Petitioner.

- Further, the absurdity in the allegations made in the impugned SCN can be gauged from the fact that the Respondents have not even mentioned the Terms & Conditions of the game plays facilitated by the Petitioner. In the Terms & Conditions, it is specifically stated that the monies deposited by the players are held in “trust” by the Petitioner. This undisputed contractual understanding between the Petitioner and its players completely negates the allegations in the Impugned SCN that the entire ‘buy- in’ amount is the Petitioner’s income.
- The Impugned SCN has also alleged that the Petitioner by providing discounts / bonuses induce the players to indulge in more game plays. At the outset, it is to be noted that the withdrawal wallet which is created for each player is the property of the player. This is in the sense that the player can choose either to withdraw the winnings and get it transferred to his bank account or he can choose to use the same for further games. The decision and the control over the withdrawal wallet

remains with the player and the Petitioner has no influence on the same. In such a scenario, it is completely absurd to say that the Petitioner induces the players to play more games by giving bonuses / discounts when in reality the option entirely lies with the players. A player exercising its own discretion to use the amount lying in his withdrawal wallet to play further games cannot be equated or even alleged to be an inducement on the part of the Petitioner. Further and without prejudice to the foregoing, providing discounts and incentives to market one's business and platform does not and cannot change the nature of games played on that platform. For instance, rummy will remain a game of skill irrespective of whether discounts were offered to a player for playing the game.

- Insofar as issuance of invoices are concerned, the Petitioner has in fact acted in accordance with Section 31(3)(b) of the CGST Act which allows an assessee to not issue an invoice if the value of supply is less than

INR 200. The Impugned SCN does not dispute the fact that more than 99.5% of the supplies made through the platform of the Petitioner had a value of less than INR 200 and therefore, there was no requirement to issue an invoice. The Impugned SCN has utterly failed to depict as to how non-issuance of invoice has led to evasion of GST.

- The Impugned SCN is utterly bad in law, since it seeks to scuttle the process as contemplated in the statutory framework vis-à-vis adjudication of proceedings. In paragraph 22 of the Impugned SCN, the Respondents have averred that the Petitioner has not responded to the Intimation Notice which was served and hence the Impugned SCN is being issued – this is a perverse statement which attempts to hide the fact that the proceedings sought to be initiated *qua* the Intimation Notice has been stayed by this Hon'ble Court vide its order dated 23.09.2022.
- The Impugned SCN is in gross violation of the law laid

down by our Constitutional Courts including the Division Bench of this Court in the case of ***All India Gaming Federation v State of Karnataka & Ors., - 2022 SCC Online Kar 435 (DB)***.

- The Impugned SCN is *per se* arbitrary, is in complete violation of the principle of *'audi alteram partem'*, is bereft of any reasoning and woefully fails to satisfy the 'Wednesbury' test of reasonableness and therefore, violates the Petitioners fundamental rights guaranteed under Articles 14 and 19(1)(g) of the Constitution of India.
- The Impugned SCN is actuated by malice, since it comes in the backdrop of pendency of W.P.22010 / 2021 and W.P.18304 / 2022, wherein interim orders have been granted. The Impugned SCN is a colourable exercise of power and gross attempt the overreach the orders of this Hon'ble Court.
- The allegations raised against the Petitioner in the earlier proceedings by the Respondents changed all of a

sudden in the present proceedings. Initially the thrust of the allegation was that the Petitioner evaded GST by claiming ineligible discounts from its 'platform fee'. This was the narrative for most part of the investigation when suddenly the same changed and it was alleged that the Petitioner was involved in 'betting'. The very fact that the Respondents have kept on changing their narrative shows the utter arbitrariness and malice on their part. It is fairly evident that the prime objective of the Respondents is to harass and intimidate the Petitioner and its employees. Further, as per the Impugned SCN, the Respondents supposedly had the intelligence from the beginning that the Petitioner is involved in 'betting', however, never disclosed the same in the provisional attachment orders. The entire approach of the Respondents is motivated in nature.

- It is well settled that "games of skill" played with monetary stakes does not partake the character of betting and it still remains within the realm of 'games of

skill' only. The term 'betting and gambling' cannot be artificially bifurcated by the Respondents to carve out an exception by stating that 'games of skill' played with monetary stakes can also partake the character of betting and hence, be taxable at the rate of 28%. Trying to do so would result in obliterating well settled distinction between 'games of skill' and 'betting and gambling'. The Respondents have been unable to discharge the burden of proving that the Petitioner's games fall within the category of 'betting and gambling'. Further, no material or legal basis for such a classification of the Petitioner's business has been referred to in the Impugned SCN.

- The Impugned SCN is premised on the fact that the Petitioner is involved in the supply of 'actionable claim' which is *ex-facie* erroneous. The Petitioner merely facilitates the playing of skill-based games between users/players on its technology platforms in return for consideration in the form of platform fees, on which the

Petitioner has duly deposited GST. 'Actionable claim' if any is between the players, which is also not taxable under GST laws, [as per Entry No.6 of Schedule III of CGST Act] since actionable claims are excluded from the ambit of GST (except for lottery, betting and gambling; exceptions which are of no relevance since the games facilitated by the Petitioner qualify as 'games of skill' as has been confirmed by this Hon'ble Court).

JUDGMENTS RELIED UPON BY PETITIONERS AND INTERVENORS

(1) State of Bombay v. RMD Chamarbaugwala - AIR 1957 SC 699 (RMDC-1);

(2) RMD Chamarbaugwalla v. Union of India - AIR 1957 SC 628(RMDC-2);

(3) State of Andhra Pradesh v. K. Satyanarayana & Ors – AIR 1968 SC 825;

(4) M.J. Sivani and Ors. v. State of Karnataka – (1995)6 SCC 289;

(5) Dr. K. R. Lakshmanan v. State of Tamil Nadu – (1996)2 SCC 226;

(6) Head Digital Works Private Limited v. State of Kerala – (2021) SCC Online Ker 3592; Junglee Games India Pvt. Ltd. v. State of Tamil Nadu - (2021) SCC OnLine Mad 2762;

(7) All India Gaming Federation v State of Karnataka & Ors – (2022) SCC OnLine Kar 435 (DB);

(8) Whirlpool Corporation vs. Registrar General – (1998) 8 SCC 1;

(9) Linde Engineering Pvt. Ltd., vs. Union of India – (2022) 57 GSTL 358 (GUJ);

(10) Calcutta Discount Co., Ltd., vs. Income Tax Officer – (1961) 2 SCR 241;

(11) Magadh Sugar and Energy Ltd., vs. State of Bihar – (2021) SCC Online (SC) 801;

(12) Director General of Foreign Exports vs. Kanak Exports –(2016) 2 SCC 226;

(13) Collector of Central Excise vs. ONGC – (1999) 1 SCC 257;

(14) Narendra Udeshi vs. Union of India – (2002) SCC Online Bom 962;

(15) Siemens Ltd., vs. State of Maharastra – (2006) 12 SCC 33;

(16) ORYX Fisheries vs. Union of India – (2011) 266 ELT 422;

(17) Spirotech Heat Exchangers vs. Union of India – (2016) 341 ELT 110 (Del);

(18) Topland Engines Pvt. Ltd., vs. Union of India – (2006) 199 ELT 209 (Guj);

(19) East India Commercial Co., Ltd., vs. Collector of Customs – (1983) 13 ELT 1342 (SC);

(20) NKAS Services Pvt. Ltd., vs. State of Jharkhand – (2022) 58 GSTL 257;

(21) Gurdeep Singh Sachar vs. Union of India – (2019) 30 GSTL 441 (Bom);

(22) Ravindra Singh Choudhary vs. Union of India – (2020) 42 GSTL 195 (Raj);

(23) State of Karnataka vs. State of Meghalaya –2022 SCC Online SC 350;

(24) Varun Gumber vs. Union Territory of Chandigarh – 2017 SCC Online P & H 5372;

(25) Executive Club vs. State of Andhra Pradesh – (1998) 3 APLJ 138;

(26) Patamata Cultural and Recreation Society vs. Commissioner of Police – 2004 SCC Online AP 963;

(27) D.Krishna Kumar vs. State of A.P. – 2002 (3) APLJ 211;

(28) Uniworth Textiles vs. Commissioner of Central Excise – (2013) 9 SCC 753;

(29) Tamilnadu Housing Board vs. Collector of Central Excise – (1995) SUPP(1) SCC 50;

(30) Continental Foundation vs. Commissioner of Central Excise – (2007) 216 ELT 177 (SC);

(31) Densons Pultretaknik vs. Commissioner of Central Excise – 2003 (155) ELT 211 (SC);

(32) Shreya Singhal vs. Union of India – (2015) 5 SCC 1;

(33) Shayara Bano vs. Union of India – (2017) 9 SCC 1;

(34) Twin Cities Cinema Cultural Centre vs. Commissioner of Police – 2002 SCC Online AP 691;

(35) Subramanyan Swamy vs. Union of India – (2016) 7 SCC 221;

(36) Sunrise Associates vs. Government of NCT of Delhi – (2006) 5 SCC 603;

(37) Skill Loto Solutions Pvt. Ltd., vs. Union of India & Others – (2020) SCC Online SC 990;

(38) State of Rajasthan vs. Rajasthan Chemist Association – (2006) 6 SCC 773;

(39) Commissioner of Income Tax vs. Sun Engineering Works – (1992) 4 SCC 363;

(40) Kalabharathi Advertising vs. Hemanth Vimalnath Narichania – (2010) 9 SCC 437;

(41) Ratanlal Khare vs. State of M.P. – (1985) SCC Online MP 369;

(42) Olga Tellis vs. Bombay Municipal Corporation – (1985) 3 SCC 545;

(43) State of Rajasthan vs. Banwarlal Verma – 2001 SCC Online Raj 106;

(44) Pratibha Processors vs. Union of India – (1996) 11 SCC 101;

(45) M/s.Filterco vs. Commissioner of Sales Tax – (1986) 2 SCC 103;

(46) Palitana Sugar Mills vs. Vilasiniben Ramachandran – (2007) 15 SCC 218;

(47) Bundl Technologies vs. Union of India – (2021) SCC Online KAR 14702;

(48) Union of India vs. PFIZER Ltd., - (2018) 2 SCC 39;

(49) Jitendra Kumar Singh vs. State of Uttar Pradesh – (2010) 3 SCC 119;

(50) Bombay Dyeing vs. Bombay Environmental Action Group – (2006) 3 SCC 434;

(51) Associated Management vs. State of Karnataka – ILR 2008 KAR 2895;

III. SUMMARY OF PLEADINGS OF RESPONDENTS-REVENUE

Respondents have filed their statement of objections denying and disputing the claims and contentions of the petitioners and the same can be summarized as hereunder:

- The petitions challenging a mere show cause notice is premature and not maintainable and is liable to be dismissed.
- The platform of the Petitioner allows players of online rummy to place stakes and bet on the outcome of such games of rummy. In addition to this, the Petitioner is making profits and gains from such games of rummy played on its platform, which according to the Hon'ble Supreme Court in the case of ***State of Andhra Pradesh v. K. Satyanarayana & Ors., – AIR 1968 SC 825*** would amount to betting and gambling.

- The contention of the Petitioner that the game of rummy played in its platform is a Game of Skill deserves to be rejected. To the contrary, it is nothing but a pure game of chance. The test according to the Hon'ble Supreme Court is threefold to determine, whether a particular game is a Game of Chance or a Game of Skill. Firstly, it has to be identified on the facts and circumstances of each case. Secondly, the underlying facts must disclose that the success in the game preponderantly depends on skill or chance. If it is skill, then it is Game of Skill and if it is chance, then it is a Game of Chance. Thirdly, the skill must be discernible from the superior knowledge, training, attention, experience and adroitness of the player.
- In the present facts of the case, the only criteria to enter a particular table in the Petitioner's platform is to stake a particular amount. Once an amount is staked, the Petitioner's platform places the player in a table where fellow players have also staked an equal amount. The Petitioner admits to this position. Further, the Petitioner's

platform does not record the skill level of a player and does not disclose the skill level of a particular player to all the players seated at a table. This position is also admitted by the Petitioner. Therefore, a player of rummy on the Petitioner's platform has no choice to make a conscious decision as to against whom he can compete. Any common man can today sign up on the app and start playing the game on the Petitioner's platform. Therefore, when skill is not the qualifying criteria and placing stakes by a player is the only criteria to enter a table on Petitioner's platform, the success of the game principally depends on chance and not skill and therefore, in the facts and circumstances, the game of rummy is a game of chance. The presumption of the Petitioner that people with less skills will stake less and people with higher skills will stake higher is farcical for the reason that even the Petitioner equates the skill to the quantum of stakes and not on how well a player can play the game of rummy. Therefore, even according to the

Petitioner, the only skill that is required is the ability to stake more and more and nothing regarding the game of rummy.

- Further, the Petitioner charges 10% of the total amount of stakes placed by the players seated at a particular table as its commission. This is nothing but making profits and gains from the stakes placed on the outcome of games of rummy and is covered by the decision of the Hon'ble Supreme Court in ***Satyanarayana's case supra.*** The Petitioner terming the 10% commission as 'service fee' for using the platform deserves to be rejected, as service fee must be charged purely for meeting expenses and must apply uniformly across the board to all players and must most importantly be independent of the games of rummy. To the contrary, the alleged service fee changes from table to table depending on total amount of stakes at a particular table. For this very reason, this submission of the Petitioner must be rejected.
- Assuming but not admitting that the Game of Rummy played in the Petitioner's platform is a Game of Skill, playing

it with stakes and the Petitioner making profits and gains from such stakes would still be betting. When this is the ratio of the Hon'ble Supreme Court in ***Satyanarayana's case supra***, any number of judgments holding the contrary is *per incuriam*. A game of skill played for stakes would still amount to betting and the Hon'ble Supreme Court has not specially blessed such games alone to be played with stakes. Any submission contrary to this settled position deserves to be rejected.

- The judgments of the Punjab and Haryana High Court, Bombay High Court and Rajasthan High Court in the cases of ***Varun Gumber, Gurdeep Singh and Ravindra Singh***'s *cases supra*, pertaining to Dream 11 will have no application, as no factual investigations were made on a case to case basis and the Petitioners therein approached by way of public interest litigations. When the Bombay High Court decided on aspects relating to GST, the Hon'ble Supreme Court permitted the Union of India to file a review before the High Court and the same is still pending. The

Rajasthan High Court took note of this and left it to the GST authorities to decide the issues. Therefore, the aspects of GST are still wide open and have not attained finality. Out of abundant caution, it is clarified that even the aspects of betting/gambling was decided without underlying facts and the Respondents are at liberty to revisit and examine the facts as it has never been done before.

- Lastly, the judgment of this Court in ***All India Gaming Federation supra,*** will have no applicability as what was decided was only the vires of the 2021 Amendment treating Games of Skill on par with Games of Chance. Taking note that they fell under different categories and ought not to have been treated as same, this Hon'ble Court struck down the Amendment. This Hon'ble Court never had the occasion to examine on a factual basis as to whether the underlying games were Games of Chance or Skill. When such is the case, the contention of the Petitioner that the issue is decided against the Department in the light of this decision, deserves to be rejected.

JUDGMENTS RELIED UPON BY RESPONDENTS

(1) H.H.Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior & Others – Union of India & Another – (1971) 1 SCC 85;

(2) R.M.D.Chamarbaugwala vs. Union of India – AIR 1957 SC 628;

(3) State of Andhra Pradesh vs. K.Satyanarayana & others – 1968(2) SCR 387;

(4) M.J.Shivani vs. State of Karnataka – (1995) 6 SCC 289;

(5) Dr.K.R.Laksmanan vs. State of Tamilnadu & Another – 1996(2)SCC 226;

(6) Executive Club formed by Lalitha Real Estates Pvt. Ltd., Vijayawada and Ors. Vs. State of Andhra Pradesh – 1998(3) APLJ 138 (HC);

(7) D.Krishna Kumar & Anr. Vs. State of Andhra Pradesh – 2002 SCC Online AP 810;

(8) Sunrise Associates vs. Govt. of NCT of Delhi & Ors. – 2006(5) SCC 603;

(9) M/s.Gaussian Networks Private Limited vs. Monica Lakhanpal and State of NCT – 2012 SCC Online Dis Crt (Del) 1;

(10) Varun Gumber vs. Union Territory of Chandigarh & Ors., - CWP No.7559 of 2017;

(11) Director General of Police vs. Dilibabu – MANU/TN/3983/2017;

(12) Gurdeep Singh Sachar vs. Union of India – 2019 (30) GSTL 441 (Bom);

(13) Ravindra Singh Chaudhury vs. Union of India – 2020 (42) GSTL 195 (Raj);

(14) Junglee Games Pvt. Ltd., vs. State of Tamil Nadu – 2021 SCC Online Mad 2762;

(15) Head Digital Works Private Limited & Ors. Vs. State of Kerala & Ors. – 2021 SCC Online Ker 3592;

(16) All India Gaming Federation vs. State of Karnataka & Ors., - 2022 SCC Online Kar 435;

(17) State of Karnataka vs. State of Meghalaya & Ors. C.A.Nos.10466-10476 of 2011;

(18) State of Bombay vs. R.M.D. Chamrbaugwala – AIR 1957 SC 699;

(19) Mahalakshmi Cultural Association v. The Director, Inspector General of Police and Ors. – 2011 SCC Online Mad 1997;

(20) Director General of Police, State of Tamilnadu vs.Mahalakshmi Cultural Association - 2012 SCC Online Mad 1130;

(21) Mahalakshmi Cultural Association vs. Director General of Police & Ors. – SLP(C)No.15371/2012 Dated 13.08.2015;

(22) Mahalakshmi Cultural Association vs. Director General of Police & Ors. – SLP(C)No.15371/2012 Dated 18.08.2015;

(23) M/s. Krida Sports And Games Pvt. Ltd., vs. Director General of Police & Ors. – Diary No(s). 7161/2019;

(24) Ramachandran K. vs. The Circle Inspector of Police Perinthalmanna – WP(C)No.35535 of 2018;

(25) Play Games 24 x 7 Private Limited vs. Ramachandran K. and Anr. – 2019 SCC Online Ker 23736;

(26) Skill Lotto Solutions Pvt. Ltd., vs. Union of India and others – 2020 SCC Online SC 990;

(27) Gaussian Network Pvt. Ltd., vs. Monica Lakhanpal & Anr. – C.R.P.119/2012 Dated 21.04.2016;

(28) The State vs. Ramprakash P. Puri and Ors. – AIR 1964 Guj 223;

(29) R.Chitralekha & Anr. Vs. State of Mysore & Ors. – 1964 AIR 1823;

(30) Santosh vs. Central Bank of India – AIR 2003 MP 218;

(31) State of U.P. & Ors. Vs. Jeet S. Bisht & Anr. – (2007) 6 SCC 586;

(32) Deb Narayan Shyam and Ors. Vs. State of West Bengal and Ors. – AIR 2005 SC 1167;

(33) State of M.P. & Anr. Vs. Narmada Bachao Andolan – (2011) 7 SCC 639;

(34) Somasundaram Chettiar & Others v. Emperor – 1947 SCC Online Mad 193;

(35) Krishnachandra And others vs. State of Madhya Pradesh – AIR 1965 SC 307;

(36) Commissioner of Income Tax, Andhra Pradesh v. Motors & General Stores (P) Ltd., - AIR 1968 SC 200;

(37) Commissioner of Income Tax, Calcutta vs. Gillanders Arbuthnot & Co., - 1973 SCC (Tax) 359;

(38) Bhopal Sugar Industries Ltd., vs. Sales Tax Officer, Bhopal – (1977) 3 SCC 147;

(39) Relevant Provisions of the Police Act, 1963;

(40) D.V.R.Recreation Club vs. State of Karnataka – 2014 SCC Online Kar 11073; Decision in W.P.No.207054 of 2014 dated 15.12.2014;

(41) D.V.R.Recreation Club vs. State of Karnataka - Writ Appeal No.200290 of 2015 Dated 27.06.2016;

(42) D.V.R.Recreation Club vs. State of Karnataka – 2016 SCC Online Kar 8878; Decision in Review Petition No.200029 of 2016 decided on 19.10.2016;

(43) Strikers Association vs. State of Karnataka – W.P.No.51372 of 2019 decided on 29.11.2019;

(44) Strikers Association vs. State of Karnataka – W.A.No.4049 of 2019 decided on 03.01.2020;

IV. I have heard Sri.Dr. Abhishek Manu Singhvi and Sri. Udaya Holla, learned Senior Counsel appearing on behalf of Sri. Siddhartha H.M, Sri. Suhaan Mukherji, Sri. Nikhil Parikshith, Sri. B.R.Vyasakiran Upadhya, Sri. Abhishek Manchanda, Sri.Chandan Prakash Pandey, Sri. Manjunath.B, Sri.Nidhiram Sharma, Sri. Onkar Sharma and Sri.Varun Thomas Mathew, learned counsel for petitioners.

I have heard Sri. Mukul Rohatgi, learned Senior Counsel along with Sri.Pradeep Nayak, Smt.Anupama Hebbar, Sri.Sankeerth Vittal and Sri.Karan Gupta, learned counsel for impleading applicant on I.A.1/2022.

I have heard Sri.Aravind Datar and Sri.Sajjan Poovayya, learned Senior Counsel along with Miss.Raksha Agarwal, Sri.Sameer Singh and Sri.Ravi Raghavan, learned counsel for impleading applicant on I.A.2/2022.

I have also heard Sri.N.Venkataman, learned Additional Solicitor General along with Sri.Jeevan J.Neeralgi and Sri.Amit

Anand Deshpande, learned counsel for Respondents – Revenue and Smt. Jai M.Patil, learned counsel for respondent – ICICI Bank.

V. SUBMISSIONS OF PETITIONERS

The Impugned SCN is wholly illegal, arbitrary, untenable and without jurisdiction or authority of law for the following reasons:

- *"Games of skill"* are always a distinct class (never *'gambling'* or *'gaming'* or *"betting & gambling"*) and always have been judicially differentiated from games of chance;
- For distinguishing between skill and chance, the Courts have applied *'predominance'* test, which is the watershed test. Statutes which save games of *"mere skill"* mean that the skill element is more than chance - never 100% skill – For example - how cards are distributed from a pack.
- We are concerned with *'Rummy'* - '*Rummy' per se* in law has always been designated as a game of skill;

- The age-old distinction between skill and chance is vital and has been maintained in all statutes because States have no competence over skill but only chance. There is a rationale behind this distinction - goes to the root of legislative competence – since skill cannot fall under Entry 34 of List II of the Constitution;
- It makes no difference if game of skill is played physically or virtually – the same *'predominance'* test applies to ascertain the true character of the game - this artificial distinction between online and offline is merely to create a fear psychosis and to reopen settled legal principles;
- Why did earlier statutes codify exclusions for games of skill? Statutes are made by application of mind and the prevailing statement of law i.e. games of skill stand protected from any penal consequences;
- The correct ratio of the case of ***K. Satyanarayana*** was the apprehension of the Court that people are playing flush in guise of rummy or doing prostitution or otherwise

indulging in noxious activities - these are issues of policing not of the validity or the character of the game;

- Playing with stakes or high stakes is irrelevant;
- The contentions of the petitioner are fully covered by the judgments of the Apex Court in ***RMDC-1, RMDC-2, Satyanarayana, Sivani, Lakshmanan*** and this Court in ***All India Gaming Federation***, ***Junglee Games(Madras)***, ***Head Digital (Kerala)*** and judgments of other High Courts.
- The expression *'gaming'* does not merit any re-examination, since it has become ***nomen juris*** in view of ***Lakshmanan's*** case, wherein it is held that Gaming is the act or practice of gambling on a game of chance and that it is staking on chance, where chance is the controlling factor and the said definition applies uniformly to all gaming legislations.
- It is no longer *res integra* that *'wagering'* or *'betting'* on a game of skill is not *'gaming'* in view of ***RMDC-1, RMDC-2 and Lakshmanan's cases supra.***

- It is also no longer *res integra* that wagering or betting on a game of skill is not *'gambling',* since the outcome depends on the *"substantial degree of skill"* of the players as per ***Lakshmanan's case***;
- The distinction between "games of skill" and "games of chance" has always been in the context of 'gambling', i.e., wagering or betting or staking on a game of chance. The distinction between skill and chance is not necessary for hosting tournaments (as alleged) with an ultimate prize money or trophy, since no wagering or betting occurs in such tournaments; this is because in all the State enactments, the pre-condition for 'gaming' and the accompanying penalties is "wagering or betting". In other words, a competition without wagering or betting would not be gaming and therefore, the distinction between skill and chance becomes immaterial.
- Competitions involving substantial skill or predominantly skill are *"business activities"* that stand protected under Article 19 (1) (g) of the Constitution. This has been held

so in ***RMDC-2's case supra***, while discussing the consequences of *'Gambling'*. Therefore, organising a game of rummy played with stakes for a commission is a business that stands protected under Article 19(1)(g).

- Rummy played with stakes has been judicially permitted and is *not* considered as *'gaming' or 'gambling'* as held in ***AIGF, Head Digital, Junglee Games cases supra*** and the Andhra Pradesh High Court.
- In the case of ***G.S. Ananthaswamy Iyer vs. State of Karnataka, 1982 SCC OnLine Kar 104,*** this Court dealt with the latter portion of para -12 of ***K. Satyanarayana's case supra*** and rejected the arguments (which were similar to the arguments advanced by the learned ASG behalf of the Respondents herein) advanced by the State in the said case.
- In another case of ***D.V.R Recreation Club vs. State of Karnataka - 2016 SCC OnLine Kar 8878,*** this Court has clearly held that rummy played with stakes is permissible and not an offence.

- The Judgment of a Court is not to be read as the *"Euclid's Theorem"* shorn of the facts and the context in which the law has been declared and accordingly, ***RMDC 1 & 2, K. Satyanarayana, M.J.Sivani and K.R. Lakshmanan's cases supra*** must be construed harmoniously and not in a disharmonious manner.
- The contention of the Respondents that in ***RMDC-1***, it was held that any game whose result is based on a '*forecast'* is a gambling activity is liable to be rejected. At paragraph 17, the tripartite categorisation of competitions by the Apex Court was in the context of Clauses (i), (ii) and (iii) of the definition of *"prize competition"* as defined under Section 2(1)(d) of the 1948 Act. Such prize competitions were offered through the medium of Newspapers. In the said paragraph-17, it was concluded that the competitions that fall under Category I & III were in the nature of gambling. Notably, paragraph-17 lays down a general principle which is that, *"a competition success wherein does not depend to a substantial*

degree upon the exercise of skill is now recognised to be of a gambling nature." In other words, competitions wherein success depends on a substantial degree of the exercise of skill are not of a gambling nature. Therefore, *de hors* the definition of prize competition the said legal principle at paragraph-17 will remain constant and universal in its application. On a plain reading of paragraph-18, it becomes clear that competitions from all 3 categories are not games of skills. The amended definition of prize competition as amended in 1952 is extracted, which retains the tripartite categorisation. Paragraphs 18 and 19 do not lay down any general legal principles but only conclude that Category I prize competitions [under Section 2 (1) (d) (i)] are of a gambling nature.

- Paragraph 20 of ***RMDC-1*** deals with Category II which are also not games of skill. Prize Competitions, i.e., competitions described under Section 2 (1) (d) (ii) as *"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 Apex Court holds that it would difficult to treat the invitation to the general public to participate in these competitions as an *"invitation to a game of skill"*. And that for most of the general public the *"forecast is nothing better than a shot at the hidden target".* The said sentence at paragraph-20 does not lay down any general legal principle that can be applied to the game of rummy played with stakes. The said sentence is a finding *qua* the specific competitions covered under sub-clause (ii)/Category II competitions offered through the medium of a News Paper, which is wholly distinct from the game of rummy played with stakes between two actual players.

- In ***RMDC-1***, the Apex Court noticed that Category (ii) was clubbed in between clauses (i) and (iii) which cover competitions that are of a pure gambling variety offered to the general public via a Newspaper. Therefore, Category II covers competitions which are akin to

competitions that fall under Category I and III offered through the medium of a Newspaper. Category (ii) covers those rare category of games whose success requires the forecast of an event or a result, which cannot be made by ordinary persons (given that it may involve several imponderables). Such a forecast may possibly be made by conducting rigorous forensic or statistical study by persons who have the scientific or the technical or the super specialised knowledge to do so; it is when such games are offered to the general public, the forecast becomes a *"shot at the hidden target"*.

- That there is an element of *'chance'* in each game and a *'game of skill'*, may not necessarily be such an activity where "skill" must always prevail; however, it is well settled in law, where in an activity the *"exercise of skill"* can control the *'chance'* element involved in the particular activity, such that the better skilled would prevail more often than not, such activity qualifies as a game of skill. The game of rummy played with stakes is played

between players on the basis of the assessment of their own skill. Therefore, while playing for stakes, the player makes a value judgment on his/her skill. The outcome of the game is determined predominantly by the skill of the players. Therefore, rummy played with stakes and the same cannot be viewed as a *'forecast'* or a shot at the *"hidden target"*. Thus the said contentions of the respondents based on ***RMDC-1's case*** is liable to be rejected.

- The respondents contention that a club deriving an income by charging sitting fees on the players playing cards must to be taken as profit or gain which makes the club a *"common gaming house"*: However, the nature of the game in question in the said case i.e. *"three cards"* holds immense significance and cannot be brushed aside. Organising a *"Three Cards"* game which is not a game of *"mere skill"* would amount to gaming and therefore, the Club in question would be a *"common gaming house"* within the meaning of Section 3 of the

Madras Gaming Act, 1930. According to the High Court, the relevant question in the said case was whether the club was utilised for *"gaming purposes"* for the profit of the club, which according to the High Court was *"essentially a question of fact"*. In the said case, the conviction was sustained on account of the fact that it had been proven that the *"premises of the club was utilised for gaming purposes for the profit of the club"*. The said decision does not lay down any general legal principle that charging a commission for playing a game of skill played between players for stakes would amount to running a common gaming house and such a principle would fall foul of ***RMDC-2's case.***

- The judgment of the Apex Court in the case of ***K.Satyanarayana*** was relied upon to contend that making a profit or gain by charging players for playing rummy is impermissible and that rummy played for stakes is an offence. The said contention is also misconceived and untenable, since the Club in question

in the said case was a *"Members Club"* and what was held to be possibly illegal was charging a *"heavy charge"* on the members for playing in card room for the purposes of making a profit or gain i.e. 5 points per game and the said scenario cannot be extended to the Petitioner Company's platform. Further, to suggest that paragraph-10 of the said judgment prohibits making of any profit or gain derived from organising a game of skill would run counter to the definition of a *"Common gambling-house"* since to fall within the said definition, an *"instrument of gaming"* must be used for *"profit or gain"*. However, at paragraph-12 of the said decision, the game of rummy was held to be protected under Section 14 of the Hyderabad Gambling Act, which necessarily implies that the said game is not hit by any of the other provisions of the Act and therefore, any profit or gain derived from playing *'rummy'* would not make the organiser a Common gambling-house. If the said judgment is interpreted to mean that no fees can be imposed on

players for playing a skill-based game, then effectively even an organiser of a chess competition, who charges an entrance fee on the players to participate in the competition would be guilty of running a common gaming house. In addition, paragraph-10 (as interpreted by the respondents) falls foul with paragraph-5 of ***RMDC-2's case,*** which permits running a business involving games of skill.

- Respondents are also not entitled to place reliance upon the latter portion of paragraph-12 which cannot be read in isolation. Paragraph-3 makes it abundantly clear that the game being played was *"rummy for stakes"*. The opening words of paragraph-12 make it clear that protection of Section 14 was available *"in this case"*. The only reasonable explanation of the said sentence (which is consistent with the entire decision including the substantive portion of paragraph-12) is that words *"from the game"* must be construed as *"from the outcome of the game"*. In other words, the said sentence prohibits

the owner of the club from betting on a game of rummy played in the club. The said sentence does not prohibit the running of a club, wherein rummy is played with stakes between the players. If ***Satyanarayana's*** case is interpreted to mean that rummy played with stakes is an offence, it would render not only Section 14 but also the opening words of paragraph-12 as otiose.

- The judgment of the Apex Court in ***M.J.Sivani's case*** is relied upon by the respondents to contend that gaming is associated with stakes or money or money's worth on the result of a game, be it a game of pure chance or of mixed skill and chance.
- Reliance has been placed on paragraphs - 7 and 8 of ***M.J.Sivani's*** case, which contains the dictionary meaning of *'gaming'*. However, the definition makes it clear that gaming is confined to playing a game of chance for stake or wager and nothing more and that gaming is synonymous with gambling. In other words, the said definition nowhere holds that playing a game of skill

for stake or wager also amounts to *'gaming'* or *'gambling'*. Though reliance is placed upon paragraph-14, the true meaning of the said para becomes clear from the nature of games that were in question viz., video games such as Super Continental, High Low, Black Jack, etc., all of which are pure games of chance. These are single mode player games which are played between the user and computer system and not between two real players and the true meaning of the last line of paragraph-14 is to be construed in this factual context alone. Notably, the Apex Court does not hold that *"Video Gaming"* is akin to Gambling. In fact, at paragraphs 13 and 18, the Apex Court acknowledges that offering video games is protected under Articles 19(1)(g) and 21 of the Constitution of India and in other words implicitly holds that such activities are not *res extra commercium*. In fact, nowhere in the judgment does the Apex Court hold that playing a game *"predominantly of skill"* played with money or money's worth or for stakes amount to *'gaming'*

or that such an activity amounts to *'gambling'*. Thus ***Sivani's*** case cannot be construed to mean that playing a game which is preponderantly of skill played with either money or stakes amounts to gambling and must be seen to have been tempered by the clear enunciation of the law *qua 'gaming'* and *'gambling'* in the later Three Judge Bench judgment in the case of ***K.R.Lakshmanan*** supra**.**

- It is contended that ***K.R.Lakshmanan's*** case *supra,* apart from not favouring the petitioner, actually supported the claim of the respondents. This contention of the respondents is based on apparent misreading and misinterpretation of the ratio laid down in the said judgment and the said contention is liable to be rejected. So also, the ratio laid down by the Division Bench of this Court in ***All India Gaming Federation's*** case is sufficient to reject all the claims put forth by the respondents as well their untenable attempt to distinguish the said judgment and contend that the same cannot be relied upon by the petitioner.

- GST is a tax on 'supply' of goods and services. Alternatively and without prejudice to the points discussed above and irrespective of qualification as 'betting and gambling', GST liability as alleged in the impugned SCN can be affixed on the Petitioners, only if the Petitioner-GTPL can be said to have 'supplied' actionable claims. However, the Petitioner-GTPL is an online intermediary who only provides services of facilitating skill-based game plays between the players and contractual terms of service with the player(s), would show that the Petitioner-GTPL was not supplying any *"actionable claim"*: For the gaming platform so provided, the Petitioner-GTPL charges a consideration in the form of *'Platform Fee'* on which GST is duly deposited. It is also undisputed that the monies that are contributed by the players to the prize pool is merely held by the Petitioner-GTPL in Trust and the Petitioner-GTPL as such has no right, lien or interest over the prize pool. *"Actionable claim"* means a claim to an unsecured debt

or to a beneficial interest in a moveable property. An actionable claim is a *"chose in action"* or a right to claim/enforce a debt. In colloquial terms, it can be described as an *"I owe you"*. Since the Petitioner Company does not have any right or claim over the prize pool and merely holds it in a fiduciary capacity only to facilitate the game plays, the very basic criteria for qualifying as an *"actionable claim"* is not met *qua* the Petitioner - Company and thus no question of *'supply'* of actionable claim by the Petitioner-Company arises.

VI. SUBMISSIONS OF APPLICANT IN I.A.No.2/2022 INTERVENOR: E-GAMING FEDERATION

- The Intervenor is a not-for-profit organisation established under the Societies Registration Act, 1860 and comprises of various stakeholders in the online gaming industry as members. The members of the Applicant ("**Operators**") are *inter alia* engaged in the business of providing technology-based platforms, which allow players to play

the online versions of the game of rummy with other players on a real-time basis.

- The players on these platforms are eligible to play the games upon payment of a platform fee (A) to the Operators which is charged as a consideration for providing the technology-based platform to the players to play such games. GST is discharged on the amount of platform fee collected by the Operators.
- Each player is also required to contribute a pre-determined amount towards the prize pool (B), which shall be distributed to the winning player / players in accordance with the rules of each game. The players are informed of both (A) and (B) upfront before a game begins. The Operators only provide platform services in consideration of the platform fees (A) only. The contribution towards the prize pool is not a consideration for the platform services and the Operators have no interest over the same. In other words, the Operators do not have any “skin in the game”.

- The players contract with each other to make contributions to the prize pool and contract with each other to abide by the rules of the game. In terms of the service terms of the platforms, operators manage the prize pool and implement the rules of the game by distributing the prize pool to the winners of the game on behalf of the players. The prize pool is a fund held by the Operators in trust, for a brief period of time (i.e., from the time of the contribution by the players prior to the commencement of the game till its completion), subsequent to which the prize pool amount is distributed among the winners. The amounts comprising the prize pool are not a “consideration” for any services provided by the Operators. Since these amounts contributed towards the prize pool are (i) not supplies made by the Operators; and alternatively (ii) consideration for supply of actionable claims, no goods and services tax (GST) is required to be discharged on the contribution made by the players to the prize pool.

- Games of skill fall outside the purview of “betting and gambling” enumerated in Entry 34 of List II of the Seventh Schedule of the Constitution. The terms “betting” and “gambling” are not defined in the Constitution or in the CGST Act and the ordinary dictionary meanings ought to be ascribed to such terms. Further, the Finance Act, 1994 at Section 65B (15) sought to define both the terms of betting and gambling interchangeably by providing as follows:

> ***“Section 65-B. Interpretations****:*
>
> ***(15)*** *Betting or gambling means putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring.”*

- In ***RMDC-1 and RMDC-2’s cases supra,*** the Apex Court recognized the distinction between gambling activities and games of substantial skill and excluded games of skill (where success depends on skill to a

substantial degree) from the scope of gambling (and consequently from the scope of entry "betting and gambling"). The test for what is a game of skill and what are games of chance has been clearly laid down by the Hon'ble Supreme Court in ***RMDC-1*** which has been consistently followed by the Apex Court, this Court and other High Courts.

- In ***RMDC-2***, it was held that a statute that applies to both "betting" or "gambling" as well as a game of skill, will be severed to only apply to activities which amount to "betting" or "gambling", while rejecting the submission of the State that the Prize Competition Act, 1955, in so far it applies to competitions of skill will be governed under Entry 26 of List II. Therefore, in interpreting the Constitutional entry i.e., Entry 34 of List II, the Apex Court held that the phrase "betting and gambling" featuring in Entry 34 does not include games of skill.

- The contentions urged by the petitioner with reference to ***RMDC-1, RMDC-2, Satyanarayana, M.J.Sivani, K.R.Lakshmanan, All India Gaming Federation, Junglee Games, Head Digital*** etc., are reiterated by the Intervenor. It is thus submitted that playing games of skill for stakes does not amount to gambling. Gambling is the act of playing a game of chance for stakes. Such staking in gambling amounts to betting. Betting and gambling are compendious terms and cannot be separated from one another. The term "betting" partakes the colour and character of the term "gambling", which means that the term betting can only be interpreted to apply to games of chance and games of skill stand excluded from betting.
- It is not disputed that rummy is a game of skill. The key skills involved in rummy are memorizing the fall of the cards, building up the right sequences by discarding cards and drawing cards from the open pile. The game of rummy requires a player to strategize his/ her

moves, exercise experience, adroitness, alertness on the table and skills in permutations and combinations. A player with greater skills is always more likely to win against players with inferior skills, purely based on the skill that the players possess.

- The dispute only pertains to whether rummy when played for stakes amounts to gambling / betting which question has been held in the negative against the respondents not only in the aforesaid judgments but also by the Andhra Pradesh High Court in the case of ***Executive Club v. State of Andhra Pradesh -1998 (3) APL) 138*** and ***D. Krishna Kumar v. State of Andhra Pradesh-2002 SCC OnLine AP 810.***
- It is the Respondents submission that playing a game of skill for stakes also amounts to betting and gambling. The respondents seeks to completely annul the difference between games of chance and games of skill as its stands today on the basis of settled law by the Higher Courts of the Country. The Respondents

are also doing so by selectively picking and choosing certain portions of the decisions of the Supreme Court, not forming part of the ratio and divorced from the context of the decisions. It is settled law that sentences in a judgment cannot be picked out of context of the question under consideration. In this regard, reliance is placed on the decisions of the Supreme Court in ***Commissioner of Income Tax v. Sun Engineering-(1992) 4 SCC 363*** and ***State of Rajasthan v. Ganeshi Lal-AIR 2008 SC 690.***

- Further, the question before this Court is whether the proper Officer issuing the impugned SCN can ignore the decision of the Division Bench of this Court in the case of ***All India Gaming Federation*** and in doing so, whether he was acting without jurisdiction. In this regard, reliance is placed on the decision of the Supreme Court in ***East India Commercial v. Collector of Customs - AIR 1962 SC 1893,*** wherein it was held that the authorities subordinate to the High

Court (such as the proper officer in this case) are bound by its rulings. Without prejudice to the above, it is submitted on merits that the decisions of the Apex Court referred to above have been misread and misinterpreted by the Respondents and do not aid the case of the Respondents.

- It is thus submitted that playing games of skill for stakes does not amount to gambling. Gambling is the act of playing a game of chance for stakes and such staking in gambling amounts to betting. Betting and gambling are compendious terms and cannot be separated from one another. The term "betting" partakes the colour and character of the term "gambling", which means that the term betting can only be interpreted to apply to games of chance and games of skill stand excluded from betting.

VII. SUBMISSIONS OF APPLICANT IN I.A.No.1/2022 INTERVENOR: ALL INDIA GAMING FEDERATION

- The business model of the Petitioner (*i.e.,* of that of an intermediary that facilitates players playing on their

platform) is similar to the one followed across the online gaming industry. The monies contributed by players to the prize pool is merely held in trust and the companies have no right, lien or interest over it as the entities merely charge a service fee for service provided (on which GST is paid). Accordingly, there is no supply of any goods or actionable claim by the entities involved. As on date, the revenue of the entire industry itself is not INR 21,000 crores. Therefore, to tax just one entity over INR 21,000 crores by way of the Impugned SCN is absurd.

- The stated stand of the Revenue is also that the allegations made in the Impugned SCN form the basis, on which further demands will be made on the entire industry. It is distressing to note that while on the one hand, the Central and the State Governments are pushing to make the country a gaming hub, on the other hand, the Revenue is seeking to effectively kill the industry.

- It was submitted that the Impugned SCN is arbitrary and ignores settled law, reiterated time and again by the Hon'ble Supreme Court. "Betting and gambling" under the CGST Act is to be ascribed the same meaning as that under the Constitution of India. Betting and Gambling" under Entry 34 List II has attained constitutional significance. "Betting and Gambling" only relates to games of chance and its scope cannot be extended to include games preponderantly and substantially of skill. "Betting and Gambling" has also been read conjunctively to mean betting ***in*** gambling. Thus, for any game to fall within the import of Entry 34, there has to be betting *in* gambling.
- The definition of "gaming" in various statutes should be read to mean the act or practice of gambling on a game of chance. Further, gambling and gaming have developed secondary meanings in judicial parlance (nomen juris). Gambling is equated with gaming, where chance is the predominant factor. The Division Bench of

this Court in ***All India Gaming Federation's*** case *supra* has further held that including games of skill in the definition of gaming is manifestly arbitrary.

- The reliance by the Respondents on paragraph-100 of ***Junglee Games*** case *supra* is erroneous. As is evident from a reading of this paragraph, the Hon'ble Madras High Court was discussing the meaning of gambling in the common parlance. Subsequently, the legal and constitutional meaning is adverted to in paragraph -104, wherein the Hon'ble Court has observed that in law, gambling is equated with gaming, where chance is the predominant factor. Paragraph-104 is the ratio emanating from the judgment of the Madras High Court, and not paragraph-100.

- Thus in summary:

- "betting and gambling" has been interpreted to mean wagering or betting on a game of chance;
- There is no independent category of betting, separate from betting and gambling; and

- Wagering on a game of skill does not amount to “betting and gambling”.

- “Betting and gambling” having attained constitutional significance and being nomen juris, “betting and gambling” under the Goods and Services Tax regime should be interpreted in the same manner as that in the Constitution of India.
- Prior to the 101st amendment to the Constitution of India, the State legislatures had the power to tax “betting and gambling” under entry 62 of the List II. “Betting and Gambling” under Entry 62 is to be ascribed the same meaning as under Entry 34 (***State of Karnataka vs. State of Meghalaya, C.A.No. 10466 of 2011, para 119***). The deletion of “betting and gambling” from Entry 62 and simultaneous inclusion in the GST regime demonstrates the legislative / constitutional intention to transpose meaning.
- Wagering or staking on a game of skill does not amount to “gambling”. Section 9 of the Public Gambling Act,

1857 and Section 84 of the Karnataka Police Act, 1963 say that proof of playing for money is not required for conviction under the respective acts. Admittedly these acts deal with gambling activities. Reference may be also had to Section 176 of the Karnataka Police Act, 1963, which exempts wagering by persons taking part in a game of skill. An amendment to this provision removing this exemption was struck down in ***All India Gaming Federation's case*** being manifestly arbitrary. Therefore, to say that placing of stakes on games of skill will make it gambling, does complete violence to the legislative intent that has consistently been in vogue for over 150 years.

- The argument that games of skill played with stakes amounts to gambling obliterates the distinction between games of skill and games of chance. The Respondents argument that the distinction remains for the purpose of conducting competitions is entirely a figment of their imagination and finds no mention in any jurisprudence

on the subject. They cannot be seen to supply such hidden interpretations. As noticed by the Hon'ble Division Bench of this Court in ***All India Gaming Federation's case***, a game that involves substantial amount of skill is not gambling. The Hon'ble Division Bench has further conclusively held that a game of skill does not cease to be one even when played with stakes. There is no concept of an independent category of betting on games of skill. All betting sought to be caught in the ambit of "betting and gambling" is betting on game of chance.

- The argument of the Respondents that placing of bets on games of skill amounts to forecasting of results on a future event and consequently, amounts to gambling by placing reliance on ***RMDC-1*** is entirely misplaced. The Apex Court in ***RMDC-1*** has held that sub- clause (b) of the definition of 'prize competitions in Section 2 (1) (d) of the Bombay Lotteries and Prize Competition Control and Tax Act, 1948, should be read to mean as applying

only to games that are gambling in nature and cannot take within its sweep innocent prize competitions. Thus, forecasting for the purposes of sub clause (b) of section 2 (1) (d) can only mean forecasting by a third party on an event, the outcome of which is not dependant on the skill of the player involved, such as the result of the rolling of a dice. This is an exclusion of games of skill and cannot be read to mean that all manner of forecasting is gambling.

- The Respondents contention that ***Satyanarayana's*** case is a clear enunciation of law that games of skill played with stakes amounts to gambling and that when the Club makes a profit, it amounts to the offence of running a common gaming house is wholly erroneous. The Hon'ble Supreme Court went into the question of profits only because this was the only point considered by the High Court in the impugned order therein, as the High Court did not consider whether rummy was a game of skill or not. The Hon'ble Supreme Court subsequently

holds in paragraph -12 that even otherwise, Rummy is a game of skill and that therefore the Hyderabad Gaming Act is question is not attracted. This is the ratio that emerges from ***Satyanarayana's*** case.

- The last portion of paragraph-12 in ***Satyanarayana's*** case relied on by the Respondents says that the offence of being a "common gambling house" is attracted when the Club itself is concerned with the outcome of the game (or if there is side betting), as recognised by the Kerala High Court in ***Head Digital's*** case. It is no one's case that the Petitioner herein is interested on the outcome of a game played by players on its platform. Irrespective of who wins, the Petitioners, in terms of its contract with the players, collects a percentage of the amounts staked as its platform fees / commission for providing its services as an intermediary. Thus, the Respondents cannot be permitted to supply words to these observations and say that placing of stakes on a game of skill amounts to gambling. In any event, from a

reading of the whole judgment, it is evident that this last line is not the ratio of the judgment at all.

- The decision of the Three Judge Bench of the Hon'ble Supreme Court in ***Lakshmanan's*** case is also entirely in favour of the Petitioner herein. The Hon'ble Supreme Court clearly notes that the term gaming can only be interpreted in the light of the law laid down in the ***RMDC 1 and 2***, i.e., competition which substantially depends on skill is not gambling. The Hon'ble Supreme Court has held that "*Gaming is the act or practice of gambling on a game of chance. It is staking on chance where chance is the controlling factor.*" Thus, accordingly, the Hon'ble Supreme Court concludes "*Even if there is wagering or betting with the Club it is on a game of mere skill and as such it would not be 'gaming' under the two Acts*." Hence, the ratio that emerges is that wager or betting on a game of skill does not amount to gambling.
- The contention of the Respondents that an exception on wagering or betting on horse racing is carved out in

specific circumstances and therefore wagering or betting otherwise is not permitted is specifically answered in the 'negative' in paragraph-35 of ***Lakshmanan's*** case, where the Hon'ble Supreme Court has held that these sections in question are applicable to bucket-shops in the city streets or bazaars, purely for gambling purposes (in other words, where it cannot be said to be a game of skill). It is also pertinent to note that the Hon'ble Supreme Court, in paragraph-26 has noticed with approval the judgment of the ***Michigan Supreme Court*** in ***Edward J. Rohan vs. Detroit Racing Association - 166 ALR 1246 SW 2d 987,*** where the Michigan Supreme Court has held that pari-mutuel betting on a horse race is not a lottery (or in other words in not gambling).

- It is important to keep in mind that in all cases referred above that have been decided by the Hon'ble Supreme Court, the games in question always involved playing with stakes. In none of the cases above, the Hon'ble

Supreme Court has held by inference or by a clear unambiguous declaration of law that playing of games of skill for wager amounts to gambling.

- It was submitted that placing of stakes by a player who plays a game of skill (as in the case in the platform run by the petitioners), cannot be equated to gambling by third persons placing bets on the outcome of the cricket match. Playing a game of skill is a protected activity under Article 19(1) (g) and therefore, classifying such activity only on account of placing of stakes as gambling (and therefore a pernicious activity) will be manifestly arbitrary. Article 19(1)(g) guarantees the right to practice any profession or to carry on any occupation, trade or business. Any occupation, trade or business necessarily involves an element of earning monies to sustain one's livelihood and for profit. Therefore, it cannot be said in the same breath that playing of games of skill is protected under Article 19 (1) (g), while also saying that

placing stakes on such games amounts to gambling and is illegal.

- Reliance placed by the Respondents on paragraph-15 of ***M.J. Shivani's*** case to say that a novice playing a game of skill does not make it gambling is completely misplaced. This is effectively the very definition of a game of skill. The more skilled player is likely to win against a novice, *i.e.,* the outcome of the game is decided on the basis of the skills of the players involved. Further, the observations made herein will also have to be read in the context of the observations on this point made in ***RMDC-1,*** where the Hon'ble Supreme Court observes that even in a game of chance, expert statisticians may form some idea of the result of an uncertain future event but it is difficult to treat these as a game of skill. Thus, the only test to ascertain the nature of the game is the preponderance test and not on the basis of the skill level of the player involved.

- The judgment of this Court in ***All India Gaming Federation*** is neither *per incuriam* nor *sub-silentio* as contended by the Respondents. Only because a specific paragraph in a precedent has not been excerpted by a Court, does not mean that a precedent has not been considered in its entirety. By that logic, if the entirety of a precedent judgment is not excerpted in a subsequent judgment, the subsequent judgment will become automatically *sub silentio* and *per-incuriam,* which is a completely absurd proposition. Thus it cannot be said that the decision of the Hon'ble Division Bench of this Court in ***All India Gaming Federation*** is either *per incuriam* (as it refers to and considers all the judgments of the Hon'ble Supreme Court) or *sub-silentio* (as it specifically holds that playing games of skill for stakes does not amount to gambling in paragraph - X).
- Online gaming platforms do not supply 'goods' (*i.e.,* actionable claims) on their platforms and they only render services on which GST is paid. Online gaming

platforms are essentially intermediaries, where a platform is created for third parties to connect for playing skill games against each other. The prize – pool amounts are held by online gaming platforms in trust in a fiduciary capacity and these platforms have no right or beneficial interest thereon. An actionable claim has been defined in Section 2(1) of the CGST as having the same meaning assigned to it in the Transfer of Property Act, 1882. The stakes placed by a player while playing a game of skill amount to actionable claims but the platform itself is not involved in or providing the actionable claim. It is only the players that provide the actionable claim *inter se*. Thus, the claim that the Petitioner is involved in supply of actionable claims is fallacious. Since the petitioner is not creating or transferring any actionable claims, the stakes placed by the players on the games cannot be treated as a supply of goods or services.

VIII. SUBMISSIONS OF RESPONDENTS-REVENUE

- Going by the nature and character of a game, Courts have classified them either as a game of skill or a game of chance. When the success in a game depends on skill or a substantial degree of skill, it gets classified as a game of skill or predominantly a game of skill. On the other hand, when the success in a game, depends on chance, then it becomes a game of chance. To reiterate, a skill based game becomes a game of skill. If skill predominates chance, it becomes a predominant game of skill, whereas a chance based game becomes a game of chance.
- The question for consideration before this Hon'ble Court is not as to whether rummy played on the Petitioner's platform is a game of skill or chance, as Courts had already held that rummy is predominantly a game of skill. The question for consideration before this Hon'ble Court is something totally different. When any person including the players of rummy wagers, stakes or bets

on the outcome of a game of rummy, which outcome is unknown and uncertain till the game gets over, whether such activity of wagering, staking or betting on the unknown and uncertain outcome would tantamount to betting and gambling irrespective of the nature of the underlying game, i.e., of skill or of chance.

- This issue is also no longer *res integra* as the Hon'ble Supreme Court in the very same case of ***Satyanarayana*** held at paragraph-12 that giving away prizes based on the forecasting i.e., predicting in anticipation an unknown and uncertain future outcome is nothing but betting and gambling. The Petitioner before this Hon'ble Court had admitted both in the Affidavits and during arguments that the game of rummy is played for stakes.
- A simple illustration would explain the position. The players of online rummy on the Petitioner's platform are forecasting i.e., predicting in anticipation the unknown and uncertain future event of the player winning the

game of rummy, and are placing stakes on that unknown and uncertain future event. Assuming a scenario where in table of four players, each of them have staked INR 1,000. Each player stakes INR 1,000 with a hope to win INR 3,600, on the event that the player wins, which event is a future unknown and uncertain event for each player on the table. The stakes are placed before even reaching the table. In fact, unless the stakes are placed, a player cannot reach the table. Therefore, each player of rummy on the Petitioner's platform forecasts i.e., predicts in anticipation the unknown and uncertain future event of the player winning the game of rummy, and places stakes on it. This is nothing but betting and gambling according to the Constitution Bench of Hon'ble Supreme Court in ***RMDC-1's case supra***.

- It was submitted that when it comes to placing stakes on forecasting i.e., predicting in anticipation the unknown and uncertain future event, it makes no difference

whether the player of the game does it or if a stranger to the game does it. To both, the player and the stranger, the outcome is equally uncertain and placing stakes on such unknown uncertainty will qualify as betting and gambling which is reiterated in ***Sivani's case*** and ***Lakshmanan's case*** by the Apex Court, thereby leading to the following conclusions:

- The act of placing stakes on forecasting the outcome i.e., predicting in anticipation of a future event which is uncertain and unknown is nothing but betting and gambling as the same is nothing but a shot at the hidden target.***(RMDC-1 Paras 20 and 21).***
- If the owner of the house or the club is making a profit or gain from the game of Rummy or any other game played for stakes, the offence may be brought home i.e., the club will be a common gambling house and persons therein would be betting and gambling ***(K. Satyanarayana - Para 12).***

- Video gaming, therefore, is associated with stakes or money or money's worth on the result of a game, be it a game of pure chance or of mixed skill and chance. For a commoner or a novice, it is difficult to play video game with skill. Ordinary common people who join the game can hardly be credited with skill for success in the game. The forecast is nothing better than a shot at a hidden target ***(MJ Sivani Paras 14 and 15).***
- Section 49-A of the Police Act and Section 4 of the Gaming Act do not apply to wagering or betting in the club premises and on the horse-races conducted within the enclosure of the club. These Sections are applicable to the bucket- shops or any house, house room, tent, enclosure, vehicle, etc. which are run in the streets, bazaars or any other place away from the club, purely for gambling purposes ***(Lakshmanan's case - Paras 35 and 37).***

- The affidavit filed by the learned ASG deals elaborately with the taxation and contentions of the respondents, the salient features of which are set out hereunder:
- The only question that arises for consideration, is whether the players of online rummy on the platform of the Petitioner are betting and gambling by placing stakes on the outcome of games of rummy. If the answer to this question is in the 'affirmative' and Respondents most humbly submit, it is so, then according to the Hon'ble Supreme Court in ***Skill Lotto Solutions Pvt Ltd v. Union of India - 2020 SCC Online SC 990,*** such a transaction would be a supply of actionable claims in the form of betting and gambling. Consequently, the scheme of CGST r/w Rule 31A will govern the transaction to be taxed at 28% on 100% of the bet value.
- Games can be categorized into three categories:

- A game of pure skill – An example under this category would be the game of Chess and Cricket.

- A game of pure chance – An example under this category would be ‘three cards’ and ‘mankatha’ where there is no requirement for any skill.
- A game of mixed skill and chance. – An example under this category would be the game of rummy.

- In a game of mixed skill and chance, the test of predominance is applied to categorize the game. If in a game of mixed skill and chance, the element of chance predominates over the element of skill, the game would be categorized as a Game of Chance. If in a game of mixed chance and skill, the element of skill predominates over the element of chance, the game would be categorized as a Game of Skill. Therefore, this factual exercise has to be carried out on a case to case basis.
- Rummy undoubtedly falls under the category of mixed chance and skill as the Hon’ble Supreme Court in ***Satyanarayana’s*** case has held rummy to be ‘*mainly and preponderantly a game of skill*’.

- The act of gambling requires three elements, viz., (a) staking of an amount, (b) an element of uncertainty i.e., chance and (c) a reward which is usually higher than the amount staked.
- In short, Gambling is staking of money for a chance to win more money.
- It was submitted that the answer to this question must lie in the negative. Be it a game of skill or a game of chance, both the games have one aspect in common and that is the uncertain outcome of the game. No player of the game knows with certainty the outcome of the game and it always remains an uncertain event until the game concludes. Therefore, placing stakes on an outcome of a game, irrespective of the game being of skill or chance, it amounts to betting and gambling. This contention can be explained by way of certain illustrations.
- *Assuming for a moment that two players A and B are placing a stake of INR 10 each on the outcome of a*

game of Mankatha. The outcome of the game is determined by a particular 'card number' falling on the inside a.k.a 'Ulle' or on the outside a.k.a 'Veliye'. There is no skill involved and the outcome is purely chance based. The winner of the game is rewarded INR 20 which is the total amount staked on the outcome of the game and this act squarely fits the definition of gambling as an amount of INR 10 was placed on an uncertain outcome of the game with a hope to gain INR 20. Assuming for a moment that spectators C and D place INR 10 each on the outcome of the game of mankatha played by A and B, the same would also amount to betting and gambling, as the outcome is equally uncertain for C and D also.

- Petitioner is not disputing this example, as according to the Petitioner, placing stakes on a game of chance would amount to gambling. When the Petitioner does not dispute this example, the Petitioner has virtually conceded the case as the scenario does not change when the underlying game is a game of skill as the outcome still remains uncertain and placing stakes on

such an uncertain event would still amount to Betting and Gambling.

- The example placed before this Hon'ble Court during oral arguments is reiterated herein. Dhoni can play the game of cricket, a pure game of skill and the act of playing the game of cricket *per se* is not illegal and is in fact protected under Article 19(1)(g). The outcome of the game depends purely on the skill sets of Dhoni. According to the Petitioner, in such a scenario, if Dhoni stakes on the outcome of the game, it would not amount to Gambling.
- Now assuming for a moment that Dhoni places stakes of INR 100 on the outcome of the game of cricket, the outcome still remains to be uncertain and Dhoni with precision cannot predict the outcome as it is impossible. Therefore, placing stakes even on the outcome of a game of skill would continue to be gambling as stakes are placed on an uncertain event with a hope to gain more money.

- The Petitioner contends that in a game of skill, only side betting is gambling and if the player of the game of skill places stakes, it would not amount to gambling. This submissions is fallacious and deserves to be rejected for the sole reason that whether it is the player of a game of cricket, who is betting or a spectator of a game of cricket who is betting, the outcome remains equally uncertain for both and placing stakes on such an uncertain event would amount to betting and gambling.
- On the Petitioner's platform, the first choice a player has to make is the amount of stakes that is willing to be put in the game (Buy in amount). Once the amount to be staked is determined by the player, the platform takes the player to the gaming table, where all the players have staked a similar amount, after deducting the amount from the in-app wallet of the player. For example, if a player has determined INR 10,000 to be staked in a game of rummy, then the platform takes the player to a table where all players have staked INR

10,000 after deducting INR 10,000 from the wallet of the player.

- Assuming there are four players in a table playing the Game of Rummy on the Petitioner's platform and each of them have staked INR 10,000, then the total amount staked on that particular table is INR 40,000. The Petitioner makes an average 10% profit at each game of Rummy played on the their platform and therefore, in this particular table, the profit of the Petitioner would be 10% of INR 40,000 i.e., INR 4,000. If this amount is reduced, then the four players are playing the game of rummy by placing INR 10,000 each with a hope to win INR 36,000.
- In this example, what is important and pertinent is that each player is placing stakes of INR 10,000 to win INR 36,000 purely based on the outcome of a particular game of rummy which is equally uncertain for all the four players. The players on the Petitioner's platform are forecasting the unknown future event of the player

winning the game of rummy and are placing stakes on such acts of forecasting. The players on the Petitioner's platform predict in anticipation the unknown and uncertain future event of a player winning and place stakes on that event. No player on the Petitioner's platform knows the outcome of the game and placing stakes on such an uncertain event qualifies as betting and gambling.

- Players on the Petitioner's platform carry out two transactions. The first transaction a player indulges in is to play the game of rummy, a game of predominant skill. This *per se*, is not illegal and enjoys Constitutional Protection under Article 19(1)(g).
- The second transaction a player indulges in is to place stakes on the outcome of games of rummy played on the Petitioner's platform which is an uncertain unknown event. The second transaction unequivocally qualifies as an act of betting and gambling.

- During oral arguments, it was contended by the Petitioner that the Respondents are bifurcating a single transaction and the same must not be permitted. According to the Petitioner, the act of playing the game of skill and placing stakes on it is a single transaction. This argument deserves to be rejected for the sole reason that the game of rummy can be played independent of the stakes and without placing stakes on the outcome. When the element of staking on the outcome of the games of rummy is introduced, it is nothing but an independent transaction which is in the nature of betting and gambling on the outcome of a game which is an uncertain event.
- It was also contended alternatively, the judgment of this Court in ***All India Gaming Federation's*** case in addition to not laying down any ratio to support the claim of the petitioners was also *sub-silentio* and *per-incuriam* and no reliance can be placed upon the said judgment by the petitioners.

- It was therefore contended that there was no merit in the petition and that the same are liable to be dismissed.

I have given my anxious consideration to the rival submissions and perused the material on record.

IX. ANALYSIS AND FINDINGS

Alternate Remedy

(1) In the case of ***M/s Radha Krishan Industries vs State of Himachal Pradesh and others – (2021) SCC OnLine SC 334***, the Apex Court held as under:

- The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;
- The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is, where an effective

alternate remedy is available to the aggrieved person;

- Exceptions to the rule of alternate remedy arise where, (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;
- An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;
- When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This

rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

- In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.
- Insofar as the scope of interference to a show-cause notice by a writ Court exercising its power under Article 226 of the Constitution of India is concerned, Courts have carved out the following exceptions in abstinence for exercise of discretionary powers:

- Notice is without jurisdiction
- Notice is in abuse of process of law
- Notice issued after inordinate delay
- Notice is illusory in nature
- Notice issued with premeditation or prejudgment
- Vires of an enactment is challenged
- Violation of principles of natural justice
- Notice is barred by limitation

- Authority is incompetent to issue Notice as per statutes governing it.
- Allegation that Notice is malafide
- Infringement of Fundamental Rights

(2) In the instant case, the material on record makes it clear that it is the specific contention of the petitioners that the respondents did not have jurisdiction or authority of law to issue the impugned SCN in the light of the law laid down by the Apex Court, this Court and other High Courts have held that a games involving skill and games of betting/gambling are significantly different and that the former category of cases cannot be brought to tax similar to the latter category and any attempt to unsettle a settled position would clearly mean that the tax authority has no jurisdiction; in other words, in view of the specific contention of the petitioners that the impugned SCN was without jurisdiction or authority of law, I am of the considered opinion that the present petition is maintainable and this contention urged by the respondents cannot be accepted.

Concept of res extra commercium:

"Res Extra Commercium" is a Roman law doctrine that translates to "*things outside commerce*". In ***RMDC-1's case***, the Apex Court introduced this doctrine to India in order to constrict the scope of freedom of trade and commerce, a fundamental right, guaranteed under Article 19(1)(g) of the Indian Constitution. The said doctrine constricts the scope by excluding certain "*immoral*" or "*noxious*" trade activities from the scope of Article 19(1)(g) and thereby, depriving them of Constitutional protection. It was held that the doctrine of *res extra commercium* can be applied having regard to the obnoxious nature of trade. Gambling activities from their very nature are in essence are *extra-commercium* and are hence, not entitled to protection under Article 19(1)(g) of the Constitution.

2. In the case of ***State of Punjab Vs Devans Modern Breweries Ltd - [2004] 13 ILD 481 (SC),*** the Apex Court held that *Res extra commercium* means, things beyond commerce,

i.e., which cannot be bought or sold, such as public roads, rivers, titles of owners etc. Similarly, in the case of ***Khoday Distilleries Ltd Vs State of Karnataka (1995) 1 SCC 574***, it was held as under:

> *" What articles and goods should be allowed to be produced, possessed, sold and consumed is to be left to the judgment of legislative and executive wisdom. There cannot be a business in crime; What is res extra commercium would be trade or business in liquor when it is completely prohibited; The State can create a monopoly to do the business itself or through an agency in terms of article 19(6) or otherwise;Restrictions and limitations on the trade or business in potable liquor can be both under article 19(6) or otherwise;When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make a discrimination between the citizens who are qualified to carry on the trade or business. The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry*

on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., res extra commercium, (outside commerce). There cannot be business in crime. Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is res extra commercium being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited. Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except

when it is used and consumed for medicinal purposes."

3. In the case of ***B.R. Enterprises Vs State of UP 2001 – (1999)9 SCC 700***, it was held as under:

"Lottery is Gambling Activity. State government prohibiting the sale of lottery tickets of other states within its territory valid only if that state is declared to be a lottery free zone.There are three ingredients in the sale of lottery tickets, namely, ***(i)*** *price,* ***(ii)*** *chance and* ***(iii)*** *consideration. So, when one purchases a lottery ticket, he purchases for a prize, which is by chance and the consideration is the price of the ticket. The holder of such ticket knows, the consideration which he has paid may be for receiving nothing (para 55).'Trade' [in Article 19(1)(g) or 301] is an exchange of any article either by barter or for money or for service rendered. In other words, it is exchange between two parties one who tenders the consideration and the other who returns for this consideration, goods, money, service or such other thing.Party paying consideration in any trade is aware for what he is paying the consideration. He receives for the consideration an ascertained thing or service. It is neither hypothetical nor it is a contract for any unascertained thing. In any case, there is no element*

or ingredient of chance under any "trade". This element of chance makes the lottery a gambling. On the other hand, an absence of chance inherently attached to any contract coupled with some skill makes it to be a "trade". Trade is always associated with some skill while in lottery there is absence of skill predominantly and essentially with the ingredient of chance. Gambling is not trade and is thus not constitutionally protected. Merely there is sanction in law for a transaction or is legalized not prohibited, it would not by itself make it to be commercium. In other words, merely because lottery is run by State, it will not change its character from being res extra commercium. Entry 62 of List II of the Seventh Schedule refers to taxes on betting and gambling which inherently permits gambling. Thus, it could be said that gambling is recognised and authorized by law, may be through regulations, licences, etc. Thus, imposition of tax on gambling of course has to be legal to impose tax on it.What makes lottery a pernicious is its gambling nature? Can it be said that in the State organized lotteries this element of gambling is excluded? The stringent measures and the conditions imposed under the State lotteries are only to inculcate faith to the participant of such lottery, that it is being conducted fairly with no possibility of fraud, misappropriation or deceit and assure and

hopeful recipients of high prizes that all is fair and safe."

4. In the case of ***Union of India Vs Martin Lottery Agencies Ltd – (2008)12 SCC 209***, it was held as under:

" *The doctrine of res extra Commercium was invoked in the United States of America where keeping in view the nature of right conferred on its citizens and the concept of imposition of reasonable restrictions thereon being absent, it was held that gambling should be frowned upon being opposed to constitutional jurisprudence. While borrowing the said principle in the Indian context, however, it must be borne in mind that Constitution of India envisages reasonable restrictions in respect of almost all the fundamental rights of the citizens. No citizen has an absolute fundamental right. Whereas the same principle may apply in Australia but it may not apply to the European Countries where gambling and even sale of narcotic drugs subject to licensing provisions, if any, is permissible.The concept of res extra commercium may in future be required to be considered afresh having regard to its origin to Roman Law as also the concept thereof. Conceptually, business may be carried out in respect of a property which is capable of being owned as*

contrasted to those which cannot be. Having regard to the changing concept of the right of property, which includes all types of properties capable of being owned including intellectual property, it is possible to hold that the restrictions which can be imposed in carrying on business in relation thereto must only be reasonable one within the meaning of clause (6) of article 19 of the Constitution of India. Right of property although no longer a fundamental right, but indisputably is a human right. [See Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel [2008] 4 SCC 649 and Karnataka State Financial Corpn. v. N. Narasimahaiah [2008] 5 SCC 176]."

5. It is therefore clear that there is sufficient jurisprudence to show that lottery, betting and gambling will be seen as noxious and *per se* classified 'res extra commercium' as beyond commerce.

Concept of GST and Definition of Business under GST

The entire scheme of indirect taxes has undergone transformation upon introduction of GST w.e.f. 01.07.2017. This tax is being levied with concurrent jurisdiction of the Centre and the States on the supply of goods or services. For

this purpose, the Constitution of India has been amended vide Constitution (101st Amendment) Act, 2016 w.e.f. 16th September 2016. In the context of levy of GST, it is relevant to note that the erstwhile system of indirect tax which was prevalent for decades in India levied tax on the activities of manufacture (for levy of excise duty), sale of goods (for levy of VAT) and provision of service (for levy of service tax), under GST regime introduced w.e.f., 1st July 2017, the levy of GST is on supply of goods or services.

2. Under CGST Act, 2017, Section 9 deals with the levy and collection of CGST. In terms of this provision, Central GST (CGST) will be levied on all intra-State supplies of goods or services or both at the rates prescribed by the Government. It is relevant to note that State GST laws are a replica of the CGST provisions (save for some provisions relating to savings, etc) and the discussion on provisions of CGST Act, 2017 would equally be applicable to the SGST provisions also.

3. Similarly, Section 5 of the IGST Act, 2017 deals with the levy and collection of taxes where the supply is in the

course of inter-State supply of goods or services or both. The said provision also provides that integrated tax on goods imported into India will be levied and collected in accordance with the provisions of Section 3 of the Customs Tariff Act, 1975 on the value as determined thereunder at the point when duties of customs are levied on the said goods under Section 12 of the Customs Act, 1962.

4. The provisions relating to levy could be summarized as below :

Levy is on	Supply of goods and/or services or both, other than on the supply of alcoholic liquor for human consumption
Rate	To be notified - but shall not exceed 20% each of CGST and SGST
Value	Value determined in terms of Section 15 of CGST
Dual tax of CGST+SGST would apply	On intra-State supply of goods &/or Services
Integrated Tax (IGST) would apply	On inter-State supply of goods &/or Services at maximum rate of 40%.
How to determine place of supply	Refer to Sections 7 to 10 of IGST

Meaning of phrases 'goods' and 'services'

- **Goods:** The term 'Goods' has been defined in Section 2(52) of CGST Act, 2017 as every kind of movable property but,

Excludes	Includes
money and securities	**actionable claim**, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply

- **Service:** The term 'Services' has been defined in Section 2(102) of CGST Act, 2017 to mean anything other than the following :

  (a) goods,

  (b) money and

  (c) securities

but 'Services' includes the following :

(a) activities relating to the use of money or

(b) conversion of money by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination where a separate consideration is charged for the above.

Concept of Supply

Under the erstwhile regime, the various indirect taxes were levied on varied activities viz., manufacture, sale or import of goods and on rendering of services. Consequent to introduction of GST regime w.e.f., 1st July 2017, the GST is levied solely on the concept of 'supply' of goods and services or both. It should be noted that import of goods continues to be governed by the Customs Act 1962.

2. It is relevant to note that in terms of Article 366(12A) of the Constitution as amended by Constitution (101st Amendment) Act, 2016 defines 'Goods and Services Tax' to mean the tax on supply of goods, services or both except taxes on the supply of alcoholic liquor for human consumption.

3. Accordingly, it is fundamental and paramount to examine and understand the meaning and definition of the term 'supply' in the context of GST law w.e.f., 1st July 2017. In this regard, we have to analyse the provisions of Section 7 of CGST Act, 2017 which covers 'scope of supply', reads as under :

Section 7: Scope of Supply

(1) For the purposes of this Act, the expression "supply" includes-

(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice versa, for cash, deferred payment or other valuable consideration.

Explanation – *For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;*

(b) import of services for a consideration whether or not in the course or furtherance of business; and

(c) the activities specified in Schedule I, made or agreed to be made without a consideration.

(d) omitted.

(1A) where certain activities or transactions constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

(2) Notwithstanding anything contained in sub-section (1):

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council,

shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-sections (1), (1A) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as-

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods.

Note: As amended by CGST (Amendment) Act, 2018 with retrospective effect from 1st July 2017. Notified to be effective from retrospective date vide Notification No. 2/2019-C.T., dated 29-1-2019 which came into effect from 1-2-2019.

4. It is interesting to note that though the 'supply' of goods or services is essential to attract levy of GST, there is no direct reference to the same in the Article 246A – 'Special provision with respect to goods and services tax' of Constitution of India as amended by the 101st Constitutional Amendment Act, 2016 w.e.f. 16th September, 2016.

5. Though both the Parliament and the Legislature of every State are empowered to make laws with respect to goods and services tax (GST) in clause (1), it is only in clause (2) there is reference to 'supply of goods or services, or both' stating that as regards the supply of goods or services in the course of inter-State trade or commerce, only Parliament will have exclusive power to make laws with respect to GST.

6. The term 'supply' has been defined elaborately under Section 7 of the CGST Act. However, it is interesting to note that under the provisions of UK VAT Act, 1994, the term "supply" is not defined in VAT law in UK [Refer to HMRC Guidelines in VATSC02120 - Basic principles and underlying

law]. It is stated in the HMRC Guidelines that there are several ways by which a supply can be made, the most common being the transfer of ownership or the transfer of possession of goods, or the provision of a service by one party to another. Further it is stated in the HMRC Guidelines that the definition of 'supply has been discussed sufficiently in tribunal and higher court cases to enable specific guidance about its meaning to be given.

Analysis of definition of 'Supply' in terms of Section 7 of the CGST Act

Sub-section (1) of Section 7: This sub-section (1) defines the term 'Supply' inclusively so as to include the following 3 sub-groups:

(a) to include all forms of supply of goods and/or services such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

(aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice versa, for cash, deferred payment or other valuable consideration.

Explanation – For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;

(b) to include importation of services for a consideration whether or not in the course or furtherance of business.

(c) the activities specified in Schedule I, made or agreed to be made without a consideration.

2. It is relevant to note that Section 7 of CGST Act, 2017 has been amended by CGST (Amendment) Act, 2018 with retrospective effect from 1st July, 2017.

Note: This amendment was notified with retrospective effect from 1.7.2017 vide Notification No. 2/2019-C.T., dated 29-1-2019 which came into effect from 1-2-2019.

3. The provisions of Section 7 consequent to the aforesaid retrospective amendment are analysed as under:

(i) Section 7 has been amended to make it clear that the entries covered in Schedule II to the CGST Act, 2017 are merely for classification purposes and would not by itself constitute supply on standalone basis. Accordingly, the sub-section (1)(d) has been omitted.

(ii) The sub-section (1A) makes it clear that where certain activities or transactions, which constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II.

(iii) Consequently, amendments also made in the section so as to incorporate the references to sub-section (1A).

(iv) In terms of Section 7(1)(c), the activities listed in Schedule I are termed as supplies even where such activities are not for consideration. Entry (4) of the said schedule provided that import of services by a taxable person from a

related person in the course of business or commerce was deemed as service. The said entry has been amended to provide that import of services by 'a person' from related persons, etc.

4. Prior to its omission, Clause (d) of Section 7(1) of CGST Act, 2017 with retrospective effect from 1st July 2017, read as under:

> *(d) the activities to be treated as supply of goods or supply of services as referred to in Schedule II.*

5. It is relevant to note that prior to the above-mentioned omission of clause (d) with retrospective omission from Section 7(1) and insertion of new sub-section (1A), it was possible to interpret that the very same position in terms of Section 7(1) as discussed below:

(i) Section 7(1)(a) specifically includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal which are made or agreed to be made for a consideration by a person in the course or furtherance of business.

(ii) As clause (a) included all forms of supply of goods or services, it was possible to interpret that the rest of the clauses (b) to (d) of section 7(1) are sub-sets of Section 7(1)(a). Therefore, the clauses (b) to (d) of Section 7(1) should satisfy the factors stipulated in Section 7(1)(a) except to the variation specifically stipulated in the respective clauses.

(iii) Section 7(1)(b) treats import of service as supply irrespective of whether it is in course or furtherance of business or not. But for that exception, in order to qualify as supply under section 7(1)(b), the rest of the factors stipulated in section 7(1)(a) should be satisfied.

(iv) Section 7(1)(c) dispenses with the requirement of presence of consideration in respect of activities stipulated in Schedule I. But for that exception, for the activities stipulated under Schedule I to qualify as supply under Section 7(1)(c), it should be established that it is made or agreed to be made during the course or furtherance of business.

(v) Finally, the purpose of Section 7(1)(d) is to only classify an activity as supply of goods and supply of services. The other factors to qualify as supply stipulated in section 7(1)(a); for **Eg:** there should be consideration, it should be in course or furtherance of business should be satisfied even by the activities falling under section 7(1)(d). This view is now reiterated by the insertion of sub-section (1A) to Section 7 after omission of sub-section (d) to Section 7(1).

Definition of 'Business':

We must necessarily notice the definition of 'business' in the GST legislations, as there is a marked departure as is highlighted below and as found in **Section 2(17) of CGST Act, 2017,** which reads as under:-

> *"business" includes—*
> *(a) any trade, commerce, manufacture, profession, vocation, adventure,* ***wager or any other similar activity****, whether or not it is for a pecuniary benefit;*
> *(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);*

(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

(e) provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members;

(f) admission, for a consideration, of persons to any premises;

(g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;

(h) activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; and

*(i) any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged a*s public authorities;

The definition of 'wager' is not found in the GST legislation and we now seek to find its meaning elsewhere.

- **Meaning of *"Wager"* or *"any other similar activity"***

Section 30 of Indian Contract Act, 1872

Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be own on any wager or entrusted to any person to abide the result of any game or other uncertain event on which wager is made.

This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of the value or amount of five hundred Taka or upwards, to be awarded to the winner or winners of any horse race.

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Penal Code apply.

Advanced Law Lexicon by P Ramanatha Aiyar's

Wagering Contract-

"A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that,

*dependant on the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the parties having any other interest in that contract than the sum or stake he will win or lose, there is no other consideration for making of such contract by either of the parties. If either of the parties may win but cannot lose or may lose but cannot win, it is not a wagering contract" **[*Carlill vs Carbolic Smoke Ball co. [1892 (2) QB 484]**

*An agreement for payment of prize money on a lottery ticket comes within the ambit of the expression 'wagering contract' as contemplated under Section 30 of the Act. **[Subhash Kumar Manwani vs State of MP, AIR 2000 MP 109, 110]***

Black's Law Dictionary

***Wager –** A contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them or that they shall gain or lose on the happening of an uncertain event or upon the ascertainment of a fact in dispute, where the parties have no interest in the event except that arising from the possibility of such gain or loss. The word "wagering" is practically synonymous with the words betting and gambling*

*and the terms are so used in common parlance and in statutory and constitutional enactments (**Mc Donald v Bryant, 238 Ark. 338, 381 S.W.2d 736, 738**]*

Any other similar activity –

- Rule of Ejusdem Generis shall apply. As per this doctrine, when particular words pertaining to a class, category or genus are followed by general words, the words are construed as limited to things of the same kind as those specified.

Therefore, applying the above principle, the phrase "any other similar activity' would include those activities that are akin to wager.

BETTING AND GAMBLING

The Black's Law Dictionary meanings for the terms of "betting" and "gambling" maybe extracted as follows:

"Bet – something (esp. money) staked or pledged as a wager;

Wager – money or other consideration risked on an uncertain event; a bet or gamble;

A promise to pay money or other consideration on the occurrence of an uncertain event"

"Gambling – the act of risking something of value, (esp. money) for a chance to win a prize. An agreement between two or more persons to play together at a game of chance for a stake or wager which is to become the property of the winner, and to which all contribute."

As per Venkataramaiya's Law Lexicon, the terms "betting" and "gambling" have been defined as follows:

"'betting' - a contract by which two or more parties agree that a sum of money, or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event.

'gambling' - To play, or game, for money or other stake; hence to stake money or other thing of value on an uncertain event. It involves not only chance, but a hope of gaining something beyond the amount played."

Further, the Advanced Law Lexicon seeks to differentiate the acts of betting and gambling by defining each as follows:

"Betting means to pledge as a forfeit to another who makes a similar pledge in return, on a future contingency, in support of an affirmation or opinion.

'Gambling' according to the common use and understanding of that word is a generic term, and includes within its meaning every act, game, and contrivance by which one intentionally exposes money or other thing of value to the risk or hazard of loss by chance."

Definition of 'business' under GST to include betting, gambling, lottery;

The principle of "*res extra commercium*" applies to betting, gambling, wagering for the purpose of other laws. However, with respect to GST law, the definition of business is much wider to include 'wager' or 'any other similar activity'. Therefore, for the purpose of GST, business also includes, betting, gambling, lottery, etc.

Given the wide scope of the definition of business under CGST Act, 2017, for the limited purpose of GST, a view is possible that protection under Article 19(1)(g) of the

Constitution of India is available to wagering, betting, gambling, lottery, etc. But that in itself, therefore, would not mean that lottery, betting and gambling are the same as other games of skill, which distinction can still be made to justify lower tax rates for the latter, if any and that is precisely what would be decided in this petition.

Actionable claim under Schedule III of CGST Act

The said Schedule III referred in Section 7(2) of the Act reads as under:

> ***"SCHEDULE III [See Section 7]***
>
> *Activities or transactions which shall be treated neither as a supply of goods nor a supply of services*
>
> *1 .....*
>
> *6. Actionable claims, other than lottery, betting and gambling."*

As per Entry No. 6 of Schedule III, actionable claims except lottery, betting and gambling are neither considered as goods nor services.

Section 2(1) of CGST Act, 2017;

"Actionable claim *shall have the same meaning as assigned to it in Section 3 of the Transfer of Property Act, 1882."*

Section 3 of the Transfer of Property Act, 1882 –

"actionable claim means a claim to any debt , other than a debt secured by mortgage of immovable property or by the hypothecation or pledge of movable property , or to any beneficial interest in movable property not in the possession, either actual or constructive , of the claimant, which the civil courts recognises as affording grounds for relief, whether such debt or beneficial interest be existent, accruing ,conditional or contingent."

Section 2(52) of CGST Act, 2017

"goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

Section 65B(15) of Finance Act, 1994 during service tax regime did define betting and gambling as under:

> *"betting or gambling" means putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring;*

In ***Skill Lotto Solutions Pvt Ltd vs UOI - 2020 (43) GSTL 289 (SC),*** the Apex Court held that inclusion of actionable claim in the definition of 'goods' is not unconstitutional. Parliament is empowered to make laws with respect to Goods and Service Tax vide Article 246A. It was reasonable to take out only three actionable claims i.e., lottery, gambling and betting from Schedule III and there was no hostile discrimination by taxing them. They were not recognised as trade, business or commerce, and have been regulated and taxed over several decades. Therefore, it is clear that lottery, betting and gambling can be treated differently from other actionable claims and subjected to tax

and the issue therefore that would arise herein is, whether a game of skill, either wholly or predominantly, can be classified as lottery, betting and gambling if these elements are involved in such a game of skill.

Law expositing "game of skill" vs "game of chance"

It must be noted that there is no denying the fact that game of skill and game of chance indeed have been differentiated by the highest Courts of this country and that is more so in the context of whether protection under Article 19(1)(g) can be taken. The decisions have clearly held that such protection is not available for lottery, betting and gambling which does not amount to a business. However, we have already seen how the definition of business would include wagering and other similar activities and that lottery, betting and gambling which are actionable claims is defined as goods under the legislation. However, since Schedule III clearly mentions and excepts lottery, betting and gambling from the generic term of actionable claims to ensure that it could be taxed, necessarily the interpretation of games of skill

is fundamental to understand whether they fit into the realm of actionable claim on one side or whether they would fit into the realm of the sub sect of actionable claim, that is, lottery, betting and gambling so that they could be subjected to tax in the latter category. If they are in the former category, they would not be exigible to tax by virtue of Schedule III.

2. The scope of "betting and gambling" came to be considered by the Hon'ble Supreme Court in RMDC-2 wherein the Apex Court followed its decision in RMDC-1 and recognized the distinction between gambling activities and games of substantial skill and excluded games of skill (where success depends on skill to a substantial degree) from the scope of gambling (and consequently from the scope of entry "betting and gambling").

3. Before analyzing the judgments relied upon by both sides, it would be profitable to refer to a recent judgment of the Apex Court with regards to the law governing 'ratio decidendi' of a case. In the case of ***Career Institute Educational Society vs. Om Shree Thakurji Educational***

Society – SLP(C) Nos.7455-7456/2023 dated 24.04.2023,

the Apex Court held as under:

> *The Judgment in Vidya Drolia & Ors. vs. Durga Trading Corporation did not examine and decide the issue of effect of unstamped or under-stamped underlying contract on the arbitration agreement. As this issue and question has not been decided in vidya Drolia (supra), the division is not precedent on this question.*
>
> *Vidya Drolia (supra) did refer to the judgment in the case of Garware Wall Ropes Limited vs. coastal Marine Constructions and Engineering Limited, but in different context, as is evident from paragraphs 146 and 147. 1 of the judgment in Vidya Drollia (supra) which are reproduced below:*
>
> > *"146. We now proceed to examine the question, whether the word "existence" in Section 11 merely refers to contract formation (whether there is an arbitration agreement) and excludes the question of enforcement (validity) and therefore the latter falls outside the jurisdiction of the court at the referral stage. On jurisprudentially and textualism it is possible to differentiate between existence of an arbitration agreement and validity of an arbitration agreement. Such interpretation can draw support from the plain meaning of the word "existence". However, it is equally possible, jurisprudentially and on contextualism, to hold that an agreement has no existence if it is not enforceable and not binding. Existence of an*

arbitration agreement presupposes a valid agreement which would be enforced by the court by relegating the parties to arbitration. Legalistic and plain meaning interpretation would be contrary to the contextual background including the definition clause and would result in unpalatable consequences. A reasonable and just interpretation of "existence" requires understanding the context, the purpose and the relevant legal norms applicable for a binding and enforceable arbitration agreement. An agreement evidenced in writing has no meaning unless the parties can be compelled to adhere and abide by the terms. A party cannot sue and claim rights based on an unenforceable document. Thus, there are good reasons to hold that an arbitration agreement exists only when it is valid and legal. A void and unenforceable understanding is no agreement to do anything. Existence of an arbitration agreement means an arbitration agreement that meets and satisfies the statutory requirements of both the Arbitration Act and the Contract Act and when it is enforceable in law.

147. xxx xxx xxx

147.1. In Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 209, this Court had examined the question of stamp duty in an underlying contract with an arbitration clause and in the context had drawn a distinction between the first and second part of Section 7(2) of the Arbitration Act, albeit the observations made and quoted above with reference to "existence" and "validity" of the arbitration agreement being apposite and extremely important, we would repeat the same by reproducing para 29 thereof: (SCC p. 238)

"29. This judgment in Hyundai Engg. Case [United India Insurance Co. Ltd. v. Hyundai Engg. & Construction Co. Ltd., (2018) 17 SCC 607] is important in that what was specifically under consideration was an arbitration clause which would get activated only if an insurer admits or accepts liability. Since on facts it was found that the insurer repudiated the claim, though an arbitration clause did "exist", so to speak, in the policy, it would not exist in law, as was held in that judgment, when one important fact is introduced, namely, that the insurer has not admitted or accepted liability. Likewise, in the facts of the present case, it is clear that the arbitration clause that is contained in the subcontract would not "exist" as a matter of law until the sub-contract is duly stamped, as has been held by us above. The argument that Section 11(6-A) deals with "existence", as opposed to Section 8, Section 16 and Section 45, which deal with "validity" of an arbitration agreement is answered by this Court's understanding of the expression "existence" in Hyundai Engg. case (supra), as followed by us."

Existence and validity are intertwined, and arbitration agreement does not exist if it is illegal or does not satisfy mandatory legal requirements.

Invalid agreement is no agreement.

xxx xxx xxx"

It is apparent from the aforementioned paragraphs in Vidya Drolia (supra) that reference to the decision in Garware Wall Ropes Limited (supra) was made to interpret the word 'existence', and whether an 'invalid' arbitration agreement, can be said to exist? This examination was to decide "who

decides existence of an arbitration agreement" in the context of Sections 8 and 11 of the Arbitration and Conciliation Act, 1996.

The distinction between obiter dicta and ratio decidendi in a judgment, as a proposition of law, has been examined by several judgments of this Court, but we would like to refer to two, namely, State of Gujarat & Ors. vs. Utility Users' Welfare Association & Ors.3 and Jayant Verma & Ors. vs. Union of India & Ors.4.

The first judgment in State of Gujarat (supra) applies, what is called, "the inversion test" to identify what is ratio decidendi in a judgment. To test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed, i.e. to remove from the text of the judgment as if it did not exist. If the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case.

In Jayant Verma (supra), this Court has referred to an earlier decision of this Court in Dalbir Singh & Ors. vs. State of Punjab 5 to state that it is not the findings of material facts, direct and inferential, but the statements of the principles of law applicable to the legal problems disclosed by the facts, which is

the vital element in the decision and operates as a precedent. Even the conclusion does not operate as a precedent, albeit operates as res judicata. Thus, it is not everything said by a Judge when giving judgment that constitutes a precedent. The only thing in a Judge's decision binding as a legal precedent is the principle upon which the case is decided and, for this reason, it is important to analyse a decision and isolate from it the obiter dicta.

RMDC-1

This is an appeal by the State of Bombay from the judgment and order passed on January 12, 1955 by The court of appeal of the High Court of Judicature of Bombay confirming, though on somewhat different grounds, the judgment and order passed on April 22, 1954, by a Single Judge of the said High Court allowing with costs the present respondents' petition under Article 226 of the Constitution of India. The said petition was presented before the High Court of Judicature at Bombay on December 18, 1952. In the said petition there were two petitioners who are now the two respondents to this appeal. The first petitioner is an individual who claims to be a citizen of India and the founder and Managing Director of the second petitioner, which is a company incorporated in the

State of Mysore and having its registered head office at 2, Residency Road, Bangalore in that State. That petition was further supported by an affidavit sworn by the first petitioner on the same day.

4. *The 1939 Act was replaced by the Bombay Lotteries and Prize Competition Control and Tax Act (Bom 54 of 1948), (hereinafter referred to as "the 1948 Act") which came into force on December 1, 1948. The 1939 Act as well as the 1948 Act, as originally enacted, did not apply to prize competitions contained in a newspaper printed and published outside the Province of Bombay. So the Prize Competition called the R.M.D.C. Crosswords was not affected by either of those two Acts.*

5. *On June 21, 1951, the State of Mysore, however, enacted the Mysore Lotteries and Prize Competition Control and Tax Act, 1951, which was based upon the lines of the said 1948 Act. That Mysore Act having come into force on February 1, 1952, the second petitioner applied for and obtained a licence under that Act and paid the requisite licence fees and also paid and is still paying to the State of Mysore the tax at the rate of 15% (latterly reduced to 12½%) of the gross receipts in respect of the R.M.D.C. Crosswords Prize Competition and continued and is still continuing the said Prize*

Competition through the said weekly newspaper "The Sporting Star" and to receive entry forms with fees from all parts of the territory of India including the State of Bombay. It is said, on the strength of the audited books of account, that after distribution of prizes to the extent of about 33% of the receipts and after payment of taxes in Mysore amounting to about 15% and meeting the other expenses aggregating to about 47%, the net profit of the second petitioner works out to about 5% only.

6. *On November 20, 1952 the State of Bombay passed the Bombay Lotteries and Prize Competitions Control and Tax (Amendment) Act (Bom 30 of 1952). This Act amended the provisions of the 1948 Act in several particulars. Thus, the words "but does not include a prize competition contained in a newspaper printed and published outside the Province of Bombay", which occurred in the definition of Prize Competition in Section 2(1)(d) of the 1948 Act, were deleted and the effect of this deletion was that the scope and the application of the 1948 Act so amended became enlarged and extended so as to cover prize competitions contained in newspapers printed and published outside the State of Bombay. After clause (d) of Section 2(1) the Amending Act inserted a new clause (dd) which defined the words "Promoter". A*

new section was substituted for the old Section 12 and another new section was inserted after Section 12 and numbered as Section 12-A. By this new Section 12-A provision was made for the levy in respect of every prize competition contained in a newspaper or a publication printed outside the State of Bombay for which a licence was obtained under the Act of a tax at such rates as might be specified not exceeding the rates specified in Section 12 or in a lump sum having regard to the circulation or distribution of the newspaper or publication in the State of Bombay. It is pointed out that the margin of net profit being only 5%, if tax has to be paid to the State of Bombay under the 1948 Act, as amended, (hereinafter referred to as "the impugned Act") the second petitioner will be unable to carry on its prize competition except at a loss.

9. *The main contentions of the present respondents before the trial Judge were:*

(a) The impugned Act and particularly its taxing provisions were beyond the competence of the State Legislature and invalid inasmuch as they were not legislation with respect to betting and gambling under Entry 34 or with respect to entertainments and amusements under Entry 33 or with respect to taxation on entertainments and amusements,

betting and gambling under Entry 62 of the State List. The legislation was with respect to trade and commerce and the tax levied by the impugned Act was a tax on the trade or calling of conducting prize competitions and fell within Entry 60 of the State List.

(b) The respondents' prize competition was not a lottery and could not be regarded as gambling inasmuch as it was a competition in which skill, knowledge and judgment had real and effective play.

(c) The impugned Act itself contained distinct provisions in respect of prize competitions and lotteries thereby recognising that prize competitions were not lotteries.

(d) The said tax being in substance and fact a tax on the trade or business of carrying on prize competitions it offended against Section 142-A(2) of the Government of India Act, 1935 and Article 276(2) of the Constitution which respectively provide that such a tax shall not exceed fifty rupees and two hundred and fifty rupees per annum.

(e) The impugned Act was beyond the legislative competence of the Bombay Legislature and invalid

as it was legislation with respect to trade and commerce not within but outside the State.

(f) The impugned Act operated extra-territorially inasmuch as it affected the trade or business of conducting prize competitions outside the State and was, therefore, beyond the competence of the State Legislature and invalid.

(g) The impugned Act offended against Article 301 of the Constitution inasmuch as it imposed restrictions on trade, commerce and intercourse between the States and was not saved by Article 304(b) of the Constitution.

(h) The restrictions imposed by the impugned Act on the trade or business of the petitioners were not reasonable restrictions in the interests of the general public and, therefore, contravened the fundamental right of the petitioners, who were citizens of India, to carry on their trade or business under Article 19(1)(g) of the Constitution.

(i) That Sections 10, 12 and 12-A of the said Act offended against Article 14 of the Constitution inasmuch as they empowered discrimination between prize competitions contained in newspapers or publications printed and published

within the State and those printed and published outside the State.

10. *The State of Bombay, which is now the appellant before us, on the other hand, maintained that*

(a) The prize competitions conducted by the petitioners were a lottery.

(b) The provisions of the impugned Act were valid and competent legislation under Entries 33, 34 and 62 of the State List.

(c) The impugned Act was not extra-territorial in its operation.

(d) The prize competitions conducted by the petitioners were opposed to public policy and there could therefore be no trade or business of promoting such prize competitions.

(e) As the petitioners were not carrying on a trade or business, no question of offending their fundamental rights under Article 19(1)(g) or of a violation of Article 301 of the Constitution could arise.

(f) The second petitioner being a Corporation was not a citizen and could not claim to be entitled to the

fundamental right under Article 19(1)(g) of the Constitution.

(g) In any event the restrictions on the alleged trade or business of the petitioners imposed by the Act were reasonable restrictions in the public interest within the meaning of Article 19(6) and Article 304(b) of the Constitution.

The trial Judge held:

(a) The tax levied under Sections 12 and 12-A of the Act was not a tax on entertainment, amusement, betting or gambling but that it was a tax on the trade or calling of the respondents and fell under Entry 60 and not under Entry 62 of the State List.

(b) The prize competition conducted by the petitioners was not a lottery and it could not be said to be either betting or gambling inasmuch as it was a competition in which skill, knowledge and judgment on the part of the competitors were essential ingredients.

(c) The levy of the tax under the said sections was void as offending against Article 276(2) of the Constitution.

(d) The restrictions imposed by the impugned Act and the Rules thereunder offended against Article

301 of the Constitution and were not saved by Article 304(b) inasmuch as the restrictions imposed were neither reasonable nor in the public interest.

(e) The second petitioner, although it was a company, was a citizen of India and was entitled to the protection of Article 19 of the Constitution.

(f) The restrictions imposed by the impugned Act and the Rules made thereunder were neither reasonable nor in the interests of the general public and were void as offending against Article 19(1)(g) of the Constitution.

In the result the rule nisi was made absolute and it was further ordered that the State of Bombay, its servants and agents, do forbear from enforcing or taking any steps in enforcement, implementation, furtherance or pursuance of any of the provisions of the impugned Act and the 1952 Rules made thereunder and particularly from enforcing any of the penal provisions against the petitioners, their Directors, officers, servants or agents and that the State of Bombay, its servants and agents, do allow the petitioners to carry on their trade and business of running the Prize Competition mentioned in the petition and do forbear from demanding, collecting or recovering from the petitioners any tax as provided in the impugned Act or the said Rules in

respect of the said Prize Competition and that the State of Bombay do pay to the petitioners their costs of the said applications.

11. *Being aggrieved by the decision of the trial Judge, the State of Bombay preferred an appeal on June 8, 1954. The court of appeal dismissed the appeal and confirmed the order of the trial Judge, though on somewhat different grounds. It differed from the learned trial Judge on the view that he had taken that there was no legislative competence in the Legislature to enact the legislation. It held that the topic of legislation was "gambling" and the Legislature was competent to enact it under Entry 34 of the State List. It, however, agreed with the learned trial Judge that the tax levied under Section 12-A was not a tax on gambling but that it was a tax which fell under Entry 60. It held that there was legislative competence in the Legislature to impose that tax but that the tax was invalid because it did not comply with the restriction contained in Article 276(2) of the Constitution. It also took the view that the tax, even assuming it was a tax on betting or gambling, could not be justified because it did not fall under Article 304(b). It differed from the learned trial Judge when he found as a fact that the scheme underlying the prize competitions was not a lottery and came to the conclusion that the Act applied to*

the prize competitions of the respondents. It held that the challenge of the petitioners to the impugned provisions succeeded because the restrictions contained in the impugned Act controlling the business of the petitioners could not be justified as the requirements of the provisions of Article 304(b) had not been complied with. The High Court agreed with the learned trial Judge that the petitioners prize competitions were their "business" which was entitled to the protection guaranteed under the Constitution. It took the view that although the activity of the petitioners was a lottery, it was not an activity which was against public interest and, therefore, the provisions of Part XIII of the Constitution applied to the respondents' business.

13. *The principal question canvassed before us relates to the validity or otherwise of the impugned Act. The court of appeal has rightly pointed out that when the validity of an Act is called in question, the first thing for the court to do is to examine whether the Act is a law with respect to a topic assigned to the particular Legislature which enacted it. If it is, then the court is next to consider whether, in the case of an Act passed by the Legislature of a Province (now a State), its operation extends beyond the boundaries of the Province or the State, for under the provisions conferring legislative*

powers on it such Legislature can only make a law for its territories or any part thereof and its laws cannot, in the absence of a territorial nexus; have any extra-territorial operation. If the impugned law satisfies both these tests, then finally the court has to ascertain if there is anything in any other part of the Constitution which places any fetter on the legislative powers of such Legislature. The impugned law has to pass all these three tests.

16. *The petitioners contend that the object of the impugned Act is to control and to tax lotteries and prize competitions. It is not the purpose of the Act to prohibit either the lotteries or the prize competitions. They urge that the impugned Act deals alike with prize competitions which may partake of the nature of gambling and also prize competitions which call for knowledge and skill for winning success and in support of this contention reliance is placed on the definition of "prize competition" in Section 2(1)(d) of the impugned Act. We are pressed to hold that the impugned Act in its entirety or at any rate insofar as it covers legitimate and innocent prize competition is a law with respect to trade and commerce under Entry 26 and not with respect to betting and gambling under Entry 34. They also urge that in any event the taxing provisions, namely, Sections 12 and 12-A are taxes on the trade of running prize*

competitions under Entry 60 and not taxes on betting and gambling under Entry 62. We are unable to accept the correctness of the aforesaid contentions for reasons which we proceed immediately to state.

17. *As it has already been mentioned, the impugned Act replaced the 1939 Act which dealt only with prize competitions. Section 2(2) of the 1939 Act defined "prize competition" in the terms following:*

"2. (2) 'Prize Competition' includes—

(a) crossword prize competition, missing words competition, picture prize competition, number prize competition, or any other competition, for which the solution is prepared beforehand by the promoters of the competition or for which the solution is determined by lot;

(b) 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; and

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

but does not include a prize competition contained in a newspaper or periodical printed and published outside the Province of Bombay."

The 1948 Act Section 2(1)(d), as originally enacted, substantially reproduced the definition of "prize competition" as given in Section 2(2) of the 1939 Act. Section 2(1)(d) of the 1948 Act, as originally enacted, ran as follows:

"2. (1)(d) 'Prize Competition' includes—

(i) cross-word prize competition, missing words prize competition, picture prize competition, number prize competition, or any other competition for which the solution is prepared beforehand by the promoters of the competition or for which the solution is determined by lot;

(ii) 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; and

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

but does not include a prize competition contained in a newspaper printed and published outside the Province of Bombay;"

The collocation of words in the first category of the definitions in both the 1939 Act and the 1948 Act as originally enacted made it quite clear that the qualifying clause "for which the solution is prepared beforehand by the promoters of the competition or for which the solution is determined by lot" applied equally to each of the five kinds of prize competitions included in that category and set out one after another in a continuous sentence. It should also be noted that the qualifying clause consisted of two parts separated from each other by the disjunctive word "or". Both parts of the qualifying clause indicated that each of the five kinds of prize competitions which they qualified were of a gambling nature. Thus a prize competition for which a solution was prepared before hand was clearly a gambling prize competition, for the competitors were only invited to guess what the solution prepared beforehand by the promoters might be, or in other words, as Lord Hewart, C.J., observed in Coles v. Odhams Press, Ltd. [LR (1936) 1 KB 416] , "the competitors are invited to pay certain number of pence to have the opportunity of taking blind shots at a hidden target". Prize competitions to which the

second part of the qualifying clause applied, that is to say, the prize competitions for which the solution was determined by lot, was necessarily a gambling adventure. On the language used in the definition section of the 1939 Act as well as in the 1948 Act, as originally enacted, there could be no doubt that each of the five kinds of prize competitions included in the first category to each of which the qualifying clause applied was of a gambling nature. Nor has it been questioned that the third category, which comprised "any other competition success in which does not depend to a substantial degree upon the exercise of skill", constituted a gambling competition. At one time the notion was that in order to be branded as gambling the competition must be one success in which depended entirely on chance. If even a scintilla of skill was required for success the competition could not be regarded as of a gambling nature. The court of appeal in the judgment under appeal has shown how opinions have changed since the earlier decisions were given and it is not necessary for us to discuss the matter again. It will suffice to say that we agree with the court of appeal that a competition in order to avoid the stigma of gambling must depend to a substantial degree upon the exercise of skill. Therefore, a competition success wherein does not depend to a substantial degree upon the exercise of skill is now

recognised to be of a gambling nature. From the above discussion it follows that according to the definition of prize competition given in the 1939 Act as in the 1948 Act as originally enacted, the five kinds of prize competition comprised in the first category and the competition in the third category were all of a gambling nature. In between those two categories of gambling competitions were squeezed in, as the second category, "competitions in which prizes were 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 is not yet generally known". This juxtaposition is important and significant and will hereafter be discussed in greater detail.

18. *As already stated the 1948 Act was amended in 1952 by Bombay Act 30 of 1952. Section 2(1)(d) as amended runs as follows:*

"Prize competition' includes—

(i)(1) cross-word prize competition,

(2) missing word prize competition,

(3) picture prize competition,

(4) number prize competition, or

(5) 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;

(ii) 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; and

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

It will be noticed that the concluding sentence "but does not include a prize competition contained in a newspaper printed and published outside the Province of Bombay" has been deleted. This deletion has very far reaching effect, for it has done away with the exclusion of prize competitions contained in a newspaper printed and published outside the State of Bombay from the scope of the definition. In the next place, it should be noted that the definition of prize competition still comprises three categories as before. The second and the third categories are couched in exactly the same language as were their counterparts in the earlier definitions. It is only in the first category that certain changes are noticeable. The five kinds of prize

competitions that were included in the first category of the old definitions are still there but instead of their being set out one after another in a continuous sentence, they have been set out one below another with a separate number assigned to each of them. The qualifying clause has been amended by inserting the words "or is not" after the word "is" and before the word "prepared" and by adding the words "or chance" after the word "lot". The qualifying clause appears, as before, after the fifth item in the first category. It will be noticed that there is a comma after each of the five items including the fifth item. The mere assigning a separate number to the five items of prize competitions included in the first category does not, in our judgment, affect or alter the meaning, scope and effect of this part of the definition. The numbering of the five items has not dissociated any of them from the qualifying clause. If the qualifying clause were intended to apply only to the fifth item, then there would have been no comma after the fifth item. In our opinion, therefore, the qualifying clause continues to apply to each of the five items as before the amendment. There is grammatically no difficulty in reading the qualifying clause as lending colour to each of those items.

19. *Accepting that the qualifying clause applies to each of the five kinds of prize competitions included*

in the first category, it is urged that the qualifying clause as amended indicates that the Legislature intended to include innocent prize competitions within the definition so as to bring all prize competitions, legitimate or otherwise, within the operation of the regulatory provisions of the Act including the taxing sections. The argument is thus formulated. As a result of the amendment the qualifying clause has been broken up into three parts separated from each other by the disjunctive word "or". The three parts are (1) for which the solution is prepared before hand by the promoters, (2) for which the solution is not prepared beforehand by the promoters and (3) for which the solution is determined by lot or chance. The first and the third parts of the qualifying clause, it is conceded, will, when applied to the preceding five kinds of prize competitions, make each of them gambling adventures; but it is contended that prize competitions to which the second part of the qualifying clause may apply, that is to say prize competitions for which the solution is not prepared beforehand, need not be of a gambling nature at all and at any rate many of them may well be of an innocent type. This argument hangs on the frail peg of unskilful draftsmanship. It has been seen that in the old definitions all the five kinds of prize competitions included in the first category were of a

gambling nature. We find no cogent reason—and none has been suggested—why the Legislature which treated lotteries and prize competitions on the same footing should suddenly enlarge the first category so as to include innocent prize competitions. To hold that the first category of prize competitions include innocent prize competitions will go against the obvious tenor of the impugned Act. The 1939 Act dealt with prize competitions only and the first category in the definition given there comprised only gambling competitions. The 1948 Act clubbed together lotteries and prize competitions and the first category of the prize competitions included in the definition as originally enacted was purely gambling as both parts of the qualifying clause clearly indicated. Section 3 of the Act declared all lotteries and all prize competitions unlawful. There could be no reason for declaring innocent prize competitions unlawful. The regulatory provisions for licensing and taxing apply to all prize competitions. If it were intended to include innocent prize competitions in the first category, one would have expected the Legislature to have made separate provisions for the legitimate prize competitions imposing less rigorous regulations than what had been imposed on illegitimate prize competitions. It will become difficult to apply the same taxing sections to legitimate as well as to

illegitimate competitions. Tax on legitimate competitions may well be a tax under Entry 60 on the trader who carries on the trade of innocent and legitimate competition. It may be and indeed it has been the subject of serious controversy whether an illegitimate competition can be regarded as a trade at all and in one view of the matter the tax may have to be justified as a tax on betting and gambling under Entry 62. Considering the nature, scope and effect of the impugned Act we entertain no doubt whatever that the first category of prize competitions does not include any innocent prize competitions. Such is what we conceive to be the clear intention of the Legislature as expressed in the impugned Act read as a whole and to give effect to this obvious intention as we are bound to do, we have perforce to read the word "or" appearing in the qualifying clause after the word "promoter" and before the word "for" as "and". Well known canons of construction of Statutes permit us to do so. (See Maxwell on the Interpretation of Statutes, 10th Edn., p. 238).

***20.** A similar argument was sought to be raised on a construction of clause (ii) of Section 2(1)(d). As already stated, in between the first and the third categories of prize competitions which, as already seen, are of a gambling nature the definition has*

included a second category of competitions 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. It is said that forecasts of such events as are specified in the section need not necessarily depend on chance, for it may be accurately done by the exercise of knowledge and skill derived from a close study of the statistics of similar events of the past. It may be that expert statisticians may form some idea of the result of an uncertain future event but it is difficult to treat the invitation to the general public to participate in these competitions as an invitation to a game of skill. The ordinary common people who usually join in these competitions can hardly be credited with such abundance of statistical skill as will enable them, by the application of their skill, to attain success. For most, if not all, of them the forecast is nothing better than a shot at a hidden target. Apart from the unlikelihood that the Legislature in enacting a statute tarring both lotteries and prize competitions with the same brush as indicated by Section 3 would squeeze in innocent prize competitions in between two categories of purely gambling varieties of them, all the considerations and difficulties we have adverted to in connection with the construction of the first category and the qualifying clause therein will apply

mutatis mutandis to the interpretation of this second clause.

21. *Reliance is placed on Section 26 of the English Betting and Lotteries Act, 1934 (24 & 25 Geo. 5 c. 58) in aid of the construction of the second category of prize competitions included in the definition given in the impugned Act. The relevant portion of Section 26 of the aforesaid Act runs thus:*

"26. (1) It shall be unlawful to conduct in or through any news paper, 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:"

It will be noticed that this section is not a definition section at all but is a penal section which makes certain competitions mentioned in the two clauses unlawful. Clause (a) of that section which corresponds to our second category is not sandwiched between two categories of gambling

prize competitions. In Elderton v. Totalisator Co. Ltd. [(1945) 2 AER 624] on which the petitioners rely the question was whether the football pool advertised in newspapers by the appellant company came within the wide language of clause (a) of that section which was in Part II of the Act. Whether the appellant company's football pool called for any skill on the part of the "investors" or whether it was of a gambling nature was not directly relevant to the discussion whether it fell within clause (a). The penal provisions of the English Act and the decision of The court of appeal throw no light on the construction of our definition clause. Seeing that prize competitions have been clubbed together with lotteries and dealt with in the same Act and seeing that the second category of the definition of "prize competition" is sandwiched in between the other two categories which are clearly of a gambling nature and in view of the other provisions of the impugned Act and in particular Section 3 and the taxing sections, we are clearly of opinion that the definition of "prize competition" on a proper construction of the language of Section 2(1)(d) in the light of the other provisions of the Act read as a whole comprises only prize competitions which are of the nature of a lottery in the wider sense, that is to say, of the nature of gambling. The court of appeal took the view that although as a matter of construction the

definition did include innocent prize competitions, yet by the application of another principle, namely, that a literal construction will make the law invalid because of its overstepping the limits of Entry 26, which comprises only trade and commerce within the State, the definition should be read as limited only to gambling prize competitions so as to make it a law with respect to betting and gambling under Entry 34. It is not necessary for us in this case to consider whether the principle laid down by Sir Maurice Gwyer, C.J., in the Hindu Women's Right to Property Act case [(1941) FCR 12] can be called in aid to cut down the scope of a section by omitting one of two things when the section on a proper construction includes two things, for we are unable, with great respect, to agree with The court of appeal that on a proper construction the definition covers both gambling and innocent competitions. In our view, the section, on a true construction, covers only gambling prize competitions and the Act is a law with respect to betting and gambling under Entry 34. As, for the foregoing reasons, we have already arrived at the conclusion just stated, it is unnecessary for us to refer to the language used in the third category and to invoke the rule of construction which goes by the name of noscitur a sociis relied on by learned counsel for the appellant.

22. *The next point urged is that although the Act may come under Entry 34, the taxing provisions of Section 12-A cannot be said to impose a tax on betting and gambling under Entry 62 but imposes a tax on trade under Entry 60. Once it is held that the impugned Act is on the topic of betting and gambling under Entry 34, the tax imposed by such a statute, one would think, would be a tax on betting and gambling under Entry 62. The Appeal Court has expressed the view that Section 12-A does not fall within Entry 62, for it does not impose a tax on the gambler but imposes a tax on the petitioners who do not themselves gamble but who only promote the prize competitions. So far as the promoters are concerned, the tax levied from them can only be regarded as tax on the trade of prize competitions carried on by them. This, with respect, is taking a very narrow view of the matter. Entry 62 talks of taxes on betting and gambling and not of taxes on the men who bet or gamble. It is necessary, therefore, to bear in mind the real nature of the tax. The tax imposed by Section 12-A is, in terms, a percentage of the sums specified in the declaration made under Section 15 by the promoter or a lump sum having regard to the circulation and distribution of the newspaper or publication in the State. Under Section 15 the promoter of a prize competition carried on in a newspaper or publication printed and*

published outside the State is to make a declaration in such form and at such period as may be prescribed. Form 'J' prescribed by Rule 11(c) requires the promoter to declare, among other things, the total number of tickets/coupons received for the competitions from the State of Bombay and the total receipts out of the sale of the tickets/coupons from the State of Bombay. The percentage under Section 12-A is to be calculated on the total sums specified in the declaration. It is clear, therefore, that the tax sought to be imposed by the impugned Act is a percentage of the aggregate of the entry fees received from the State of Bombay. On ultimate analysis it is a tax on each entry fee received from each individual competitor who remits it from the State of Bombay. In gigantic prize competitions which the prize competitions run by the petitioners undoubtedly are, it is extremely difficult and indeed well nigh impossible for the State to get at each individual competitor and the provision for collecting the tax from the promoters after the entry fees come into their hands is nothing but a convenient method of collecting the tax. In other words, the taxing authority finds it convenient in the course of administration to collect the duty in respect of the gambling activities represented by each of the entries when the same reaches the hands of the promoters. The tax on gambling is a

well recognised group of indirect taxes as stated by Findlay Shirras in his Science of Public Finance Vol. II p. 680. It is a kind of tax which, in the language of J.S. Mill quoted by Lord Hobhouse in Bank of Toronto v. Lambe [LR (1887) 12 AC 575] is demanded from the promoter in the expectation and intention that he shall indemnify himself at the expense of the gamblers who sent entrance fees to him. That, we think, is the general tendency of the tax according to the common understanding of men. It is not difficult for the promoters to pass on the tax to the gamblers, for they may charge the proportionate percentage on the amount of each entry as the seller of goods charges the sales tax or he may increase the entrance fee from 4 annas to 5 annas 6 pies to cover the tax. If in particular circumstances it is economically undesirable or practically impossible to pass on the tax to the gamblers, that circumstance is not a decisive or even a relevant consideration for ascertaining the true nature of the tax, for it does not affect the general tendency of the tax which remains. If taxation on betting and gambling is to be regarded as a means of controlling betting and gambling activities, then the easiest and surest way of doing so is to get at the promoters who encourage and promote the unsocial activities and who hold the gamblers' money in their hands. To collect the tax

from the promoters is not to tax the promoters but is a convenient way of imposing the tax on betting and gambling and indirectly taxing the gamblers themselves. It is to be noted that the tax here is not on the profits made by the petitioners but it is a percentage of the total sum received by them from the State of Bombay as entrance fees without the deduction of any expense. This circumstance also indicates that it is not a tax on a trade. According to the general understanding of men, as stated by Lord Warrington of Clyffe in Rex v. Caledonian Collieries Ltd. [LR (1928) AC 358] there are marked distinctions between a tax on gross collection and a tax on income which for taxation purposes means gains and profits. Similar considerations may apply to tax on trade. There is yet another cogent reason for holding that the tax imposed by Section 12-A is a tax on betting and gambling. In enacting the statute the Legislature was undoubtedly making a law with respect to betting and gambling under Entry 34 as hereinbefore mentioned. By the amending Act 30 of 1952 the Legislature by deleting the concluding words of the definition of "prize competition", namely, "but does not include etc. etc." extended the operation of the Act to prize competitions carried on in newspapers printed and published outside the State of Bombay. They knew that under Article 276 which reproduced Section 142-A of the Government

> *of India Act, 1935, they could not impose a tax exceeding the sum of Rs 250 of any trade or calling under Entry 60. If the tax can be referable either to Entry 60 or to Entry 62, then in view of the fact that Section 12-A will become at least partially, if not wholly, invalid as a tax on trade or calling under Entry 60 by reason of Article 276(2), the court must, in order to uphold the section, follow the well established principle of construction laid down by the Federal Court of India and hold that the Legislature must have been contemplating to make a law with respect to betting and gambling under Entry 62, for there is no constitutional limit to the quantum of tax which can be imposed by a law made under that Entry. For reasons stated above, we are satisfied that Section 12-A is supportable as a valid piece of legislation under Entry 62.*

In ***RMDC-1,*** it was held by the Apex Court that any game/competition that relies substantially upon exercise of skill cannot be classified as 'gambling'; it was also held that gambling or conducting the business of gambling is extra-commercium and hence not included within the meaning of 'trade, commerce or intercourse' and consequently, not protected by the fundamental right to trade and profession

under Article 19(1)(g) or the freedom of trade, commerce and intercourse under Article 301.

2. The contention of the respondents that in ***RMDC-1***, it was held that category (ii) i.e., *"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"* may not be dependent on chance, but may include competitions, in which the exercise of knowledge and skill is present was rejected by the Apex Court, which that such a competition is a game of chance and is therefore of a gambling nature.

3. The Apex Court did not agree that such a competition was a game of skill and upheld the tax as falling within the ambit of the then Entry 62 of List II i.e., tax on "betting and gambling". The case was not one where it was held that the competition was a game of skill and that staking of money on such a game of skill also amounts to gambling as sought to be canvassed by the Respondent. Actually, the

Apex Court itself in paragraph-19 observed that *"Tax on legitimate competitions* (competitions where success depends preponderantly on skill) *may well be a tax under Entry 60 on the trader who carries on the trade of innocent and legitimate competitions."* Thus, tax on competitions where success depends preponderantly on skill, is not governed under the then Entry 62 which included betting and gambling, but will be a tax under Entry 60 of List II, i.e., as a trade activity.

4. The Respondents also submitted that the above Category (ii) competitions involve forecasting or speculating the outcome of the competition, which is an uncertain event, which was held to be gambling. It is in this light, it was submitted that players playing a game of skill for stakes are forecasting the outcome of the game for the prize and are therefore gambling. Even this contention cannot be accepted since a player who is involved in a game of skill does not forecast victory but plays in the confidence that he will win. He is not betting or gambling on something but is confident of his skills.

5. The game of rummy, as opposed to a Category (ii) competition, is not one where the outcome of an event is being predicted. It is a game where predominantly skill is exercised to control the outcome of the game. The game of Rummy is not one where forecasting or predicting the answer or the winner against stakes is the activity of the player. The game is one, where exercise of substantial skill is the activity of the player and such skill controls the outcome of the game and not chance. When the outcome of a game is dependent substantially or preponderantly on skill, staking on such game does not amount to betting or gambling.

6. It is also relevant to state that in the definition of wagering, the persons so doing should not have any interest in the outcome, which is completely contrary to the concept of game of skill, where the person playing the rummy is clearly interested in winning, which is also a circumstance to rule out the possibility of it being called a wagering contract. The contention that it matters not whether the player or some third

person is staking money is not apposite considering the fact that the person who stakes does so based on the confidence that he has on his skills and not his luck.

7. As rightly contended by the petitioners and intervenors, the contention of the respondents that in ***RMDC-1***, it was held that any game whose result is based on a '*forecast'* is a gambling activity is liable to be rejected. At paragraph 17, the tripartite categorisation of competitions by the Apex Court was in the context of Clauses (i), (ii) and (iii) of the definition of *"prize competition"* as defined under Section 2(1) (d) of the 1948 Act. Such prize competitions were offered through the medium of Newspapers. In the said paragraph-17, it was concluded that the competitions that fall under Category I & III were in the nature of gambling. Notably, paragraph-17 lays down a general principle which is that, *"a competition success wherein does not depend to a substantial degree upon the exercise of skill is now recognised to be of a gambling nature."* In other words, competitions wherein success depends on a substantial degree of the exercise of

skill are not of a gambling nature. Therefore, *de hors* the definition of prize competition, the said legal principle at paragraph - 17 will remain constant and universal in its application. On a plain reading of paragraph-18, it becomes clear that competitions from all 3 categories are not games of skills. The amended definition of prize competition as amended in 1952 is extracted, which retains the tripartite categorisation. Paragraphs 18 and 19 do not lay down any general legal principles but only conclude that Category I prize competitions [under Section 2 (1) (d) (i)] are of a gambling nature.

8. Paragraph - 20 of ***RMDC-1*** deals with Category II which are also not games of skill. Prize Competitions, i.e., competitions described under Section 2 (1) (d) (ii) as *"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 Apex Court holds that it would difficult to treat the invitation to the general public to participate in these competitions as an

"invitation to a game of skill". And that for most of the general public the *"forecast is nothing better than a shot at the hidden target".* The said sentence at paragraph-20 does not lay down any general legal principle that can be applied to the game of rummy played with stakes. The said sentence is a finding *qua* the specific competitions covered under sub-clause (ii)/ Category II competitions offered through the medium of a News Paper, which is wholly distinct from the game of rummy played with stakes between two actual players.

9. In ***RMDC-1,*** the Apex Court noticed that Category (ii) was clubbed in between clauses (i) and (iii) which cover competitions that are of a pure gambling variety offered to the general public via a Newspaper. Therefore, Category II covers competitions which are akin to competitions that fall under Category I and III offered through the medium of a Newspaper. Category (ii) covers those rare category of games whose success requires the forecast of an event or a result, which cannot be made by ordinary persons (given that it may involve several imponderables). Such a forecast may possibly

be made by conducting rigorous forensic or statistical study by persons who have the scientific or the technical or the super specialised knowledge to do so; it is when such games are offered to the general public, the forecast becomes a *"shot at the hidden target"*.

10. The argument of the Respondents that placing of bets on games of skill amounts to forecasting of results on a future event, and consequently amounts to gambling, by placing reliance on ***RMDC-1*** is entirely misplaced. The Apex Court in ***RMDC-1*** has held that sub- clause (b) of the definition of 'prize competitions in Section 2 (1) (d) of the Bombay Lotteries and Prize Competition Control and Tax Act, 1948, should be read to mean as applying only to games that are gambling in nature and cannot take within its sweep innocent prize competitions. Thus, forecasting for the purposes of sub – clause (b) of Section 2 (1) (d) can only mean forecasting by a third party on an event, the outcome of which is not dependant on the skill of the player involved, such as the result of the rolling of a dice. This is an exclusion of games of skill and

cannot be read to mean that all manner of forecasting is gambling.

11. That there is an element of *'chance'* in each game and a *'game of skill'*, may not necessarily be such an activity where "skill" must always prevail; however, it is well settled in law, wherein, an activity the *"exercise of skill"* can control the *'chance'* element involved in the particular activity, such that the better skill would prevail more often than not, such activity qualifies as a game of skill. The game of rummy played with stakes is played between players on the basis of the assessment of their own skill. Therefore, while playing for stakes, the player makes a value judgment on his/her skill. The outcome of the game is determined predominantly by the skill of the players. Therefore, rummy played with stakes same cannot be viewed as a *'forecast'* or a shot at the *"hidden target"*. Thus the said contentions of the respondents based on ***RMDC-1*** is liable to be rejected.

RMDC-2

Pursuant to resolutions passed by the legislatures of several States under Article 252, clause (1) of the Constitution, Parliament enacted Prize Competitions Act, (42 of 1955), hereinafter referred to as "the Act", and by a notification issued on March 31, 1956, the Central Government brought it into force on April 1, 1956. The petitioners before us are engaged in promoting and conducting prize competitions in different States of India, and they have filed the present petitions under Article 32 questioning the validity of some of the provisions of the Act and the rules framed thereunder.

2. *It will be convenient first to refer to the provisions of the Act and of the rules, so far as they are material for the purpose of the present petitions. The object of the legislation is, as stated in the short title and in the preamble, "to provide for the control and regulation of prize competitions". Section 2(d) of the Act defines "prize competition" as meaning "any competition (whether called a cross-word prize competition, a missing-word prize competition, a picture prize competition or by any other name), in which prizes are offered for the solution of any puzzle based upon the building up, arrangement, combination or permutation of letters, words or*

figures". Sections 4 and 5 of the Act are the provisions which are impugued as unconstitutional, and they are as follows:

"4. No person shall promote or conduct any prize competition or competitions in which the total value of the prize or prizes (whether in cash or otherwise) to be offered in any month exceeds one thousand rupees; and in every prize competition, the number of entries shall not exceed two thousand.

5. Subject to the provisions of Section 4, no person shall promote any prize competition or competitions in which the total value of the prize or prizes (whether in cash or otherwise) to be offered in any month does not exceed one thousand rupees unless he has obtained in this behalf a licence granted in accordance with the provisions of this Act and the rules made thereunder."

Then follow provisions as to licensing, maintaining of accounts and penalties for violation thereof. Section 20 confers power on the State Governments to frame rules for carrying out the purpose of the Act. In exercise of the powers conferred by this section, the Central Government has framed rules for Part C States, and they have been, in general, adopted by all the States. Two of these rules, namely, Rules 11 and 12 are impugned by the

petitioners as unconstitutional, and they are as follows:

"11. Entry fee.—(1) Where an entry fee is charged in respect of a prize competition, such fee shall be paid in money only and not in any other manner.

(2) The maximum amount of any entry fee shall not exceed Re 1 where the total value of the prize or prizes to be offered is rupees one thousand but not less than rupees five hundred; and in all other cases the maximum amount of an entry fee shall be at the following rates, namely—

(a) as where the total value of the prize or prizes to be offered is less than rupees five hundred but not less than rupees two hundred and fifty; and

(b) as 4 where the total value of the prize or prizes to be offered is less than rupees two hundred and fifty.

12. Maintenance of Register.—Every licensee shall maintain in respect of each prize competition for which a licence has been granted a register in Form C and shall, for the purpose of ensuring that not more than two thousand entries are received for scrutiny for each such competition, take the following steps, that is to say, shall—

(a) arrange to receive all the entries only at the place of business mentioned in the license;

(b) serially number the entries according to their order of receipt;

(c) post the relevant particulars of such entries in the register in Form C as and when the entries are received and in any case not later than the close of business on each day; and

(d) accept for scrutiny only the first two thousand entries as they appear in the register in Form C and ignore the remaining entries, if any, in cases where no entry fee is charged and refund the entry fee received in respect of the entries in excess of the first two thousand to the respective senders thereof in cases where an entry fee has been charged after deducting the cost (if any) of refund."

4. *These petitions were heard along with Civil Appeal No. 134 of 1956, wherein the validity of the Bombay Lotteries and Prize Competitions Control and Tax Act, 1948, was impugned on grounds some of which are raised in the present petitions. In our judgment in that appeal, we have held that trade and commerce protected by Article 19(1)(g) and Article 301 are only those activities which could be regarded as lawful trading activities, that gambling is*

not trade but res extra commercium, and that it does not fall within the purview of those Articles. Following that decision, we must hold that as regards gambling competitions, the petitioners before us cannot seek the protection of Article 19(1)(g), and that the question whether the restrictions enacted in Sections 4 and 5 and Rules 11 and 12 are reasonable and in the interests of the public within Article 19(6) does not therefore arise for consideration.

***5.** As regards competitions which involve substantial skill however, different considerations arise. They are business activities, the protection of which is guaranteed by Article 19(1)(g), and the question would have to be determined with reference to those competitions whether Sections 4 and 5 and Rules 11 and 12 are reasonable restrictions enacted in public interest. But Mr Seervai has fairly conceded before us that on the materials on record in these proceedings, he could not maintain that the restrictions contained in those provisions are saved by Article 19(6) as being reasonable and in the public interest. The ground being thus cleared, the only questions that survive for our decision are (1) whether, on the definition of "prize competition" in Section 2(d), the Act applies to competitions which involve substantial skill and are not in the nature of*

gambling; and (2) if it does, whether the provisions of Sections 4 and 5 and Rules 11 and 12 which are, ex concessi void, as regards such competitions, can on the principle of severability be enforced against competitions which are in the nature of gambling.

6. *If the question whether the Act applies also to prize competitions in which success depends to a substantial degree on skill is to be answered solely on a literal construction of Section 2 (d), it will be difficult to resist the contention of the petitioners that it does. The definition of "prize competition" in Section 2(d) is wide and unqualified in its terms. There is nothing in the wording of it, which limits it to competitions in which success does not depend to any substantial extent on skill but on chance. It is argued by Mr Palkhivala that the language of the enactment being clear and unambiguous, it is not open to us to read into it a limitation which is not there, by reference to other and extraneous considerations. Now, when a question arises as to the interpretation to be put on an enactment, what the court has to do is to ascertain "the intent of them that make it", and that must of course be gathered from the words actually used in the statute. That, however, does not mean that the decision should rest on a literal interpretation of the words used in disregard of all other materials. "The literal*

construction then", says Maxwell on Interpretation of Statutes, 10th Edn., p. 19, "has, in general, but prima facie preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider, according to Lord Coke : (1) What was the law before the Act was passed; (2) What was the mischief or defect for which the law had not provided; (3) What remedy Parliament has appointed; and (4) The reason of the remedy". The reference here is to Heydon case [(1584) 3 Co. Rep 76 ER 637] . These are principles well settled, and were applied by this Court in Bengal Immunity Company Limited v. State of Bihar [(1955) 2 SCR 603, 633] . To decide the true scope of the present Act, therefore we must have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the legislation and the purposes thereof, the mischief which it intended to suppress and the other provisions of the statute, and construe the language of Section 2(d) in the light of the indications furnished by them.

9. *Having regard to the circumstances under which the resolutions came to be passed, there cannot be any reasonable doubt that the law which the State legislatures moved Parliament to enact under Article*

252(1) was one to control and regulate prize competitions of a gambling character. Competitions in which success depended substantially on skill could not have been in the minds of the legislatures which passed those resolutions. Those competitions had not been the subject of any controversy in court. They had done no harm to the public and had presented no problems to the States, and at no time had there been any legislation directed to regulating them. And if the State legislatures felt that there was any need to regulate even those competitions, they could have themselves effectively done so without resort to the special jurisdiction under Article 252(1). It should further be observed that the language of the resolutions is that it is desirable to control competitions. If it was intended that Parliament should legislate also on competitions involving skill, the word "control" would seem to be not appropriate. While control and regulation would be requisite in the case of gambling, mere regulation would have been sufficient as regards competitions involving skill. The use of the word "control" which is to be found not only in the resolution but also in the short title and the preamble to the Act appears to us to clearly indicate that it was only competitions of the character dealt with in the Bombay judgment, that were within the contemplation of the legislature.

10. *Our attention was invited by Mr Seervai to the statement of objects and reasons in the Bill introducing the enactment. It is therein stated that the proposed legislation falls under Entry 34 of the State List viz. "Betting and gambling". If we could legitimately rely on this, that would be conclusive against the petitioners. But Mr Palkhivala contends, and rightly, that the Parliamentary history of the enactment is not admissible to construe its meaning, and Mr Seervai also disclaims any intention on his part to use the statement of objects and reasons to explain Section 2(d). We must accordingly exclude it from our consideration. But even apart from it, having regard to the history of the legislation, the declared object thereof and the wording of the statute, we are of opinion that the competitions which are sought to be controlled and regulated by the Act are only those competitions in which success does not depend to any substantial degree on skill.*

22. *That being the position in law, it is now necessary to consider whether the impugned provisions are severable in their application to competitions of a gambling character, assuming of course that the definition of "prize competition" in Section 2(d) is wide enough to include also*

competitions involving skill to a substantial degree…….

23. *Applying these principles to the present Act, it will not be questioned that competitions in which success depends to a substantial extent on skill and competitions in which it does not so depend, form two distinct and separate categories. The difference between the two classes of competitions is as clear-cut as that between commercial and wagering contracts. On the facts, there might be difficulty in deciding whether a given competition falls within one category or not; but when its true character is determined, it must fall either under the one or the other. The distinction between the two classes of competitions has long been recognised in the legislative practice of both the United Kingdom and this country, and the courts have, time and again, pointed out the characteristic features which differentiate them. And if we are now to ask ourselves the question, would Parliament have enacted the law in question if it had known that it would fail as regards competitions involving skill, there can be no doubt, having regard to the history of the legislation, as to what our answer would be. Nor does the restriction of the impugned provisions to competitions of a gambling character affect either the texture or the colour of the Act; nor do the*

> *provisions require to be touched and re-written before they could be applied to them. They will squarely apply to them on their own terms and in their true spirit, and form a code complete in themselves with reference to the subject. The conclusion is therefore inescapable that the impugned provisions, assuming that they apply by virtue of the definition in Section 2(d) to all kinds of competitions, are severable in their application to competitions in which success does not depend to any substantial extent on skill.*
>
> ***24.** In the result, both the contentions must be found against the petitioners, and these petitions must be dismissed with costs. There will be only one set of counsel's fee.*

In this case, the petitioners, who were advertising and running prize tournaments in various Indian states, challenged the constitutionality of the Prize Competitions Act (42 of 955), Section 4 and 5, and Rules 11 and 12 framed under Section 20 of the Act. Their argument was that a 'prize competition,' as defined in Section 2(d) of the Act, included not only gambling competitions but also those acts in which success depended to a significant degree on skill, and that the

Sections and Rules infringed on their (the petitioner's) fundamental right to conduct business and therefore, are violative of fundamental right guaranteed to every individual under Article 19(6) of the Constitution. They also contended that the said part of the Act cannot be severed from it, hence the entire Act should be declared as invalid.

2. Whereas, on behalf of the Union of India, it was argued that the definition, when properly understood, meant and comprised only gambling competitions, and that even if that was not the case, the impugned provisions being severable from the Act as contended in their application, were legitimate as far as gambling competitions were concerned.

3. The petitions were tried alongside ***RMDC-1*** and the following issues arose for consideration:

(i) Whether the Act applies to competitions that require substantial skill and are not in the nature of gambling, based on the definition of "prize competition" in Section 2 (d)?

(ii)And If it does, whether the ex concessi invalid provisions of Section 4 and 5 and Rules 11 and 12 relating to

such competitions can be implemented on the principle of severability against competitions that are in the character of gambling.

4. The Apex Court reiterated the ratio in ***RMDC-1*** that "trade and commerce," as defined by Article 19(1)(g) and Article 301 of the Constitution are the only activities that can be considered authorised trading activities, and that gambling is *res extra commercium*.

5. The Apex Court held that the distinction between the two types of competitions is as distinct as the distinction between commercial and wagering contracts. On the facts, or at one glance, the Apex Court stated that it may be difficult to discern, whether a given competition belongs in one of the categories or not, but once the true nature of the competition is determined, it will fall into one of the categories.

6. The challenged provisions were presumed to apply to all types of competitions by virtue of the definition in Section 2 (d), and that they were severable in their application to

competitions, in which accomplishment is not dependent on skill to any significant amount.

7. As it was in dispute whether Section 4 and Section 5 and also Rules 11 and 12 of the Act is void in its application to those competitions in which success did not depend on any skill, it was to be decided by the Apex Court with reference to application of doctrine of severability that a statute which is void in part will be treated as void in overall or whether the valid part is capable of enforcement.

8. The Apex Court decided the interpretation of Section 2(d) by referring to the circumstances that led to the making of this legislation. Moreover, the Apex court applied the severability principle as to the application of Section 4 and Section 5 and Rules 11 and 12 of the Act not only to the acts involving skill but also to the acts which did not depend on any skill.

9. The Court herein referred to many previously decided cases and used certain criteria laid down by the

American Courts while determining the doctrine of severability and came to the conclusion that the provisions challenged by the petitioners are severable in their application to competitions, in which, success is not based on skill in any significant way.

10. The Apex Court held that the impugned provisions were indeed valid following the application of the doctrine of severability, and that competitions that had skill as the main deciding factor of the outcome of the competition would not come within the ambit of the Prize Competition Act, 1955. It was also held that a statute that applies to both “betting” or “gambling” as well as a game of skill, will be severed to only apply to activities which amount to “betting” or “gambling”, while rejecting the submission of the State that the Prize Competition Act, 1955, in so far it applies to competitions of skill will be governed under Entry 26 of List II. Therefore, in interpreting the Constitutional entry i.e., Entry 34 of List II, the Apex Court held that the phrase “betting and gambling” featuring in Entry 34 does not include games of skill.

11. It was held that a statute that applies to both “betting” or “gambling” as well as a game of skill, will be severed to only apply to activities which amount to “betting” or “gambling”, while rejecting the submission of the State that the Prize Competition Act, 1955, insofar as it applies to competitions of skill will be governed under Entry 26 of List II i.e., as a trading activity. It is relevant to state that the impugned statute, the Prize Competition Act, 1955, itself contained provisions relating to entry fee payable by the participants, which is a pointer to the fact that the competitions were being played for stakes. Even so, the Apex Court held that if such competitions involve substantial skill, they do not amount to betting and gambling and the statute was severed only to apply to competitions which do not depend substantially on skill i,e., games of chance. It is therefore clear that though the definitions in the legislation were wide enough, the Apex Court still went on to interpret that games of skills are different from games of chances and could be severed for separate treatment.

12. Thus a careful scrutiny of the ratio laid down in ***RMDC-1*** and ***RMDC-2*** is sufficient to indicate that the same completely support the case of the petitioners and intervenors and consequently, the various contentions urged by the respondents in this regard cannot be accepted.

SATYANARAYANA'S CASE

The State of Andhra Pradesh appeals by special leave against the judgment of the High Court of Andhra Pradesh in which, accepting a reference by the Sessions Judge, the conviction of the respondents under Sections 4 and 5 of the Hyderabad Gambling Act (2 of 1305-F) ordered by the 5th City Magistrate at Secunderabad has been set aside.

2. *The short question in this case is whether the premises of a club known as the "Crescent Recreation Club" situated in Secunderabad were being used as a common gambling house and whether the several respondents who were present at the time of the raid by the police could be said to be gambling therein. The facts of the case are as follows:*

3. *On May 4, 1963, the police headed by Circle Inspector Krishnaswami raided the premises of the club. They found Respondents 1-5 playing a card game known as "rummy" for stakes. At the time of the raid, there were some counters on the table as also money and of course the playing-cards with the players. Respondent 6, the Treasurer of the Club, was also present and was holding the stake money which is popularly known as "kitty". The 7th respondent is the Secretary of the Club and he has been joined as an accused, because he was in charge of the management of the club. The kitty which the sixth respondent held was Rs 74.62 n.p. and a further sum of Rs 218 was recovered from the table of the 6th respondent. 66 counters were on the table and some more money was found with the persons who were indulging in the game. The evidence of the Circle Inspector is that he had received credible information that the premises of the club were being used as a common gambling house and he raided it and found evidence, because instruments of gambling were found and the persons present were actually gambling. The Magistrate convicted all the seven respondents and sentenced them to various fines, with imprisonment in default. The respondents then filed an application for revision before the Sessions Judge, Secunderabad who made a reference to the High*

Court under Section 438 of the Code of Criminal Procedure, recommending the quashing of the conviction and the setting aside of the sentences. This recommendation was accepted by the learned Single Judge in the High Court and the present appeal is brought against his judgment by special leave granted by this Court.

4. *The Hyderabad Act follows in outline the provisions of the Public Gambling Act, 1867 in force in India. Section 3 of the Act defines a "common gambling house". The translation of the Urdu text placed before us was found to be inaccurate but we have compared the Urdu definition with the definition of "common gaming house" in the Public Gambling Act, and we are of opinion that represents a truer translation than the one included in the official publication. We accordingly quote the definition from the Indian Act, adding thereto the explanation which is not to be found in the Indian Act. "Common gambling-house" according to the definition means:*

"any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure; room or place, whether by way of

charge for the use of the instruments of gaming, or of the house enclosure, room or place, or otherwise howsoever.

Explanation.— The word 'house' includes a tent and all enclosed space".

The contention in regard to this definition is that the evidence clearly disclosed that the club was being used as a common gambling house and therefore the penal provisions of the Act were clearly attracted. We are concerned additionally with several sections from the Gambling Act which need to be seen. Section 4, which follows in outline the corresponding section in the Public Gambling Act, provides for penalty for an owner, occupier or person using common gambling house and includes within the reach of the section persons who have the care or the management of or in any manner assist in conducting, the business of, any such house, enclosure or open space. The members of the club which is a ("Members'Club") would prima facie be liable but as they are not before us, we need not consider the question whether they should also have been arraigned in the case or not. The Secretary and the Treasurer, who were respectively Accused 7 and 6 were so arraigned as it was thought they came within the reach of Section 4

because they were in the care and management of the club itself.

5. *The learned Magistrate who tried the case was of the opinion that the offence was proved, because of the presumption since it was not successfully repelled on behalf of the present respondents. In the order making the reference the learned Sessions Judge made two points : He first referred to Section 14 of the Act which provides that nothing done under the Act shall apply to any game of mere skill wherever played and he was of opinion on the authority of two cases decided by the Madras High Court and one of the Andhra High Court that the game of rummy was a game of skill and therefore the Act did not apply to the case. He also held that there was no profit made by the members of the club from the charge for the use of cards and the furniture and the room in the club by the players and therefore the definition of "common gambling house" did not apply to the case. In accepting the reference, the learned Single Judge in the High Court did not express any opinion upon the question whether the game of rummy can be described as a game of skill. He relied upon the second part of the proposition which the Sessions Judge had suggested as the ground for acquitting the accused namely, that the club was not making a profit but was only charging*

something as a service charge and to this we shall now refer.

8. *In our opinion the points made by Mr Ram Reddy do not prove this club to be a common gambling house. The presumption under Section 7, even if it arises in this case, is successfully repelled by the evidence which has been led, even on the side of the prosecution.*

12. *We are also not satisfied that the protection of Section 14 is not available in this case. The game of rummy is not a game entirely of chance like the "three-card" game mentioned in the Madras case to which we were referred. The "three card" game which goes under different names such as "flush", "brag" etc. is a game of pure chance. Rummy, on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in Rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the cards is not*

according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that Rummy is a game of chance and there is no skill involved in it. Of course, if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of rummy or any other game played for stakes, the offence may be brought home. In this case, these elements are missing and therefore we think that the High Court was right in accepting the reference it did.

13. *The appeal fails and is dismissed.*

Both sides are ad-idem as regards the ratio laid down by the Apex Court in ***Satyanarayana's*** case that Rummy preponderantly was a game of skill and that from this alone, it cannot be said that Rummy is a game of chance and there is no skill involved in it.

2. This decision was heavily relied upon by the Respondents to submit that playing a game of skill (rummy) for stakes also amounts to betting and gambling. Reliance was placed upon paragraph – 12, which reads as under:-

"12. The game of Rummy is not a game entirely of chance like the 'three-card' game mentioned in the Madras case to which we were referred. The 'three card' game which goes under different names such as 'flush', 'brag' etc. is a game of pure chance. Rummy, on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in Rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the I cards is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that Rummy is a game of chance and there is, no skill involved in it. Of course, if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of Rummy or any other game played for stakes, the offence may be brought home. …"

3. The Apex Court observed that if (i) there is evidence of gambling in some other way or (ii) that the owner of the house or the club is making a profit or gain from the game of rummy or any other game played for stakes, the “offence” of operating a “common gaming house” may be attracted. The term “common gaming house” was defined as follows:

> *“any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure; room or place, whether by way of charge for the use of the instruments of gaming, or of the house enclosure, room or place, or otherwise howsoever.*
>
> *Explanation: The word 'house' includes a tent and all enclosed space.”*

4. It is in the context of this definition that the Apex Court observed that when an owner of the house or the club is making a profit or gain from the game of rummy or any other game played for stakes, the offence of operating a “common gaming house” may be attracted. There is no inference,

therefore, to suggest that games of rummy when played for stakes would take it into the realm of gambling and such an inference cannot be accepted.

5. It is true that in ***Satyanarayana's*** case, Rummy was in fact being played for stakes. Even so, the Court held that rummy is a game of skill and outside the purview of betting and gambling. Further, it was held that recovery of small costs such as sitting fees, etc. is not profit in the context of the definition of "common gaming house". Further, the reference to "gambling in some other way" is regarding side betting, where third parties or the club itself may be staking on the outcome of a game being played by players.

6. It is also relevant to note that the Club in question in the said case was a *"Members Club"* and what was held to be possibly illegal was charging a *"heavy charge"* on the members for playing in card room for the purposes of making a profit or gain i.e., 5 points per game and the said scenario cannot be extended to the Petitioner Company's platform.

7. As rightly contended by the petitioners to suggest that paragraph-10 of the said judgment prohibits making of any profit or gain derived from organising a game of skill would run counter to the definition of a *"Common gambling-house"* since to fall within the said definition, an *"instrument of gaming"* must be used for *"profit or gain"*. However, at paragraph - 12 of the said decision, the game of rummy was held to be protected under Section 14 of the Hyderabad Gambling Act, which necessarily implies that the said game is not hit by any of the other provisions of the Act and therefore, any profit or gain derived from playing *'rummy'* would not make the organiser a common gambling-house. If the said judgment is interpreted to mean that no fees can be imposed on players for playing a skill-based game, then effectively even an organiser of a chess competition who charges an entrance fee on the players to participate in the competition would be guilty of running a common gaming house. In addition, paragraph-10 (as interpreted by the respondent) falls

foul with paragraph-5 of ***RMDC-2,*** which permits running a business involving games of skill.

8. Respondents are also not entitled to place reliance upon the latter portion of paragraph -12 which cannot be read in isolation. Paragraph - 3 makes it abundantly clear that the game being played was *"rummy for stakes"*. The opening words of paragraph - 12 make it clear that protection of Section 14 was available *"in this case"*. The only reasonable explanation of the said sentence (which is consistent with the entire decision including the substantive portion of paragraph - 12) is that words *"from the game"* must be construed as *"from the outcome of the game"*. In other words, the said sentence prohibits the owner of the club from betting on a game of rummy played in the club. The said sentence does not prohibit the running of a club, wherein rummy is played with stakes between the players. If ***Satyanarayana's*** case is interpreted to mean that rummy played with stakes is an offence, it would render not only Section 14 but also the opening words of paragraph - 12 as otiose.

9. The Respondents' contention that ***Satyanarayana's*** case is a clear enunciation of law that games of skill played with stakes amounts to gambling and that when the club makes a profit, it amounts to the offence of running a common gaming house is wholly erroneous. The Hon'ble Supreme Court went into the question of profits only because this was the only point considered by the High Court in the impugned order therein, as the High Court did not consider whether rummy was a game of skill or not. The Hon'ble Supreme Court subsequently holds in paragraph -12 that even otherwise, Rummy is a game of skill and that therefore the Hyderabad Gaming Act is question is not attracted. This is the ratio that emerges from ***Satyanarayana's*** case and not what is sought to be contended by the respondents.

10. The last portion of paragraph - 12 in ***Satyanarayana's*** case relied on by the Respondents says that the offence of being a "common gambling house" is attracted when the club itself is concerned with the outcome of the game (or if there is side betting), as recognised by the

Kerala High Court in ***Head Digital's*** case. It is no one's case that the Petitioner herein is interested on the outcome of a game played by players on its platform. Irrespective of who wins, the Petitioners, in terms of its contract with the players, collects a percentage of the amounts staked as its platform fees / commission for providing its services as an intermediary. Thus, the Respondents cannot be permitted to supply words to these observations and say that placing of stakes on a game of skill amounts to gambling. In any event, from a reading of the whole judgment, it is evident that this last line is not the ratio of the judgment at all.

M.J. SIVANI'S CASE

In ***M.J.Sivani's*** case supra, in the context of video games, the Apex Court held as under:

> *" 3. The primary question is whether video games require to be regulated under the respective Mysore Police Act, 1963 and the notifications issued there under and the Madras City Police Act, 1888 and the orders of the Tamil Nadu Government in GOMs No. 166-0 dated 18-1-1993 and the allied.....*

4. The main thrust in these appeals is whether the video games attract the relevant orders and is a game within the definition of 'gaming' defined under the Tamil Nadu Gaming Act, 1930 or the Madras City Police Act or of the Mysore Act etc. The contention of the appellants is that it does not involve collection, soliciting, receiving or distribution of winning of prizes nor does it involve wagering. There is no element of betting or wagering in the business conducted by the appellants while operating video games. The definition of gaming, therefore, does not get attracted to video gaming. The space occupied by the machines used for video gaming is very small. It is neither like a theatre nor a public place. Therefore, it is not a "common gaming house" as defined under the respective Acts. The games conducted in the respective shops of the appellants do not involve any money transaction except collection of non-refundable charges for tokens for playing games. The player is rewarded on winning as many number of tokens as he can obtain by skill and such token he so gains gives him another chance to play. The tokens are not exchangeable for any cash or money. That apart, the games are conducted only for amusement and to pass the time. The essential requirement to bring any game within the definition of gaming as defined under the Act is completely lacking. The customers are entertained purely for amusement. The video games

are, therefore, neither illegal nor unjustified. Therefore, the appellants are not required to obtain any licence from the licensing authority concerned.

9. In State of A.P. v. K. Satyanarayana considering whether Rummy is a game of chance or skill, this Court held that "The game of Rummy is not a game entirely of chance like the 'three- card' game .... The 'three-card' game which goes under different names such as 'flush', 'brag' etc. is a game of pure chance. Rummy on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and discarding cards. ... It is mainly and preponderantly a game of skill. The chance in Rummy is of the same character as the chance in a deal at a game of bridge."

13. The primary questions that emerge are whether video game is a game and whether it is a game of skill or chance and liable to be regulated under the relevant Act, notification or regulations or orders issued there under. The word 'gaming' defined under the Acts is an inclusive definition to bring within its ambit diverse games as held earlier.

14. Some of the video games are operated with two-way or four-way joysticks, push buttons, a volume control with a steering wheel and accelerator, gun-

trigger control or potentiometer etc.....Video gaming, therefore, is associated with stakes or money or money's worth on the result of a game, be it a game of pure chance or of mixed skill and chance.

15. For a commoner or a novice, it is difficult to play video game with skill. Ordinary common people who join the game can hardly be credited with skill for success in the game. The forecast is nothing better than a shot at a hidden target. Whether a particular video game is a game of skill or a game of chance, or mixed chance or skill requires to be determined on the main element, namely, skill or chance. If it is a game of pure chance or mixed chance and skill, it is gaming. Even if the game is for amusement or diversion of a person from his usual occupation for entertainment, it would constitute 'gaming'. The object of the relevant Act, notification or orders made thereunder is to regulate running of the video games and for that licence is required from the licensing authority

16. In Madras cases, the Commissioner prohibited afore-enumerated games as pure games of chance and permitted certain other games as game of skill. That conclusion was based upon consideration of the findings, submitted by a committee of senior police officers arrived at on sample survey. The High Court

accepted the finding by the committee thus "From the file, it is seen that when one enters the video games' parlours, he is able in the first instance, only to see these machines exhibited, which appears to be providing games of entertainment or amusement or games involving skill on the part of the player. Several instances have been given in the survey report. It is seen from the report; that on a closer look, one could perceive electronic machines installed wherein the game or games provided are purely games of chance. As an instance, in one of these games, five closed cards are exhibited on the screen. The player is allowed to press some of the buttons provided in the machine on which the closed cards are reversed and jacks, aces, kings, queens, etc., appear. If the player succeeds in getting two jacks and three aces, he gains certain points and these points are recorded electronically. The player is permitted to repeat the play as a result of which he might also lose the initial points gained by him. Although this game is claimed to be one which depends upon the skill with which the buttons are pressed, in actually operating these buttons one could easily see that there is absolutely no skill at all involved in the game and the chances of a player maintaining the game depends purely upon his luck and not upon his skill. Further, on opening one such machine, it is noticed by the Technical Officer, Control Room, that there is a provision for

making adjustments in such a way that a player can never succeed in winning the points required for a success at the time. The player appears to have absolutely no idea as to how the cards got reversed or rearranged. There can, therefore, be no doubt, that this game is purely a game of chance wholly unrelated to the skill of the player. In respect of this particular game, the minimum amount fixed for a play is Rs. 20."

17. The report further disclosed that one player by name Ramesh lost rupees one lakh in video games who was also examined by the committee. The machines are not freely accessible or easily visible to a casual visitor. At some places, they were installed behind partition and the players are conducted into such places with a view to ensuring that such games are not visible from outside. There is no scope for using one's skill to arrive at a desired result in the games like Royal Casino, Super Continental, Five Line, High Low, Black Jack, Poker Double Up, Skill Ball, Pac Man and Golden Derby. They were classified as games of chance. By allowing such games, the innocent children and the common public would lose hard-earned money. Machines electronically operated are adjusted in such a way that the player always lose the game since no skill is involved. Machines were tampered with, so that

chances of winning by the player was almost an impossibility. The Commissioner, therefore, had prohibited such games of chance while permitting to play the games of skill.

18. The question then emerges whether regulation of video games violates the fundamental right to trade or business or avocation of the appellants guaranteed under Articles 19(1)(g) and

19. The licensing authority, therefore, is conferred with discretion to impose such restrictions by notification or order having statutory force or conditions emanating therefrom as part thereof as are deemed appropriate to the trade or business or avocation by a licence or permit, as the case may be. Unregulated video game operations not only pose a danger to public peace and order and safety; but the public will fall a prey to gaming where they always stand to lose in playing the games of chance. Unless one resorts to gaming regularly, one can hardly be reckoned to possess skill to play the video game. Therefore, when it is a game of pure chance or manipulated by tampering with the machines to make it a game of chance, even acquired skills hardly assist a player to get extra tokens. Therefore, even when it is a game of mixed skill and chance, it would be a

gaming prohibited under the statute except by regulation.

36. It is contended for the appellants from Tamil Nadu that the authorities are refusing to grant licence en bloc and the action, therefore, is arbitrary. It is seen that the Commissioner has banned exhibiting of only those video games specified in the body of the judgment and noted by the High Court and permitted exhibition of games of skill in an appropriate case. If the Commissioner rejects any application on irrelevant grounds, it may be open to the aggrieved party to have its legality impugned in appropriate proceedings.

The Respondents also placed heavy reliance on the case of ***M.J. Sivani*** (supra), to suggest that playing a game of skill for stakes amounts to gambling. In this case, the Apex Court was concerned with the questions as to whether a video game is a game and whether it is a game of skill or chance and liable to be regulated under the Mysore Police Act, 1963 and the notifications issued thereunder and the Madras City Police Act, 1888 and the orders of the Tamil Nadu Government in GOMs No. 166-0 dated 18.1.1993, etc.

2. The paragraphs extracted supra clearly shows that the Apex Court was considering the fact that several persons lose their livelihood in video gaming which on facts could be mixed game of skill and chance and that these activities could be subjected to licensing. This decision does not aid the Respondents' submission that playing a game predominantly of skill for stakes amounts to gambling.

3. It is significant to note that this very contention of the respondents was also urged in ***All India Gaming Federation's*** case and was repelled by the Hon'ble Division Bench of this Court by holding as under:

> *"The vehement contention of Learned Advocate General that gaming includes both a 'game of chance' and a 'game of skill', and sometimes also a combination of both, is not supported by his reliance on M.J SIVANI v. STATE OF KARNATAKA. We are not convinced that M.J. SIVANI recognises a functional difference between actual games and virtual games. This case was decided on the basis of a wider interpretation of the definition of 'gaming' in the context of a legislation which was enacted to regulate the running of video parlours and not*

banning of video games; true it is that the Apex Court treated certain video games as falling within the class of 'games of chance' and not of 'games of skill'. However, such a conclusion was arrived at because of manipulation potential of machines that was demonstrated by the reports of a committee of senior police officers; this report specifically stated about the tampering of video game machines for eliminating the chance of winning. This decision cannot be construed repugnant to Chamarbaugwala jurisprudence as explained in K.R. LAKSHMANAN. We are of a considered view that the games of skill do not metamorphise into games of chance merely because they are played online, ceteris paribus. Thus, SIVANI is not the best vehicle for drawing a distinction between actual games and virtual games. What heavily weighed with the Court in the said decision was the adverse police report. It is pertinent to recall Lord Halsbury's observation in QUINN v. LEATHAM: that a case is only authority for what it actually decides in a given fact matrix and not for a proposition that may seem to flow logically from what is decided. This observation received its imprimatur in STATE OF ORISSA v. SUDHANSU SEKHAR MISRA.

4. The said decision ***All India Gaming Federation's*** case was on online gaming and as set out in our extracts

before included not only rummy but also several kinds of online games such as carom, chess, pool, bridge, cross-word, scrabble and fantasy sports such as cricket, etc., as found in paragraph - 3 of the said judgment and consequently, on this ground also, the contention of the respondents by placing reliance upon ***M.J.Sivani's*** case cannot be accepted.

5. Reliance has been placed on paragraphs - 7 and 8 of ***M.J.Sivani's*** case which contains the dictionary meaning of *'gaming'*. However, the definition makes it clear that gaming is confined to playing a game of chance for stake or wager and nothing more and that gaming is synonymous with gambling. In other words, the said definition nowhere holds that playing a game of skill for stake or wager also amounts to *'gaming'* or *'gambling'*. Though reliance is placed upon paragraph - 14, the true meaning of the said para becomes clear from the nature of games that were in question viz. video games such as Super Continental, High Low, Black Jack, etc. all of which are pure games of chance. These are single mode player games which are played between the user and computer

system and not between two real players and the true meaning of the last line of paragraph - 14 is to be construed in this factual context alone. Notably, the Apex Court does not hold that *"Video Gaming"* is akin to Gambling. In fact, at paragraphs 13 and 18, the Apex Court acknowledges that offering video games is protected under Article 19 (1) (g) and 21 of the Constitution and in other words, implicitly holds that such activities are not *res extra commercium*. In fact, nowhere in the judgment does the Apex Court hold that playing a game *"predominantly of skill"* played with money or money's worth or for stakes amount to *'gaming'* or that such an activity amounts to *'gambling'*. Thus ***M.J.Sivani's*** case cannot be construed to mean that playing a game which is preponderantly of skill played with either money or stakes amounts to gambling and must be seen to have been tempered by the clear enunciation of the law *qua 'gaming'* and *'gambling'* in the later Three Judge Bench judgment in the case of ***K.R.Lakshmanan*** supra**.**

K.R. LAKSHMANAN'S CASE

The Madras Race Club (the Club) is an Association registered as a company with limited liability under the Companies Act, 1956. The Club was formed in the year 1896 by taking over the assets and liabilities of the erstwhile unincorporated club known as Madras Race Club. According to its Memorandum and Articles of Association, the principal object of the Club is to carry on the business of a race-club in the running of horse-races. The Club is one of the five "Turf Authorities of India", the other four being the Royal Calcutta Turf Club, the Royal Western India Turf Club Limited, the Bangalore Turf Club Limited and the Hyderabad Race Club. Race meetings are held in the Club's own racecourse at Madras and at Uthagamandalam (Ooty) for which bets are made inside the racecourse premises. While horse-races are continuing in the rest of the country, the Tamil Nadu Legislature, as far back as 1949, enacted a law by which horse-racing was brought within the definition of 'gaming'. The said law, however, was not enforced till 1975, when it was challenged by the Club by way of a writ petition before the Madras High Court. The writ petition was dismissed by the High Court. These proceedings before us are a

sequel to the chequered history of litigation, between the parties, over a period of two decades.

2. *From the pleadings of the parties and the arguments addressed before us by the learned counsel the following questions arise for our consideration:*

1. What is 'gambling'?

2. What is the meaning of the expression "mere skill" in terms of Section 49-A of the Madras City Police Act, 1888 (the Police Act) and Section 11 of the Madras Gaming Act, 1930 (the Gaming Act)?

3. Whether the running of horse-races by the Club is a game of 'chance' or a game of "mere skill"?

4. Whether 'wagering' or 'betting' on horse-races is 'gaming' as defined by the Police Act and the Gaming Act?

5. Whether the horse-racing — even if it is a game of "mere skill" — is still prohibited under Section 49-A of the Police Act and Section 4 of the Gaming Act?

6. Whether the Madras Race Club (Acquisition and Transfer of Undertaking) Act, 1986 (the 1986 Act) gives effect to the policy under Article 39(b) and (c)

of the Constitution of India (the Constitution) and as such is protected under Article 31-C of the Constitution. If not, whether the 1986 Act is liable to be struck down as violative of Articles 14 and 19(1)(g) of the Constitution.

3.*The New Encyclopaedia Britannica defines gambling as "the betting or staking of something of value, with consciousness of risk and hope of gain on the outcome of a game, a contest, or an uncertain event the result of which may be determined by chance or accident or have an unexpected result by reason of the better's miscalculations". According to Black's Law Dictionary (6th Edn.) "Gambling involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of consideration, an element of chance and a reward". Gambling in a nutshell is payment of a price for a chance to win a prize. Games may be of chance or of skill or of skill and chance combined. A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards, are all modes of chance. In these games the result is wholly uncertain and doubtful. No human mind knows or can know what it will be until the dice is thrown, the wheel stops its revolution or the dealer has dealt with the cards. A*

game of skill, on the other hand — although the element of chance necessarily cannot be entirely eliminated — is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player. Golf, chess and even rummy are considered to be games of skill. The courts have reasoned that there are few games, if any, which consist purely of chance or skill, and as such a game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance. It is the dominant element — 'skill' or 'chance' — which determines the character of the game.

4. *The Public Gambling Act, 1867 provided punishment for public gambling and for keeping of "common gaming-house". The Act did not bring within its scope the betting on horse-races. The Bengal Public Gaming Act, 1867 provided punishment for public gambling and the keeping of common gaming-house. Gaming was defined in the Bengal Act to include wagering or betting except wagering or betting on horse-races. The next legislation was the Bombay Prevention of Gambling Act, 1887 which defines 'gaming' in similar terms as the Bengal Act.*

5. *Before we deal with the Madras legislations on the subject, it would be useful to refer to the judgments of this Court wherein the question whether trade or business which is of 'gambling' nature can be a fundamental right within the meaning of Article 19(1)(g), of the Constitution.*

6. *This Court in State of Bombay v. R.M.D. Chamarbaugwala [AIR 1957 SC 699 : 1957 SCR 874 : 59 Bom LR 945] speaking through S.R. Das, C.J. observed as under:*

"(38) From ancient times seers and law-givers of India looked upon gambling as a sinful and pernicious vice and deprecated its practice. Hymn XXXIV of the Rig Veda proclaims the demerit of gambling. Verses 7, 10 and 13:

'7. Dice verily are armed with goads and driving hooks, deceiving and tormenting, causing grievous woe. They give frail gifts and then destroy the man who wins, thickly anointed with the player's fairest good.

10. The gambler's wife is left forlorn and wretched: the mother mourns the son who wanders homeless. In constant fear, in debt, and seeking riches, he goes by night unto the home of others.

11. Play not with dice: no, cultivate thy cornland. Enjoy the gain, and deem that wealth sufficient. There are thy cattle, there thy wife. O gambler, so this good Savitar himself hath told me.'

The Mahabharata deprecates gambling by depicting the woeful conditions of the Pandavas who had gambled away their kingdom.

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While Manu condemned gambling outright, Yajnavalkya sought to bring it under State control but he too in Verse 202(2) provided that persons gambling with false dice or other instruments should be branded and punished by the king. Kautilya also advocated State control of gambling and, as a practical person that he was, was not averse to the State earning some revenue therefrom.

Vrihaspati dealing with gambling in Chap. XXVI, Verse 199, recognises that gambling had been totally prohibited by Manu because it destroyed truth, honesty and wealth, while other law-givers permitted it when conducted under the control of the State so as to allow the king a share of every stake. Such was the notion of Hindu law-givers regarding the vice of gambling. Hamilton in his Hedaya Vol. IV,

Book XLIV, includes gambling as a kiraheeat or abomination."

7. *The learned Chief Justice then referred to various statutes in India prohibiting public gambling and also referred to case-law on the subject in other countries. He quoted the following observations of McTiernan, J. of the Australian High Court in King v. Connara [(1939) 61 CLR 596] :*

"Some trades are more adventurous or speculative than others, but trade or commerce as a branch of human activity belongs to an order entirely different from gaming or gambling. Whether a particular activity falls within the one or the other order is a matter of social opinion rather than jurisprudence. … It is gambling to buy a ticket or share in a lottery. Such a transaction does not belong to the commercial business of the country. The purchaser stakes money in a scheme for distributing prizes by chance. He is a gamester."

On the question whether gambling is protected either by Article 19(1)(g) or Article 301 of the Constitution, this Court held as under:

"(42) It will be abundantly clear from the foregoing observations that the activities which have been condemned in this country from ancient times

appear to have been equally discouraged and looked upon with disfavour in England, Scotland, the United States of America and in Australia in the cases referred to above.

We find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard-earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution-makers to be raised to the status of trade, commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Article 19(1)(g).

We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Article 301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word 'trade', 'business' or 'intercourse'.

We are, however, clearly of opinion that whatever else may or may not be regarded as falling within

the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Articles 19(1)(g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Article 19(1)(g) or Article 301 of our Constitution."

8. *On the crucial question whether the games which depend to a substantial degree upon the exercise of skill come within the stigma of 'gambling', S.R. Das, Chief Justice, in Chamarbaugwala case [AIR 1957 SC 699 : 1957 SCR 874 : 59 Bom LR 945] held as under:*

"Thus a prize competition for which a solution was prepared beforehand was clearly a gambling prize competition, for the competitors were only invited to guess what the solution prepared beforehand by the promoters might be, or in other words, as Lord Hewart, C.J., observed in Coles v. Odhams Press Ltd. [(1936) 1 KB 416 : 1935 All ER Rep 598] , 'the competitors are invited to pay certain number of pence to have the opportunity of taking blind shots at a hidden target'.

Prize competitions to which the second part of the qualifying clause applied, that is to say, the prize competitions for which the solution was determined by lot, was necessarily a gambling adventure.

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Nor has it been questioned that the third category, which comprised 'any other competition success in which does not depend to a substantial degree upon the exercise of skill', constituted a gambling competition. At one time the notion was that in order to be branded as gambling the competition must be one success in which depended entirely on chance. If even a scintilla of skill was required for success the competition could not be regarded as of a gambling nature.

The Court of Appeal in the judgment under appeal has shown how opinions have changed since the earlier decisions were given and it is not necessary for us to discuss the matter again. It will suffice to say that we agree with the Court of Appeal that a competition in order to avoid the stigma of gambling must depend to a substantial degree upon the exercise of skill. Therefore, a competition success wherein does not depend to a substantial degree upon the exercise of skill is now recognised to be of a gambling nature."

(emphasis added)

9. *On the same day when this Court decided Chamarbaugwala case [AIR 1957 SC 699 : 1957 SCR 874 : 59 Bom LR 945] , the same four-Judge Bench presided over by S.R. Das, Chief Justice, delivered the judgment in another case between the same parties titled R.M.D. Chamarbaugwalla v. Union of India [AIR 1957 SC 628 : 1957 SCR 930 : 59 Bom LR 973] . The validity of some of the provisions of the Prize Competitions Act, 1955 (42 of 1955) was challenged before this Court by way of petitions under Article 32 of the Constitution. Venkatarama Ayyar, J. speaking for the Court noticed the contentions of the learned counsel for the parties in the following words:*

"Now, the contention of Mr Palkhiwala, who addressed the main argument in support of the petitions, is that prize competition as defined in Section 2(d) would include not only competitions in which success depends on chance but also those in which it would depend to a substantial degree on skill; … that even if the provisions could be regarded as reasonable restrictions as regards competitions which are in the nature of gambling, they could not be supported as regards competitions wherein success depended to a substantial extent on skill,

and that as the impugned law constituted a single inseverable enactment, it must fail in its entirety in respect of both classes of competitions. Mr Seervai who appeared for the respondent, disputes the correctness of these contentions. He argues that 'prize competition' as defined in Section 2(d) of the Act, properly construed, means and includes only competitions in which success does not depend to any substantial degree on skill and are essentially gambling in their character; that gambling activities are not trade or business within the meaning of that expression in Article 19(1)(g), and that accordingly the petitioners are not entitled to invoke the protection of Article 19(6); and that even if the definition of 'prize competition' in Section 2(d) is wide enough to include competitions in which success depends to a substantial degree on skill and Sections 4 and 5 of the Act and Rules 11 and 12 are to be struck down in respect of such competitions as unreasonable restrictions not protected by Article 19(6), that would not affect the validity of the enactment as regards the competitions which are in the nature of gambling, the Act being severable in its application to such competitions."

The learned Judge thereafter observed as under:

"… we must hold that as regards gambling competitions, the petitioners before us cannot seek the protection of Article 19(1)(g)….

(5) As regards competitions which involve substantial skill however, different considerations arise. They are business activities, the protection of which is guaranteed by Article 19(1)(g)…."

Finally, Venkatarama Ayyar, J. speaking for the Court held as under:

"(23) Applying these principles to the present Act, it will not be questioned that competitions in which success depends to a substantial extent on skill and competitions in which it does not so depend, form two distinct and separate categories. The difference between the two classes of competitions is as clear-cut as that between commercial and wagering contracts. On the facts there might be difficulty in deciding whether a given competition falls within one category or not; but when its true character is determined, it must fall either under the one or the other. The distinction between the two classes of competitions has long been recognised in the legislative practice of both the United Kingdom and this country, and the Courts have, time and again, pointed out the characteristic features which differentiate them. And if we are now to ask

ourselves the question would Parliament have enacted the law in question if it had known that it would fail as regards competitions involving skill, there can be no doubt, having regard to the history of the legislation, as to what our answer would be. … The conclusion is therefore inescapable that the impugned provisions, assuming that they apply by virtue of the definition in Section 2(d) to all kinds of competitions, are severable in their application to competitions in which success does not depend to any substantial extent on skill."

This Court, therefore, in the two Chamarbaugwala cases, has held that gambling is not trade and as such is not protected by Article 19(1)(g) of the Constitution. It has further been authoritatively held that the competitions which involve substantial skill are not gambling activities. Such competitions are business activities, the protection of which is guaranteed by Article 19(1)(g) of the Constitution. It is in this background that we have to examine the question whether horse-racing is a game of chance or a game involving substantial skill.

10. *The Police Act extends to the whole of the city of Madras, as defined in Section 3 of the said Act. Section 3 of the Police Act defines "common*

gaming-house", 'gaming' and "instruments of gaming" in the following words:

" 'Common gaming-house' means any house, room, tent, enclosure, vehicle, vessel or any place whatsoever in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using, or keeping such house, room, tent, enclosure, vehicle, vessel or place, whether by way of charge for the use of instruments of gaming or of the house, room, tent, enclosure, vehicle, vessel or place, or otherwise howsoever; and includes any house, room, tent, enclosure, vehicle, vessel or place opened, kept or used or permitted to be opened, kept or used for the purpose of gaming;

'Gaming'.— 'Gaming' does not include a lottery but includes wagering or betting, except wagering or betting on a horse-race when such wagering or betting takes place—

(i) on the date on which such race is to be run; and

(ii) in a place or places within the race enclosure which the authority controlling such race has with the sanction of the State Government set apart for the purpose.

For the purposes of this definition, wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt of distribution of winnings or prizes, in money or otherwise, in respect of any wager or bet, or any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution.

Instruments of gaming.— 'Instruments of gaming' include any article used or intended to be used as a subject or means of gaming, any document used or intended to be used as a register or records or evidence of any gaming, the proceeds of any gaming, and any winnings or prizes in money or otherwise distributed or intended to be distributed in respect of any gaming."

11. *Section 42 of the Police Act gives power to the Commissioner to grant warrant to enter any place which is used as a common gaming-house and the arrest of persons found therein and to seize all instruments of gaming etc. Section 43 provides that any cards, dyes, gaming-table or cloth, board or other instruments of gaming found in any place entered or searched under Section 42 shall be evidence that such place is used as a common gaming-house. Section 44 states that in order to convict any person of keeping common gaming-*

house, the proof of playing for stakes shall not be necessary. Section 45 provides for penalty for opening, keeping or use of a gaming-house. Section 46 lays down penalty for being found in a common gaming-house for the purpose of gaming. Section 47 permits destruction of the instruments of gaming on conviction and Section 48 relates to indemnification of witnesses. Sections 49 and 49-A (to the extent relevant) of the Police Act are reproduced hereunder:

"49. Nothing in Sections 42 to 48 of this Act shall be held to apply to games of mere skill wherever played.

49-A. (1) Whoever—

(a) being the owner or occupier or having the use of any house, room, tent, enclosure, vehicle, vessel or place, opens, keeps or uses the same for the purpose of gaming—

(i) on a horse-race, or

*(ii)-(vi)****

*(b)-(d)****

shall be punishable with imprisonment for a term which may extend to two years and with fine which

may extend to five thousand rupees, but in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of this Court—

(i) such imprisonment shall not be less than three months and such fine shall not be less than five hundred rupees for the first offence;

(ii) such imprisonment shall not be less than six months and such fine shall not be less than seven hundred and fifty rupees for the second offence; and

(iii) such imprisonment shall not be less than one year and such fine shall not be less than one thousand rupees for the third or any subsequent offence."

Section 49-A of the Police Act was substituted for the original section by Section 2(iii) of the Madras City Police and Gaming (Amendment) Act, 1955 (the 1955 Act).

12. *The Gaming Act extends to the whole of the State of Tamil Nadu, with the exception of the city of Madras. Section 3 of the Gaming Act defines, common gaming-house, 'gaming' and instruments of gaming which is identical to the definitions given under the Police Act. Sections 5 to 10 of the Gaming*

Act are identical to Sections 42 to 47 of the Police Act. Section 11 of the Gaming Act is as under:

"11. Nothing in Sections 5 to 10 of this Act shall be held to apply to games of mere skill wherever played."

Section 4 of the Gaming Act to the extent relevant reads:

"4. (1) Whoever—

(a) being the owner or occupier or having the use of any house, room, tent, enclosure, vehicle, vessel or place, opens, keeps or uses the same for the purpose of gaming—

(i) on a horse-race, or

*(ii)-(vi)****

*(b)-(d)***"*

The above-quoted Section 4 of the Gaming Act was substituted by Section 3(1) of the 1955 Act. This section is identical to Section 49-A of the Police Act.

***13.** The expression 'gaming' as originally defined under the Police Act and the Gaming Act (the two Acts) did not include wagering or betting on a horse-race when such wagering or betting took place — (i)*

on the date on which such race was to run; and (ii) in a place or places within the race enclosure which the authority controlling such race had with the sanction of the State Government set apart for the purpose. The definition of gaming in the two Acts was sought to be amended by Sections 2 and 4 of the Madras City Police and Gaming (Amendment) Act, 1949 (the 1949 Act). The said sections are reproduced hereunder:

"2. In the Madras City Police Act, 1888, in Section 3, for the definition of 'Gaming' the following definition shall be substituted, namely:

'Gaming does not include a lottery but includes wagering or betting.

Explanation.— For the purpose of this definition, wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt or distribution of winnings of prizes, in money or otherwise, in respect of any wager or bet, or any act which is intended to aid or facilitate or wagering or betting or such collections, soliciting, receipt or distribution.'

4. In the Madras Gaming Act, 1930, in Section 3, for the definition of 'gaming' the following definition shall be substituted, namely:

'Gaming' does not include a lottery but includes wagering or betting.

Explanation.— For the purposes of this definition wagering or betting shall be deemed to comprise the collection or soliciting of bets, the receipt or distribution of winnings or prizes, in money or otherwise, in respect of any wager or bet, or any act which is intended to aid or facilitate wagering or betting or such collection, soliciting, receipt or distribution."

14. *It is obvious from the 1949 Act that the words "except wagering or betting on a horse-race when such wagering or betting takes place — (i) on the date on which such race is to be run; and (ii) in a place or places within the race enclosure which the authority controlling such race has with the sanction of the State Government set apart for the purpose" have been omitted from the definition of 'gaming' in the two Acts. The State Government, however, did not enforce Sections 2 and 4 of the 1949 Act till 1975. Although no notification enforcing Sections 2 and 4 of the 1949 Act was ever issued by the State Government, but the said provisions have been brought into existence and enforced by an Act of Legislature called the Tamil Nadu Horse Races (Abolition and Wagering or Betting) Act, 1974 (the*

1974 Act). Section 2 of the said Act is in the following terms:

"2. Amendment of Tamil Nadu Act VII of 1949.— In the Madras City Police and Gaming (Amendment) Act, 1949 (Tamil Nadu Act VII of 1949), in Section 1,—

(1) in sub-section (2), the portion commencing with the expression 'and Sections 2 and 4' and ending with the expression 'appoint', shall be omitted;

(2) after sub-section (2), the following sub-section shall be inserted, namely:

'(3) Sections 2 and 4 shall come into force on 31-3-1975, notwithstanding anything contained in any law for the time being in force or in any notification or order issued by the Government'."

15. *The 1974 Act was challenged before the High Court by way of writ petition under Article 226 of the Constitution. The challenge was primarily on two grounds. It was contended before the High Court that the betting on the horse-races not being gambling the State Legislature, under Entry 34 of List II of the Seventh Schedule to the Constitution, had no legislative competence to legislate the 1974 Act. In other words the contention was that Entry 34*

being "betting and gambling" unless both betting and gambling are involved the State Legislature has no legislative competence to make the law. It was also contended that horse-racing being a game of substantial skill, the provisions of the two Acts were not applicable to horse-races. The High Court rejected both the contentions. The High Court held horse-racing to be a game of chance, and as such gambling, on the following reasons:

"The question is whether, having regard to this approach, betting on horse-races is of gambling nature. We are told that it is not, because betters bring to bear on betting considerable knowledge of each horse as to its ancestry or pedigree, history of its performance in the previous races, various other factors and related circumstances and skill based on such knowledge and experience in horse-racing. We, of course, know the plethora of publications, information by means of booklets, pamphlets and even books and the knowledge about horses and horse-races all over the world for centuries and the tremendous enthusiasm exhibited by those race-goers who in deciding to stake on a particular horse, know everything about it which enables them to judge that it may in all probability come out successful in a race. Even so, if any skill is involved in the process, it is not the skill of the horse but of

the one who bets on it and, based on such skill, the better cannot say with any certainty that a horse without fail will in any case come out successful. It may be that the knowledge and experience one would have or skill of one who bets on a horse may with their use eliminate as far as possible, the odd chance of failure and ensure to a degree so to speak, a probability of success; but the most astute better by using his substantial skill may still fail to be successful in his stake. The element of chance is not outweighed by any skill of the better or the horse. The figures we were shown would only show that successful betting on horses sometimes, not necessarily every time, goes with substantial skill of the one who stakes. But we are not persuaded that betting on horses is a game of substantial skill. Horse-racing is a competition in speed which will depend on a variety of changing and uncertain factors which, with the best of knowledge and skill of the better, cannot be reduced to a certainty, though of course by such knowledge and skill the probability of success of a particular horse may be approximated. In our opinion, therefore, betting on horses does involve an element of gambling and we are unable to agree that staking on horses with expert knowledge and skill of the better is not betting involving an element of gambling."

19. *We may now take up the second question for consideration. Section 49 of the Police Act and Section 11 of the Gaming Act specifically provide that the penal provisions of the two Acts shall not apply to the games of "mere skill wherever played". The expression "game of mere skill" has been interpreted by this Court to mean "mainly and preponderantly a game of skill". In State of A.P. v. K. Satyanarayana [(1968) 2 SCR 387 : AIR 1968 SC 825 : 1968 Cri LJ 1009] , the question before this Court was whether the game of rummy was a game of mere skill or a game of chance. The said question was to be answered on the interpretation of Section 14 of the Hyderabad Gambling Act (2 of 1305-F) which was pari materia to Section 49 of the Police Act and Section 11 of the Gaming Act. This Court referred to the proceedings before the courts below in the following words:*

"The learned Magistrate who tried the case was of the opinion that the offence was proved, because of the presumption since it was not successfully repelled on behalf of the present respondents. In the order making the reference the learned Sessions Judge made two points: He first referred to Section 14 of the Act which provides that nothing done under the Act shall apply to any game of mere skill wherever played and he was of opinion on the

authority of two cases decided by the Madras High Court and one of the Andhra High Court that the game of rummy was a game of skill and therefore the Act did not apply to the case."

(emphasis added)

This Court held the game of rummy to be a game of mere skill on the following reasoning:

"We are also not satisfied that the protection of Section 14 is not available in this case. The game of rummy is not a game entirely of chance like the 'three-card' game mentioned in the Madras case [Somasundaram Chettiar, In re, AIR 1948 Mad 264 : 49 Cri LJ 434] to which we were referred. The 'three-card' game which goes under different names such as 'flush', 'brag' etc. is a game of pure chance. Rummy, on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of rummy requires considerable skill in holding and discarding cards. We cannot, therefore, say that the game of rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the

cards is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that rummy is a game of chance and there is no skill involved in it."

20. *The judgments of this Court in the two Chamarbaugwala cases and in the Satyanarayana case [(1968) 2 SCR 387 : AIR 1968 SC 825 : 1968 Cri LJ 1009] clearly lay down that (i) the competitions where success depends on substantial degree of skill are not 'gambling' and (ii) despite there being an element of chance if a game is preponderantly a game of skill it would nevertheless be a game of "mere skill". We, therefore, hold that the expression "mere skill" would mean substantial degree or preponderance of skill.*

21. *The crucial question to be determined is whether a horse-race run on the turf of the Club is a game of 'chance' or a game of "mere skill". The relevant pleadings before the High Court in the writ petition were as under:*

"Racing is really a test of equine speed and stamina. The horses are trained to run and their form is constantly watched by experts….

As stated earlier, racing is not a game of chance. Experts on racing throughout the world would bear testimony to the fact, and indeed it has been so recognised, by decisions, that the result of a horse-race on which bets are placed is not based on pure chance. A considerable degree of skill does come into the operation. It starts from the breeding and training of the race-horse on which much talent, time and money are expended by trained persons, jockeys have also to be specially trained and equipped. The horses themselves are not necessarily consistent in fitness, which is the reason why horses are exercised openly and watched carefully by representatives of the Press and their observations widely published. Thus, the inherent capacity of the animal, the capability of the jockey, the form and fitness of the horse, the weights carried and the distance of the race at the time of the race are all objective facts capable of assessment by race-goers. Thus the prediction of the result of the race is not like drawing 3 aces in a game of poker. Rather, it is the result of much knowledge, study and observation.... Horse-racing has been universally recognised as a sport. Horsemanship involves considerable skill, technique and knowledge and jockeys have to be specially trained over a period of years. Whether a particular horse wins at the race or not, is not dependent on

mere chance or accident but is determined by numerous factors, such as the pedigree of the animal, the training given to it as well as the rider, its current form, the nature of the race etc. Horse-racing has been held judicially to be a game of skill unlike pure games of chance like roulette or a lottery."

The above-quoted averments have not been specifically denied in the counter-affidavit filed before the High Court.

22.*The New Encyclopaedia Britannica, 15th Edn., Vol. 5, at page 105, while defining the expression 'gambling' refers to horse-racing as under:*

"Betting on horse-racing or athletic contests involves the assessment of a contestant's physical capacity and the use of other evaluative skills."

23. *Vol. 6 of the Encyclopaedia at p. 68 onwards deals with the subject of horse-racing. Thoroughbred horses with pedigree are selected and trained for races. Horse-racing is a systematic sport where a participant is supposed to have full knowledge about the horse, jockey, trainer, owner, turf and the composition of the race. It would be useful to quote an extract from the Encyclopaedia:*

"Horse-racing, sport of running horses at speed, mainly, thoroughbreds with a rider astride or Standardbreds with the horse pulling a conveyance with a driver. These two kinds of racing are called racing on the flat and harness-racing. Some races on the flat involve jumping….

Knowledge of the first horse-race is probably lost in prehistory. Both four-hitch chariot and mounted (bareback) races were held in the Olympic Games of 700-40 BC. Other history of organized racing is not very firmly established. Presumably, organized racing began in such countries as China, Persia, Arabia, and other countries of the Middle East and of North Africa, where horsemanship early became highly developed. Thence came too the Arabian, Barb and Turk horses that contributed to the earliest European racing. Such horses became familiar to Europeans during the Crusades (11th to 13th centuries) from which they brought those horses back….

Eligibility rules were developed based on the age, sex, birthplace, and previous performance of horses and the qualifications of riders. Races were created in which owners were the riders (gentlemen riders); in which the field was restricted geographically to a township or country; and in which only horses that

had not won more than a certain amount were entered….

All horse-racing on the flat except quarter-horse racing involves thoroughbred (q.v.) horses. Thoroughbreds evolved from a mixture of Arab, Turk and Barb horses with native English stock. Private stud books existed from the early 17th century, but they were not invariably reliable. In 1791 Weatherby published An Introduction to a General Stud Book, the pedigrees being based on earlier racing calendars and sales papers. After a few years of revision, it was updated annually. All thoroughbreds are said to descend from three 'Oriental' stallions (the Darley Arabian, the Godolphin Barb, and the Byerly Turk, all brought to Great Britain, 1690-1730) and from 43 'royal' mares (those imported by Charles II). The predominance of English racing and hence of the General Stud Book from 1791 provided a standard….

A race-horse achieves peak ability at age five, but the classic age of three years and the escalating size of purses, breeding fees, and sale prices made for fewer races with horses beyond the age of four….

Over the centuries the guiding principle for breeding thoroughbreds has been, as expressed by an old

cliché: breed the best to the best and hope for the best. Performance of progeny is the most reliable guide to what is best for breeding purposes, of course but in the case of horses untried at stud, their own racing ability, pedigree, and physical conformation are the only available yardsticks. Emphasis is on racing ability, especially in evaluating potential stallions."

24. *Horse-racing is an organized institution. Apart from a sport, it has become a huge public entertainment business. According to The New Encyclopaedia Britannica the occasion of certain races are recorded as public holidays. Derby day at Epsom where the public is admitted on two parts of the grounds at no fee has drawn as many as 5,00,000 spectators. Attendance at horse-races in many countries is the highest or among the highest of all sports. The horses which participate in the races are a class by themselves. They have a history of their own. The breed of the horse is an important factor. The experts select the horses which are to be inducted into the racing profession. The selected horses are given extensive training by professional trainers. Breed, upbringing, training and the past record of the race-horses are prominently published and circulated for the benefit of prospective bettors. Jockeys are experts in horse-*

riding and are extensively trained in various aspects of horse-racing. They are supposed to know the horse they are riding and the turf on which the horse is to run.

25. *Judicial pronouncements on the subject are primarily of American courts. In People of Monroe [85 ALR 605] , it was held that the pari-mutuel betting on the result of horse-races, did not violate a provision of the State Constitution prohibiting lotteries. The Court observed as under:*

"The winning horse is not determined by chance alone, but the condition, speed, and endurance of the horse, aided by the skill and management of the rider or driver, enter into the result…. In our opinion the pari-mutuel system does not come within the constitutional inhibition as to lotteries…. 'In horse-racing the horses are subject to human guidance, management, and urging to put forth their best efforts to win.' "

26. *The question before the Michigan Supreme Court in Edward J. Rohan v. Detroit Racing Assn. [166 ALR 1246 SW 2d 987] was whether Act No. 199 Pub. Acts 1933, authorising pari-mutuel betting on horse-races violated the constitutional prohibition against lotteries. The Court answered the question in the negative on the following reasoning:*

"In the case of Commonwealth v. Kentucky Jockey Club [238 Ky 739 : 38 SW 2d 987] , a statute permitting pari-mutuel betting on horse-races was held to be constitutional and not in violation of a provision of the State Constitution prohibiting lotteries. See also, Utah State Fair Assn. v. Green [(1926) 68 Utah 251 : 249 P 1016] ; Panas v. Texas Breeders & Racing Assn. Inc. [Tex Civ App 80 SW 2d 1020] ; State v. Thompson [160 Mo 333 : 60 SW 1077 : 54 LRA 950 : 83 Am St Rep 468] ; Engle v. State of Arizona [(1939) 53 Ariz 458 : 90 P 2d 988] ; Stoddart v. Sagar [64 LJ MC 234 : (1895) 2 QB 474 : (1895-9) All ER Rep Ext 2048] ; Caminada v. Hulton [(1891) 60 LJ MC 116 : 64 LT 572] .

Under the above authorities it is clear that pari-mutuel betting on a horse-race is not a lottery. In a lottery the winner is determined by lot or chance, and a participant has no opportunity to exercise his reason, judgment, sagacity or discretion. In a horse-race the winner is not determined by chance alone, as the condition, speed and endurance of the horse and the skill and management of the rider are factors affecting the result of the race. The better has the opportunity to exercise his judgment and discretion in determining the horse on which to bet. The pari-mutuel method or system of betting on a horse-race does not affect or determine the result of

the race. The pari-mutuel machine is merely a convenient mechanical device for recording and tabulating information regarding the number and amount of bets (Utah State Fair Assn. v. Green [(1926) 68 Utah 251 : 249 P 1016]), and from this information the betting odds on the horses entered can be calculated and determined from time to time during the process of betting. The recording and tabulating of bets could be done manually by individuals, but the pari-mutuel machine is a more convenient and faster method. The fact that a better cannot determine the exact amount he may win at the time he places his bet, because the odds may change during the course of betting on a race, does not make the betting a mere game of chance, since the better can exercise his reason, judgment, and discretion in selecting the horse he thinks will win. Horse-racing, like foot racing, boat racing, football, and baseball, is a game of skill and judgment and not a game of chance. Utah State Fair Assn. v. Green [(1926) 68 Utah 251 : 249 P 1016] .

Therefore, we conclude that Act No. 199, Pub. Acts 1933, authorising pari-mutuel betting on horse-races, does not violate the constitutional prohibition against lotteries."

27. *In Harless v. United States [(1843) Morris (Iowa) 169] , the Court while holding that horse-racing was not a game of chance observed as under:*

"The word game does not embrace all uncertain events, nor does the expression 'games of chance' embrace all games. As generally understood, games are of two kinds, games of chance and games of skill. Besides, there are trials of strength, trials of speed, and various other uncertainties which are perhaps no games at all, certainly they are not games of chance. Among this class may be ranked a horse-race. It is as much a game for two persons to strive which can raise the heaviest weight, or live the longest under water, as it is to test the speed of two horses. It is said that a horse race is not only uncertain in its result, but is often dependent upon accident. So is almost every transaction of human life, but this does not render them games of chance. There is a wide difference between chance and accident. The one is the intervention of some unlooked-for circumstance to prevent an expected result, the other is uncalculated effect of mere luck. The shot discharged at random strikes its object by chance; that which is turned aside from its well-directed aim by some unforeseen circumstance misses its mark by accident. In this case, therefore, we reasonably feel disappointed,

but not in the other, for blind uncertainty is the chief element of chance. In fact, pure chance consists in the entire absence of all the means of calculating results; accident in the unusual prevention of an effect naturally resulting from the means employed. That the fleetest horse sometimes stumbles in the racecourse and leaves the victory to its more fortunate antagonist is the result of accident, but the gambler, whose success depends upon the turn of the cards or the throwing of the dice, trusts his fortune to chance. It is said that there are strictly few or no games of chance, but that skill enters as a very material element in most or all of them. This, however, does not prevent them from being games of chance within the meaning of the law. There are many games the result of which depends entirely upon skill. Chance is in nowise resorted to therein. Such games are not prohibited by the statute. But there are other games (in) which, although they call for the exercise of much skill, there is an intermingling of chance. The result depends in a very considerable degree upon sheer hazard. These are the games against which the statute is directed, and horse-racing is not included in that class."

28. *In Engle v. State [(1939) 53 Ariz 458 : 90 P 2d 988] , horse-racing was held to be a game of skill and not of chance on the following reasoning:*

"There is some conflict perhaps in the cases as to whether horse-racing be in itself a game of chance, but we think the decided weight of authority and reason is that it is not. In any game there is a possibility that some oversight or unexpected incident may affect the result, and if these incidents are sufficient to make a game in which it may occur one of chance, there is no such thing as a game of skill.

In Utah State Fair Assn. v. Green [(1926) 68 Utah 251 : 249 P 1016] , a horse-race was held not to be a game of chance within the prohibition of a State Constitution, which provided that the legislature should not authorize any game of chance, lottery, or gift enterprise, since in respect thereto the elements of judgment, learning, experience, and skill predominate over the element of chance."

29. *Russell, L.J. in Earl of Ellesmere v. Wallace [(1929) 2 Ch 1 : 1929 All ER Rep Ext 751] , while dealing with the question whether there was a contract by way of wagering between the jockey club and the horse-owners observed as under:*

"To the unsophisticated racing man (if such there be) I should think that nothing less like a bet can well be imagined. It is payment of entrance money to entitle an owner to compete with other owners for

a prize built up in part by entrance fees, the winning of the prize to be determined not by chance but by the skill and merit of horse and jockey combined….

Let us clear our minds of the betting atmosphere which surrounds all horse-racing, and affirm a few relevant propositions. There is nothing illegal in horse-racing; it is a lawful sport. There is nothing illegal in betting per se. There is all the difference in the world between a club sweepstakes on the result of the Derby and a sweepstakes horse-race as defined in the Rules of Racing. In each no doubt the winner is ascertained by the result of an uncertain event, but in the case of the former the winner is ascertained by chance, i.e. the luck of the draw not the result of the race (for the result is the same whether the draw is made before or after the race); in the case of the latter the winner is ascertained not by chance, but by merit of performance. The former is a lottery; the latter is not."

30. *We have no hesitation in reaching the conclusion that horse-racing is a sport which primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast*

horses, a better trained jockey can touch the winning-post.

31. *In view of the discussion and the authorities referred to by us, we hold that horse-racing is a game where the winning depends substantially and preponderantly on skill.*

32. *Mr Ashok Desai, learned counsel for the State of Tamil Nadu, has contended that the "handicap horse-races" introduce an element of chance and as such horse-racing is not a game of skill. We do not agree. It is no doubt correct that in a handicap race the competitors are given advantages or disadvantages of weight, distance, time etc. in an attempt to equalize their chances of winning, but that is not the classic concept of horse-racing, according to which the best horse should win. The very concept of handicap race goes to show that there is no element of chance in the regular horse-racing. It is a game of skill. Even in a handicap race — despite the assignment of imposts — the skill dominates. In any case an occasional handicap race in a race-club cannot change the natural horse-racing from a game of skill to that of chance.*

33. *The expression 'gaming' in the two Acts has to be interpreted in the light of the law laid down by this Court in the two Chamarbaugwala cases, wherein it*

has been authoritatively held that a competition which substantially depends on skill is not gambling. Gaming is the act or practice of gambling on a game of chance. It is staking on chance where chance is the controlling factor. 'Gaming' in the two Acts would, therefore, mean wagering or betting on games of chance. It would not include games of skill like horse-racing. In any case, Section 49 of the Police Act and Section 11 of the Gaming Act specifically save the games of mere skill from the penal provisions of the two Acts. We, therefore, hold that wagering or betting on horse-racing — a game of skill — does not come within the definition of 'gaming' under the two Acts.

34. *Mr Parasaran has relied on the judgment of the House of Lords in Attorney General v. Luncheon and Sports Club Ltd. [1929 AC 400 : 1929 All ER Rep Ext 780] , and the judgment of the Court of Appeal in Tote Investors Ltd. v. Smoker [(1967) 3 All ER 242 : (1967) 3 WLR 1239 : (1968) 1 QB 509] , in support of the contention that dehors Section 49 of the Police Act and Section 11 of the Gaming Act, there is no 'wagering' or 'betting' by a punter with the Club. According to him, a punter bets or wagers with the totalizator or the bookmaker and not with the Club. It is not necessary for us to go into this question. Even if there is wagering or betting with*

the Club it is on a game of mere skill and as such it would not be 'gaming' under the two Acts.

35. *Next comes question five for consideration. Section 49-A of the Police Act and Section 4 of the Gaming Act were brought into these two Acts by the 1955 Act by substituting the original sections. The provisions of these two sections have been operating since 1955. 'Gaming' as defined in the two Acts, prior to 31-3-1975, did not include wagering or betting on a horse-race when such wagering or betting took place (i) on the date on which such race was to be run; and (ii) in a place or places within the race enclosure which the authority controlling such race had with the sanction of the State Government set apart for the purpose. The position which emerges is that during the period from 1955 till 31-3-1975 horse-racing was not prohibited under the two Acts, despite the fact that Section 49-A of the Police Act and Section 4 of the Gaming Act were also operating. If we accept the contention of the learned counsel for the respondents that Section 49-A of the Police Act and Section 4 of the Gaming Act prohibit the holding of the horse-races then two contradictory provisions had been operating in the two Acts from 1955 till 1975. One set of provisions would have prohibited the horse-races by making it an offence and the other set of provisions would*

have permitted the horse-races. The legislature could have never intended such a situation. The only reasonable interpretation which can be given to the two sets of provisions in the two Acts is that they apply to two different situations. Section 49-A of the Police Act and Section 4 of the Gaming Act do not apply to wagering or betting in the Club premises and on the horse-races conducted within the enclosure of the Club. These sections are applicable to the bucket-shops run in the city streets or bazaars purely for gambling purposes. It would be useful to have a look at the Statement of Objects and Reasons of the 1955 Act, which is as under:

"STATEMENT OF OBJECTS AND REASONS

The Madras City Police Act, 1888, and the Madras Gaming Act, 1930, provide for punishment for opening or keeping or conducting, etc., any common gaming-house and for being found gaming in a common gaming-house. A situation has arisen particularly in the city of Madras where gambling in public streets on the figures in the prices of New York Cotton, bullion, etc., and in the registration number of motor vehicles has become very widespread. In order to put down this evil it is considered necessary that the offence of betting on cotton prices figures and bullion price figures, etc.,

in the open streets should also be made punishable and that the punishment, which is at present very inadequate, should be made more deterrent.

It is also considered desirable to bring the language of the provisions relating to gaming in the City Police Act in line with that in the Gaming Act and also to combine the sections relating to gaming on horse-race and on other forms of gaming which are separate in the respective Acts at present. Opportunity has also been taken to omit certain provisions which prohibit publications relating to horse-races as they have been held ultra vires the State Legislatures by the Madras High Court.

It is proposed to amend these two Acts so as to give effect to the above objects."

36. *It is obvious that the 1955 Act was brought to control gambling in public streets and motor vehicles. It is further clear from the Objects and Reasons that the Act did not intend to stop horse-racing, because even the prohibition on publications relating to horse-racing was sought to be omitted under the Act.*

37. *We may examine the question from another angle. We have held horse-racing to be a game of skill and as such protected under Section 49 of the*

Police Act and Section 11 of the Gaming Act. Horse-racing is not a game of chance and as such is not gambling. That being the situation, horse-racing which is conducted at the racecourse of the Club is not 'gaming' under the two Acts and as such cannot be made penal. We have, therefore, no hesitation in holding that Section 49-A of the Police Act and Section 4 of the Gaming Act are not applicable to wagering or betting on a horse-race when such wagering or betting takes place within the Club premises and on the date on which such race is actually run on the turf of the Club. These sections are applicable to the bucket-shops or any house, houseroom, tent, enclosure, vehicle, etc. which are run in the streets, bazaars or any other place away from the Club.

51. *We allow the writ petitions and the civil appeal. The impugned judgment of the High Court is set aside. We hold and declare that horse-racing is a game of mere skill within the meaning of Section 49 of the Police Act and Section 11 of the Gaming Act. Horse-racing is neither 'gaming' nor 'gambling' as defined and envisaged under the two Acts read with the 1974 Act and the penal provisions of these Acts are not applicable to the horse-racing which is a game of skill. The 1986 Act is ultra vires Article 14 of the Constitution and as such is struck down.*

The Madras Race Club was a registered company which was involved in horse racing. The Tamil Nadu Horse Races (Abolition and Wagering or Betting) Act, 1974 abolished horse racing in Tamil Nadu. Aggrieved by the enactment of this legislation, the petitioners contended that Horse riding is a universally recognised sport. It involves a special skill to win a match which is not based on betting or gambling. It depends upon the pedigree of the horse, the ability of the horse and the rider, nature of the race, its current form etc. Out of the amount collected 75% goes to the winner as prize money, whereas 20% is paid as tax to the State government and only 5% goes to the Club as commission. The petitioners relied upon ***Satyanarayana's*** case, where the Apex Court declared that the game of Rummy required a special skill and cannot be called as gambling or betting. They also placed reliance upon ***RMDC-1*** and ***RMDC-2,*** wherein the Apex Court held that, a business or trade will not be gambling or betting and will be provided protection under Article

19(1)(g), provided it involves “predominantly and substantially skill” without which its performance would be impossible.

2. The State contended that Horse riding is a form of betting which involves a skill neither from the horse nor from the rider but from the better who has to keep a keen check over the horses to determine its capability by observing various matches, which is a pure skill that any better should possess. Further the State legislature reserves its authority under Entry 34 of List II of the Seventh Schedule to the Constitution to enact the 1974 Act.

3. The Apex Court came to the conclusion that for a game/sport not be considered as betting or gambling and to enjoy protection under Article 19(1)(g), it must have a substantial degree of skill which makes it unique. It was held that horse riding is one such sport which involves special skills of the horse as well as the rider and consequently, since horse riding was not betting or gambling declared the impugned Act as unconstitutional, as horse riding which involves substantial skill was rightfully given protection under Article 19(1)(g).

4. In ***Lakshmanan's*** case, the Hon'ble Supreme Court clearly notes that the term "gaming" can only be interpreted in light of the law laid down in the ***RMDC 1*** and ***2*** and ***Satyanarayana***, i.e., competition/game which substantially / preponderantly depends on skill is not gambling. The Hon'ble Supreme Court has held that "*Gaming is the act or practice of gambling on a game of chance. It is staking on chance where chance is the controlling factor.*" Thus, accordingly, the Hon'ble Supreme Court concludes "*Even if there is wagering or betting with the Club it is on a game of mere skill and as such, it would not be 'gaming' under the two Acts*." Hence, the ratio that emerges is that wager or betting on a game of skill does not amount to gambling.

5. The contention of the Respondents that an exception on wagering or betting on horse racing is carved out in specific circumstances, and therefore wagering or betting otherwise is not permitted is specifically answered in the *negative* in paragraph-35 of ***Lakshmanan's*** case, where the Hon'ble Supreme Court has held that these Sections in question are

applicable to bucket-shops in the city streets or bazaars, purely for gambling purposes (in other words, where it cannot be said to be a game of skill). It is also pertinent to note that the Hon'ble Supreme Court, in paragraph - 26 has noticed with approval the judgment of the Michigan Supreme Court in ***Edward J. Rohan vs. Detroit Racing Association, 166 ALR 1246 SW 2d 987,*** where the Michigan Supreme Court has held that pari-mutuel betting on a horse race is not a lottery (or in other words in not gambling).

6. The decision in the ***K.R. Lakshmanan's*** case (supra) was strongly relied upon by the Respondents to suggest that staking of money on horseracing (a game of skill) amounts to betting and gambling. However, it was specifically exempt under the definition of "gaming" under the Police Act and the Gaming Act. It is the Respondents' submission that but for such exemption, staking of money on horseracing would have been covered within the definition of "gaming"; and once it is within the ambit of the term "gaming", it amounts to betting and gambling. In that case, under the Police Act and

the Gaming Act, the term “gaming” excluded wagering or betting on a horse-race when such wagering or betting takes place – (i) on the date on which such race is to be run; and (ii) in a place or places within the race enclosure which the authority controlling such race has with the sanction of the State Government, set apart for the purpose.

7. Section 49 of the Police Act and Section 11 of the Gaming Act specifically provided that the provisions of those Acts do not apply to games of “mere skill wherever played”. The exclusion of horse racing from the definition of “gaming” was omitted by the Tamil Nadu Horce Races (Abolition and Wagering or Betting) Act, 1974. This 1974 Act was challenged before the Madras High Court on the ground that staking of money on horse racing is not gambling and the State legislature has no competence to enact the 1974 Act under Entry 34 of List II which enumerated “betting and gambling”. It was also challenged on the ground that horse racing being a game of substantial skill, the provisions of the Police Act and the Gaming Act even as amended by the 1974 Act are not

applicable to horse racing. Both these contentions were rejected by the Madras High Court. The Supreme Court in this case, was hearing an appeal from the judgment of the Madras High Court. It is in this context that the decision must be understood. The Supreme Court, after referring the ***RMDC-1*** and ***RMDC-2*** as well as ***K. Satyanarayana***'s cases (supra) held that where success depends on substantial degree of skill are not "gambling" and that despite there being an element of chance, if a game is preponderantly a game of skill, it shall be a game of mere skill. The Apex Court held that the expression "mere skill" would mean substantial degree or preponderance of skill.

8. Thereafter, the Apex Court held that horseracing is a game of skill in the following words:

> *"We have no hesitation in reaching the conclusion that the horse-racing is a sport which primarily depends on the special ability acquired by training. It is the speed and stamina of the horse, acquired by training, which matters. Jockeys are experts in the art of riding. Between two equally fast horses, a better trained jockey can touch the winning-post.*

In view of the discussion and the authorities referred to by us, we hold that the horse-racing is a game where the winning depends substantially and preponderantly on skill."

9. The Apex Court further held that gaming is the act or practice of gambling on a game of chance and that gaming is staking on chance, where chance is the controlling factor. Gaming is under the Police Act and the Gaming Act is therefore wagering or betting on games of chance and that it would not include staking on games of skill i.e., horse racing. The term "chance" in this context must be applied with reference to game of chance only. It is not chance in the sense that the outcome is uncertain, and is therefore subject to chance. Merely because the term wagering or betting is used in connection with horse racing does not indicate that staking on horseracing, a game of skill, amounts to betting and gambling. The relevant extract of the decision is as follows:

"The expression `gaming' in the two Acts has to be interpreted in the light of the law laid-down by this

Court in the two Chamarbaugwala cases, wherein it has been authoritatively held that a competition which substantially depends on skill is not gambling. Gaming is the act or practice of gambling on a game of chance. It is staking on chance where chance is the controlling factor. `Gaming' in the two Acts would, therefore, mean wagering or betting on games of chance. It would not include games of skill like horse-racing. In any case, Section 49 of the Police Act and Section 11 of the Gaming Act specifically save the games of mere skill from the penal provisions of the two Acts. We, therefore, hold that wagering or betting on horse-racing - a game of skill - does not come within the definition of `gaming' under the two Acts.

10. The activity of horse-racing is a game of skill and staking on horse-racing has been held to not be gambling. The Respondents, however, seeks to infer a second game i.e., predicting the winner of a horserace for stakes, by suggesting that the decision implies so. As per the Respondents, predicting or forecasting the winner of the horserace for stakes, which as submitted by them is an uncertain event and chance based, amounts to betting, and but for the exemption under Section 49 of the Police Act and

Section 11 of the Gaming Act, activity amounts to gambling. First, the decision does not mention or imply a second game i.e., predicting the winner of a horse race and no such inference can be drawn. Even if such a second game of predicting or forecasting can be inferred, and be regarded as gambling, the game of rummy cannot be equated with it. Rummy is not a game where the outcome is being predicted or forecasted, but is a game being played where success and the outcome of the game is substantially and preponderantly dependent on the exercise of skill of the player.

11. Secondly, this submission fails in view the findings of the Court in paragraph - 33, wherein it was held that as a game of skill, it is exempt from the definition of “gaming” itself, as gaming is the act or practice of gambling on a game of chance and that gaming is staking on chance where chance is the controlling factor. Since horse racing was held to be outside the purview of “gaming”, the exemptions under Section 49 of the Police Act and Section 11 of the Gaming Act are not relevant. In other words, staking on horse racing is not

protected because of the exemptions under Section 49 of the Police Act and Section 11 of the Gaming Act, but it is protected as it does not amount to “gaming” itself in the first place. If it is not gaming under the said Acts, it does not amount to betting and gambling. In any event, if nothing in those Acts can apply to games of skill under Section 49 of the Police Act and Section 11 of the Gaming Act, playing any game of skill for stakes or otherwise, cannot attract the provisions of those Acts. It appears therefore that our analysis stating that in games of skill, the person places a stake based on his confidence and even third parties would do so is also clear. Under these circumstances, it is clear that ***Lakshmanan’s*** case completely supports the petitioners and the contentions of the respondents in this regard cannot be accepted.

Head Digital Works case – Kerala High Court

The High Court of Kerala came to the conclusion that playing for stakes or playing not for stakes can never be a criterion to find out whether a game is a game of skill. Online

rummy played with or without stakes remains to be a ‘game of skill’. It was held that since the game does not come within the meaning of ‘gambling’ or ‘gaming’, providing a platform for playing the game, which is in the nature of the business cannot be curtailed.

Junglee Games case – Madras High Court

In this case, the Madras High Court held that Gambling and gaming have attained secondary meanings in judicial parlance and that the principle of *nomen juris* cannot be shrugged off to understand such words to mean or imply anything other than how they have been judicially interpreted. Irrespective of what meanings are ascribed to these words in dictionaries, gambling is equated with gaming and the activity involves chance to such a predominant extent that the element of skill that may also be involved cannot control the outcome.

2. It was held that a game of skill may not necessarily be such an activity where skill must always prevail. According

to the Court, it would suffice for an activity to be regarded as a game of skill if, ordinarily, the exercise of skill can control the chance element involved in the activity such that the better skilled would prevail often. Every future event, game or like activity depends on an element of chance which can never be eliminated, the Court held that the vagaries of the unknown and unpredictable, and yet possible, must be kept out of consideration to determine whether an activity is a game of skill. It held that if the odds favouring an outcome are guided more by skill than by chance, it would be a game of skill.

3. A person may be gifted in card games, or another's talent may lie in word games. Rationally, such persons should be free to exploit their skills; and only reasonable restrictions that do not completely blunt their chance to show off or make a living out of their skills may be permissible. Both rummy and poker are games of skill as they involve considerable memory, working out of percentages, the ability to follow the cards on the table and constantly adjust to the changing possibilities of the unseen cards. It observed that though

poker may not have been recognised in any previous judgment in India to be a game of skill, but the Law Commission in its 276th Report has accepted poker as a game of skill.

All India Gaming Federation Case – Karnataka High Court(DB)

The Karnataka Government amended the Karnataka Police Act, 1963 vide Karnataka Police(Amendment) Act, 2021(Act No.28 of 2021) and thereby, banned and prohibited the operations of online gaming with stakes in the State. The same having been challenged, the Hon'ble Division Bench of this Court vide Order dated 14.02.2022 declared the subject provisions of the Amendment Act as *ultra vires* the Constitution and struck them down by holding as under:

> *"The tickling tone for this judgment can be set by what Lord Denning had humoured in* ***TOTE INVESTORS LTD. vs. SMOKER***[1]*: "...The defendant has in the past occasionally had a wager on a horse-race. Today she has been taking part in*

[1] (1968) 1 QB 509

another game of chance or skill – the game of litigation..."

All these petitions by the companies & individuals involving substantially similar questions of law & facts seek to lay a challenge to the validity of the Karnataka Act No.28 of 2021 (hereafter 'Amendment Act') whereby the Karnataka Police Act, 1963 (hereafter 'Principal Act') has been amended; the cumulative effect of these amendments, according to them, is the criminalization of playing or facilitating online games.....

***III. GROUNDS OF CHALLENGE BRIEFLY STATED**:*

The challenge to the Amendment Act is structured inter alia on the following grounds:

(i) Lack of legislative competence since the Amendment Act does not fit into Entry 34, List II, Schedule VII of the Constitution of India vide ***CHAMARBAUGWALA-I***[2]***, CHAMARBAUGWALA-II***[3]***, K.SATYANARAYANA vs. STATE OF ANDRHA***

[2]AIR 1957 SC 628
[3] AIR 1957 SC 874

PRADESH[4] *&* ***K.R.LAKSHMANAN vs. STATE OF TAMIL NADU***[5]*.*

(ii) ……..

(iv) Violation of fundamental right to profession/business guaranteed under Article 19(1)(g) read with Article 301 i.e., incompetent & unreasonable restriction vide ***CHINTAMAN RAO vs. STATE OF MADHYA PRADESH***[6]*,* ***MOHD. FAROOQ vs. STATE OF MADHYA PRADESH***[7]*, game of skill not being a res extra commercium (CHAMARBAUGWALA-II, supra) and embargo being de hors Article 19 (6).*

(v) Manifest arbitrariness ***SHAYARA BANO vs. UNION OF INDIA***[8] *since the Amendment Act fails to recognize the blatant normative difference between a 'game of skill' and a 'game of chance', in gross derogation of Chamarbaugwala Jurisprudence of more than six decades.*

(vi) The impugned legislative measure is a result of excessive paternalism & populism. The State is imposing its own notion of morality on the free & rational citizens by clamping a blanket ban on

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[4] AIR 1968 SC 825
[5] (1996) 2 SCC 226
[6] (1950) SCR 759
[7] (1969) 1 SCC 853
[8] (2017) 9 SCC 1

online games of skill. This is constitutionally unsustainable.

IV. RESPONDENTS' OBJECTIONS TO THE PETITIONS:

The respondents oppose the petitions on the grounds as summarized below:

(i)…….

(ii) In the preceding two decades or so, because of digital revolution, there has been a proliferation of online gaming platforms which engage in 'betting & wagering' unbound by time & place unlike traditional betting, and this has proved disastrous to the public interest in general and public order & public health in particular. The menace of cyber games having reached epic proportions, the police in the past three years or so, have registered about 28,000 cases, all over the State. Several persons have committed suicide and millions of families have been ruined. Therefore, the Amendment Act is made criminalizing wagering, betting or risking money on the unknown result of an event, be it a game of chance or a game of skill. The persons owning these premises or online platforms wherein such games are played are also liable to be punished. The State derives legislative power under Article 246 read with Entries 1, 2, 6 & 34 of State List as widely interpreted by the Apex Court.

(iii) Amendment Act introduces clarificatory provisions to the effect that the provisions relating to gaming apply to online gaming & platforms, as well. Apart from making the offences cognizable & non-bailable, it makes the punishment more stringent commensurating with the gravity of the offence. However, if persons merely play a game of chance or a game of skill without risking cash or kind, they do not fall in the net of penal provisions.

1. AS TO WHAT THE IMPUGNED TEXTUAL CHANGES TO THE AMENDMENT ACT DOES TO THE PRINCIPAL ACT:

For ease of understanding, what the Principal Act prior to 2021 Amendment was and what it has become post Amendment, their relevant comparative texts are furnished in the following comparative tabular forms. Whatever has been added to or deleted from the Principal Act is shown in bold italics:

2. ***AS TO WHAT IMPACT THE AMENDMENT HAS ON THE RIGHTS & LIBERTIES OF INDIVIDUALS:***

(a) The Karnataka Police Act, 1963 was enacted by the State Legislature for the regulation of police force, the maintenance of public order and for

the prevention of gambling. It received the assent of the President of India on 18.01.1964 and came to be gazetted on 13.02.1964. This Act came into force with effect from 02.04.1965 as notified. The Act has been amended as many as a dozen times between 1965 and 2021. Except the 2021 amendment, the rest are not put in challenge. The Amendment Act i.e., the Karnataka Act No.28 of 2021 which has brought about a substantial & sweeping change to the Principal Act, received the assent of the Governor of Karnataka on 4.10.2021. It came into force on being published in the official gazette on 5.10.2021. The Amendment Act introduces an expansive definition of 'gaming' under Section 2(7) by including all online games which involve all forms of wagering or betting. The definition of the term 'wagering or betting' itself is widened to engulf even a game of skill involving money or otherwise, however, excluding horse racing subject to certain conditions. Similarly, it expansively alters the definitions of 'common gaming house' under Section 2(3), 'wagering or betting' in Explanation (i) to Section 2(7), 'instruments of gaming' under Section 2(11), 'online gaming' under Section 2(12A), 'place' under Section 2(13). Thus, the amendment encompasses in its fold games of skill too, offered to users through the online

platforms/portals/applications played with monetary stakes or not.

(b) Section 78(1)(vi) & (vii) post amendment proscribe the act of running online gaming platforms offering games of skill to its users. These expanded definitions are the building blocks of penal provisions such as Sections 78, 79, 80, 87, 114 & 128A. The net effect of Amendment Act is: owners of online gaming houses, providers of online gaming facilities and players of online games, all become offenders liable to be jailed & fined in terms of penal provisions. Added, amended Section 128A makes these offences both cognizable & non-bailable. As mentioned in the Comparative Tables above, the definition of 'pure game of skill' under the Principal Act has undergone a substantial change by virtue of amendment. The amended section retains an exclusion for 'pure games of skill' while omitting the exclusion that benefited the players of games of skill with financial stakes, in the pre-amendment regime. The amended definition of 'gaming' prohibits online games of skill when played with monetary stakes, is not disputed by the respondents.

VI. A BRIEF HISTORY OF BETTING AND GAMBLING:

(a) Acclaimed jurist of yester decades late H.M.Seervai in his magnum opus 'Constitutional

Law of India' Volume III, Fourth Edition, Tripathi, at paragraph 22.262 writes: 'If the decisions of the US Supreme Court, Supreme Court of Australia or Canada, or the decision of the Privy Council can be referred to for showing the evils of gambling, there is no reason why references should not be made to Hindu Law and to Hindu religious books, or to Mohammadan Law, to show that gambling had been condemned in India from ancient times'.

(b) Gambling is perhaps as old as mankind. Betting & gambling have always been a part of several civilizations. The Greeks and Romans were among the first to practise gambling. Most of the scriptures, native & foreign shun them. In India from time immemorial, sages had proscribed gambling as a sinful and pernicious vice. Sage Kanvasha Ailusha (Aksha Maujavant) had composed a cautionary poem/hymn in Rig Veda (10.34) which is titled "The Gambler's Lament". It comprises monologue of a repentant gambler who grieves the ruin brought on him because of addiction to the game of dice; this Veda (10.34) has a hymn which nearly translates to: a gambler's wife is left forlorn and wretched; the mother mourns the son who wanders homeless, in constant fear, in debt and seeking money by theft in the dark of night. In raajsooya yaag, of middle Vedic period, a ritual game of dice used to be

played in which the game was rigged so that the king-to-be, would win.

(c) In Indian epic 'Mahaabhaarat', King Yudhistira the eldest brother of Paandavaas gambles away his kingdom, brothers, wife Draupadi and lastly himself to his cousins i.e., Kauravaas and all they as stipulated go to woods. Yaajnavalkya Smriti has a verse which states that son should not pay the paternal debt that was contracted for the purpose of liquor, lust or gambling. Kaatyaayana Smriti states that gambling, if cannot be stopped in the kingdom, should be discouraged by imposing tax. Manusmriti injuncts that gambling & betting, the king shall exclude from his realm since those two vices may cause the destruction of kingdom; a wise man should not practise them even for amusement. Kautilya of arthashaastr fame treats all gamblers as cheats and therefore suggests severe punishment. A great Tamil book by Thiruvalluvar 'Tirukkural' fumes against gambling.

(d) John Dunkley's 'Gambling: A social & moral problems in France', 1958 Edn. discusses about the historicity of gambling in France. In 17th - 18th centuries, French cities were attracting gamblers from all over Europe and the Resolution on Hazardous Games was passed way back in the year 1697 providing general guidelines on how to

gamble and for easing the problems associated with gambling; however, French moralists were opposing the same contending: "Gambling spoils an individual's ability to reason; gambling poisons gamblers' relations with others; gambling makes a gambler neglect his religious and social duties". It is not impertinent to quote a stanza from ***Shakespeare's*** *'Merchant of Venice':*

"If Hercules and Lychas play at dice
Which is the better man, the greater throw May
turn by fortune from the weaker hand;
So is Alcides beaten by his page,
And so may I, blind Fortune leading me,
Miss that which one unworthier may attain,
And die with grieving."

VII. CONSTITUENT ASSEMBLY DEBATES ON 'Betting & gambling':

(a) There was a considerable discussion in the Constituent Assembly on the introduction of Entry 34 in the State List which was Entry 45 in the Draft Constitution. Two prominent members of the Assembly, namely, Mr. Shibban Lal Saksena & Mr. Lakshminarayan Sahu had suggested for the omission of this Entry from the constitutional document, under a wrong impression that if omitted, there would no longer be betting or gambling in the

country. Dr. Ambedkar erased their impression by the following reply:

"I should like to submit to them that if this entry was omitted, there would be absolutely no control of betting and gambling at all, because if Entry 45 was there it may either be used for the purpose of permitting betting and gambling or it may be used for the purposes of prohibiting them. If this entry is not there, the provincial governments would be absolutely helpless in the matter... If this Entry was omitted, the other consequence would be that this subject will be automatically transferred to List I under Entry 91.... If my friends are keen that there should be no betting and gambling, then proper thing would be to introduce an article in the Constitution itself making betting and gambling a crime, not to be tolerated by the State. As it is, it is a preventive thing and the State will have full power to prohibit gambling". ***CAD of 02.09.1949, Volume IX****.*

(b) The first ground vehemently canvassed by petitioners is that the subject amendment could not have been enacted for want of legislative power. Drawing the attention of Court to Entry 34 of State List which employs the term 'Betting and gambling' they contended that this term has acquired a constitutional significance having

been so treated by the Apex Court in two CHAMARBAUGWALLA cases, K.SATYANARAYANA and K.R.LAKSHMANAN, supra. Learned Advocate General appearing for the respondents per contra contended that the legislative competence of the State extends to and beyond Entry 34. He points out Entry 1 (Public order), Entry 2 (Police), Entry 6 (Public health and sanitation) and Entry 26 (Trade and commerce) in the same List. According to respondents, the Amendment Act is a piece of 'ragbag legislation', to borrow the words of Hon'ble M.N.Venkatachalaiah,J. in ***UJAGAR PRINTS vs. UNION OF INDIA****.*

(d) When a word or an expression acquires a special connotation in law, it can be safely assumed that the legislature has used such word or expression in its legal sense as distinguished from its common parlance or the dictionary meaning. These legal concepts employed in a Constitution if construed by the Courts as such, acquire the constitutional spirit. Further when such terms are construed by the Apex Court to mean a particular thing, other Courts cannot venture to interpret the same to mean something else. What we are construing is a constitutional concept, i.e., 'Betting & gambling' and not just two English words. Learned

Advocate General's argument of 'widest amplitude' therefore cannot stretch the contours of a constitutional concept like this to the point of diluting its identity. Gambling, betting and other associated concepts are not of recent origin. They have been there in American and English realm of laws since centuries as mentioned in CHAMARBAUGWALLA-1 itself. We are not required to start afresh every time we want to examine the operation of some terms employed in the Constitution, even if it transpires that these terms do need a revised construction; we have a basis from which we can start our critique. In ***A-G FOR NSW vs. BREWARY EMPLOYEES UNION***[9]*, the High Court of Australia (5 judges) observed "...although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting, to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be...".*

IX. SCOPE OF ENTRY 34 IN STATE LIST; CHAMARBAUGWALA JURISPRUDENCE; GAMES OF SKILL vs. GAMES OF CHANCE:

[9] (1908) 6 CLR 469, 611-12

Learned advocates appearing for the petitioners submitted that the term 'Betting and gambling' employed in Entry 34, List II having been treated as a constitutional concept in CHAMARBAUGWALLA I & II and in the cases that followed, as distinguished from an ordinary legal concept this Court too has to construe it accordingly. They contended that substantially the Amendment Act being pari materia with the statutes of other States, the approach of this Court to the matter needs to be consistent with the relevant decisions of several High Courts in the country. They also notified that some of these have been affirmed by the Apex Court on challenge. Justice Oliver Wendell Holmes in ***TOWNE vs. EISNER****, had said "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used...". The two words namely "Betting" and "gambling" as employed in Entry 34, List II have to be read conjunctively to mean only betting on gambling activities that fall within the legislative competence of the State. To put it in a different way, the word "betting" employed in this Entry takes its colour from the companion word "gambling". Thus, it is betting in relation to gambling as distinguished from betting that does not depend on skill that can be regulated*

by State legislation; the expression "gambling" by its very nature excludes skill. It is chance that pervasively animates it. This interpretation of the said Entry gains support from the six decade old CHAMARBAUGWALA jurisprudence, as discussed below:

(i) In ***CHAMARBAUGWALA-I,*** *supra the Apex Court inter alia was considering whether the Bombay Lotteries and Prize Competition Act, 1948, is a legislation relatable to Entry 34, List II, i.e., "Betting and gambling". To answer this question, the definition of "prize competition" in the said legislation was examined with all its constituents & variants such as "gambling prize competition", "gambling adventure", "gambling nature" & "gambling competition". After undertaking this exercise, the Court observed:*

"...On the language used in the definition section of the 1939 Act as well as in the 1948 Act, as originally enacted, there could be no doubt that each of the five kinds of prize competitions included in the first category to each of which the qualifying clause applied was of a gambling nature. Nor has it been questioned that the third category, which comprised " any other competition success in which does not depend to a substantial degree upon the exercise of skill", constituted a gambling competition. At one

time the notion was that in order to be branded as gambling the competition must be one success in which depended entirely on chance. If even a scintilla of skill was required for success the competition could not be regarded as of a gambling nature. The Court of Appeal in the judgment under appeal has shown how opinions have changed since the earlier decisions were given and it is not necessary for us to discuss the matter again. It will suffice to say that we agree with the Court of Appeal that a competition in order to avoid the stigma of gambling must depend to a substantial degree upon the exercise of skill. Therefore, a competition success wherein does not depend to a substantial degree upon the exercise of skill is now recognized to be of a gambling nature."

What emerges from the above observations is that: gambling is something that ***does not depend*** *to a substantial degree upon the exercise of* ***skill****, and therefore something which* ***does depend****, ought not to be considered as gambling; as a logical conclusion, a game that involves a substantial amount of skill is not a gambling.*

(ii) In ***R.M.D.CHAMARBAUGWALA-II****, supra the Court was treating the question, whether it was constitutionally permissible for section 2(d) of the*

Prize Competition Act, 1955, which defined "Prize Competition" to take within its embrace not only the competitions in which success depended on chance but also those wherein success depended to a substantial extent on the skill of player. What is observed in CHAMARBAUGWALA-I becomes further clear by the following observations in this case:

"... If the question whether the Act applies also to prize competitions in which success depends to a substantial degree on skill is to be answered solely on a literal construction of s.2 (d), it will be difficult to resist the contention of the petitioners that it does. The definition of 'prize competition' in s. 2(d) is wide and unqualified in its terms. There is nothing in the working of it, which limits it to competitions in which success does not depend to any substantial extent on skill but on chance...that competitions in which success depends to a substantial extent on skill and competitions in which it does not so depend, form two distinct and separate categories ... The distinction between the two classes of competitions has long been recognised in the legislative practice of both the United Kingdom and this country, and the Courts have, time and again, pointed out the characteristic features which differentiate them. And if we are now to ask ourselves the question, would Parliament

have enacted the law in question if it had known that it would fail as regards competitions involving skill, there can be no doubt, having regard to the history of the legislation, as to what our answer would be ... The conclusion is therefore inescapable that the impugned provisions, assuming that they apply by virtue of the definition in s. 2(d) to all kinds of competitions, are severable in their applications to competitions in which success does not depend to any substantial extent on skill..."

(iii) In ***K. SATYANARAYANA****, the Apex Court was examining as to whether the rummy was a game of chance or a game of skill. Strangely, CHAMARBAUGWALAS I & II do not find a reference in this decision; however, what the Court observed being consistent with the said decisions and the following observations are profitably reproduced:*

"12. ... The game of rummy is not a game entirely of chance like the "three-card" game mentioned in the Madras case to which we were referred. The "three card game which goes under different names such as "flush", "brag" etc. Is a game of pure chance. Rummy, on the other hand, requires certain amount of skill because the fall of the cards has to be memorised and the building up of Rummy requires considerable skill in holding and

discarding cards. WE cannot, therefore, say that the game of rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in Rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out, there is an element of chance, because the distribution of the card is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be said that Rummy is a game of chance and there is no skill involved in it..."

(iv) In ***K.R. Lakshmanan****, a Three Judge Bench of the Apex Court was examining the vires of amendments to the Madras City Police Act, 1888 and the Madras Gaming Act, 1940 whereby the exception carved out for wagering on horse-racing from the definition of "gaming" was deleted, much like the effect of the Amendment Act herein which inter alia widens the definition of "gaming" to include "wagering on games of skill", that hitherto enjoyed constitutional protection. Having considered CHAMARBAUGWALAS-I & II, K.SATYANARAYANA and some notable decisions of foreign jurisdictions, the Court succinctly stated the difference between a game of chance and a game of skill, as under:*

“3. The new Encyclopedia Britannica defines gambling as "The betting or staking of something of value, with consciousness of risk and hope of gain on the outcome of a game, a contest, or an uncertain event the result of which may be determined by chance or accident or have an unexpected result by reason of the better's miscalculations". According to Black's Law Dictionary (Sixth Edition) "gambling involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of consideration, an element of chance and a reward... Gambling in a nut-shell is payment of a price for a chance to win a prize. Games may be of chance, or of skill or of skill and chance combined. A game of chance is determined entirely or in part by lot or mere luck. The throw of the dice, the turning of the wheel, the shuffling of the cards, are all modes of chance. In these games the result is wholly uncertain and doubtful. No human mind knows or can know what it will be until the dice is thrown, the wheel stops its revolution or the dealer has dealt with the cards. A game of skill, on the other hand - although the element of chance necessarily cannot be entirely eliminated- is one in which success depends principally upon the superior knowledge, training, attention, experience and adroitness of the player.”

"33. The expression `gaming' in the two Acts has to be interpreted in the light of the law laid-down by this Court in the two Chamarbaugwala cases, wherein it has been authoritatively held that a competition which substantially depends on skill is not gambling. Gaming is the act or practice of gambling on a game of chance. It is staking on chance where chance is the controlling factor. `Gaming' in the two Acts would, therefore, mean wagering or betting on games of chance. It would not include games of skill like horse-racing. … We, therefore, hold that wagering or betting on horse-racing - a game of skill - does not come within the definition of `gaming' under the two Acts. 34… Even if there is wagering or betting with the Club it is on a game of mere skill and as such it would not be 'gaming' under the two Acts."

X. AS TO WHAT OTHER HIGH COURTS IN THE COUNTRY VIEWED GAMES OF SKILL AS:

(i) The Punjab & Haryana High Court in ***VARUN GUMBER,*** *supra held that the fantasy games predominantly involve skill and therefore, do not fall within gambling activities and that the said games are protected u/a 19(1)(g) of the*

Constitution. The matter went to the Apex Court in ***SLP No.026642/2017*** *and came to be dismissed on 15.9.2017.*

(ii) A Division Bench of Hon'ble Bombay High Court in ***GURDEEP SINGH SACHAR vs. UNION OF INDIA*** *was considering in PIL jurisdiction as to whether playing of fantasy games by virtual teams amounted to gambling. Having discussed CHAMARBAUGHWALAS, K.R.LAKSHMANAN, etc., answered the question in the negative specifically recording a finding that the success in dream 11 fantasy sports depends upon users exercise of skill based on superior knowledge, judgment and attention, and that the result of the game was not dependent on the winning or losing of the particular team in the real world game on any particular day. The Court said "It is undoubtedly a game of skill and not a game of chance." The matter was carried upward to the Apex Court in* ***SLP (Criminal) No.43346/2019*** *which came to be dismissed on 13.12.2019.*

(iii) The Division Bench of Hon'ble High Court of Madras in ***JUNGLEE GAMES INDIA PRIVATE LIMITED vs. STATE OF T.N,*** *having extensively discussed the two CHAMARBAUGWALAS and K.SATYANARAYANA as further developed in K.R. LAKSHMANAN, has*

invalidated Act 1 of 2021 which had amended the Tamil Nadu Gaming Act, 1930, as being ultra vires the Constitution. The observations at paragraph 125 of the judgment are profitably reproduced below:

" It is in such light that "Betting and gambling" in Entry 34 of the State List has to be seen, where betting cannot be divorced from gambling and treated as an additional field for the State to legislate on, apart from the betting involved in gambling. Since gambling is judicially defined, the betting that the State can legislate on has to be the betting pertaining to gambling; ergo, betting only on games of chance. At any rate, even otherwise, the judgments in the two Chamarbaugwala cases and in K.R.Lakshmanan also instruct that the concept of betting in the Entry cannot cover games of skill..."

(iv) Following the Apex Court Rulings and the above Madras decision, a learned Single Judge of Hon'ble Kerala High Court in ***HEAD DIGITAL WORKS PRIVATE LIMITED vs. STATE OF KERALA*** *quashed a statutory notification that was issued under Section 14A of the Kerala Gaming Act, 1960 which had proscribed online rummy played for stakes. The Court at paragraph 36 of its judgment observed: ".... As such playing for stakes or playing not for stakes can never be a criterion to find out whether a game is a game of skill. ... The game of*

Online Rummy will also have to be held to be a game of skill..."

(v) A Division Bench of Hon'ble Rajasthan High Court in ***RAVINDRA SINGH CHAUDHARY vs. UNION OF INDIA AND OTHERS*** *was considering in PIL jurisdiction as to whether online fantasy sports/games offered on dream 11 platform amounted to gambling/betting. Having inter alia referred to CHAMARBAUGWALA and K.R.LAKSHMANAN, the question was answered in the negative and writ petition was dismissed with costs. The Court also discussed its decision in* ***CHANDRESH SANKHLA vs. STATE OF RAJASTAN*** *which had already considered the said issue. Further, challenge to the said decision in* ***AVINASH MEHROTRA vs. STATE OF RAJASTAN*** *came to be repelled by the Apex Court on 30.7.2021. It is relevant to mention that the Court referred to the decision of New York Supreme Court in* ***WHITE vs. CUOMO,*** *which had taken the view that games of the kind were games of chance. This should be a complete answer to the learned AG who heavily banked upon decision of a US Court in support of his contention.*

Note: *The collective ratio unmistakably emerging from all the decisions mentioned in paragraphs IX & X above put succinctly is: A game*

of chance and a game of skill although are not poles asunder, they are two distinct legal concepts of constitutional significance. The distinction lies in the amount of skill involved in the games. There may not be a game of chance which does not involve a scintilla of skill and similarly, there is no game of skill which does not involve some elements of chance. Whether a game is, a 'game of chance' or a 'game of skill', is to be adjudged by applying the ***Predominance Test:*** *a game involving substantial degree of skill, is not a game of chance, but is only a game of skill and that it does not cease to be one even when played with stakes. As a corollary of this, a game not involving substantial degree of skill, is not a game of skill but is only a game of chance and therefore falls within the scope of Entry 34 in the State List.*

XI. AS TO THE VIEW OF FOREIGN JURISDICTIONS ABOUT GAMES OF SKILL:

(i) In ***UNITED STATES OF AMERICA vs. LAWRENCE DICRISTINA****, the Second US Circuit of Appeal, New York, tossed out the conviction and vacated the indictment of Mr. Lawrence who ran the warehouse wherein the poker game Texas Hold' Em was played……..*

XII. AS TO DIFFERENCE BETWEEN ACTUAL GAMES & VIRTUAL GAMES, AND IF ALL ONLINE GAMES ARE GAMES OF CHANCE:

The vehement contention of Learned Advocate General that gaming includes both a 'game of chance' and a 'game of skill', and sometimes also a combination of both, is not supported by his reliance on ***M.J SIVANI vs. STATE OF KARNATAKA****. We are not convinced that M.J. SIVANI recognises a functional difference between actual games and virtual games. This case was decided on the basis of a wider interpretation of the definition of 'gaming' in the context of a legislation which was enacted to regulate the running of video parlours and not banning of video games; true it is that the Apex Court treated certain video games as falling within the class of 'games of chance' and not of 'games of skill'. However, such a conclusion was arrived at because of manipulation potential of machines that was demonstrated by the reports of a committee of senior police officers; this report specifically stated about the tampering of video game machines for eliminating the chance of winning. This decision cannot be construed repugnant to Chamarbaugwala jurisprudence as explained in K.R.LAKSHMANAN. We are of a considered view that the games of skill do not*

metamorphise into games of chance merely because they are played online, ceteris paribus. Thus, SIVANI is not the best vehicle for drawing a distinction between actual games and virtual games. What heavily weighed with the Court in the said decision was the adverse police report. It is pertinent to recall Lord Halsbury's observation in ***QUINN vs. LEATHAM*** *that a case is only authority for what it actually decides in a given fact matrix and not for a proposition that may seem to flow logically from what is decided. This observation received its imprimatur in* ***STATE OF ORISSA vs. SUDHANSU SEKHAR MISRA****.*

XIX. AS TO ARTICLE 19 (1) (g) AND ENTRY 26 (TRADE AND COMMERCE) IN STATE LIST:

(a) The Apex Court while considering CHAMARBAUGWALA-II, supra opined that "...we find it difficult to accept the contention that those activities which encourage a spirit of reckless propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble

home could possibly have been intended by our Constitution makers to be raised to the status of trade, commerce or intercourse and to be made the subject matter of a fundamental right guaranteed by the Article 19(1)(g) ." It also reproduced the observation of the US Supreme Court in ***UNITED STATES vs. KAHRIGER*** *and* ***LEWIS vs. UNITED STATES****: "...there is no constitutional right to gambling..." In view of the settled position of law, it hardly needs to be stated that gambling, i.e., the 'games of chance' do not enjoy any Constitutional protection since they are mala in se. It is open to the legislature to absolutely prohibit them as is done to the trades in noxious or dangerous goods or trafficking in women. However, games of skill by their very nature stand on a different footing.*

(b) Learned Advocate General appearing for the State contends that: the games of chance being res extra commercium, the games of skill fall within the field of 'Trade & commerce' under Entry 26 of State List. The fundamental right inter alia of trade & business is guaranteed under Article 19(1) (g) and therefore, the same is subject to reasonable restrictions imposed under Article 19(6). A reasonable restriction may also include an absolute embargo. Regard being had to enormous adverse implications of online gaming on the society in

general and the younger generation in particular, the Amendment Act is made criminalizing the cyber games. In support of his contention, he banks upon CHAMARBAUGWALAS, K.R.LAKSHMANAN & M.J. SIVANI, supra. He draws attention of the Court to a spate of suicides in the State, a plethora of criminal cases registered by the police and to the debates in the Legislative Assembly that culminated into the Amendment Act. He contends that the policy of proscribing cyber games is a matter left to the legislative wisdom and the writ Court should loathe to interfere.

(c) Learned advocates appearing for the petitioners do not much dispute that the State has power to regulate the business activities, as provided under Article 19(6). They contend that in view of CHINTAMAN RAO & MOHD. FAROOQ supra, the onus lies on the State to demonstrate the reasonableness of restrictions and that where the restriction amounts to absolute embargo, this onus is onerous vide ***NARENDRA KUMAR vs. UNION OF INDIA****. They draw attention of the Court to the observations of Madras High Court in JUNGLEE GAMES, supra, to the effect that the State has not adopted the 'least intrusive approach test' and therefore, the Amendment Act should be voided.*

They also invoke the doctrine of proportionality for the invalidation of impugned legislative measure.

(d) The online gaming activities played with stake or not do not fall within the ambit of Entry 34 of the State List i.e., 'Betting and gambling', if they predominantly involve skill, judgment or knowledge. They partake the character of business activities and therefore, they have protection under Article 19(1(g). Apparently, the games of skill played online or offline with or without stakes, are susceptible to reasonable restrictions under Article 19(6). The Amendment Act brings in a blanket prohibition with regard to playing games of skill. The version & counter version as to the nature & reasonableness of the restrictions need to be examined in the light of norms laid down by the Apex Court……

(g) The Amendment Act puts games of skill and games of chance on par, when they are poles asunder, in the light of obtaining jurisprudence. The games of skill, in addition to being a type of expression, are entitled to protection under Article 19(1)(g) by virtue of their recognition as business. There are competing interests of State and the individual, which need to be balanced by employing known principles such as doctrine of proportionality, least restrictive test & the like. A line has to be

drawn to mark the boundary between the appropriate field of individual liberty and the State action for the larger good ensuring the least sacrifice from the competing claimants. As already mentioned above, the Amendment Act puts an absolute embargo on the games of skill involving money or stakes. Learned Advocate General contended that the State was not in a position to apply the 'least restrictive test' and that the prohibition being the objective of the Amendment Act, there is no scope for invoking the said test at all. This amounts to throwing the baby with bath water.

(h) In a progressive society like ours, imposing an absolute embargo, by any yardstick appears to be too excessive a restriction. In such cases, a heavy burden rests on the State to justify such an extreme measure, as rightly contended by the petitioners. There is no material placed on record to demonstrate that State whilst enacting such an extreme measure, has considered the feasibility of regulating wagering on games of skill. If the objective is to curb the menace of gambling, the State should prohibit activities which amount to gambling as such and not the games of skill which are distinct, in terms of content and produce. The State action suffers from the vice of paternalism

since there is excessive restriction on the citizens freedom of contract. However, the ground of legislative populism does not avail against the plenary power of legislation. It has long been settled that the motive of the legislature in passing a legislation is beyond the scrutiny of courts vide a Five Judge Bench decision of the Apex Court ***T VENKATA REDDY vs. STATE OF ANDHRA PRADESH****.*

(i) A mere likelihood or propensity of misuse of online gaming platforms, without anything more, does not constitute a legal justification for the banning of commercial activities. Article 300A has been expansively construed to include intangible property like intellectual property which is a product of original thought and skill, i.e., creation of the mind, and essentially used in commerce vide ***K.T.PLANTATIONS vs. STATE OF KARNATAKA****. An activity predominantly involving skill cannot be readily banned at a stroke of legislative pen. In any organized society, knowledge, wisdom, talent & skill are the invaluable tools for wealth generation. They are the unseeming ingredients of economic rights such as rights to profession, property, etc. Our Constitution modelled on the principle of 'limited government' normally frowns upon the measures which stultify & negate these invaluables, whether acquired by Man or gifted by his Maker. On the*

contrary and ideally speaking, State in the larger public interest has to create an atmosphere which nurses them. Story of civilizations is replete with instances of bonsaing of economies in communities that failed to do this. An absolute embargo on the business activities runs the risk of invalidation, unless the State produces relevant material for the ouster of 'least restrictive test'. This test is normally employed as a 'Litmus Test' in judicial review of State action in all civilized jurisdictions .

(k) The Tamil Nadu Gaming and Police Laws (Amendment) Act 2021 that was put in challenge before the Madras High Court and the Amendment Act impugned herein are substantially similar in their text, context, object & effect. They have been structured with the same jurisprudential concepts. What the Hon'ble Madras High Court in JUNGLEE GAMES supra observed being equally applicable to the Amendment Act here is profitably reproduced:

"The amended statute prohibited all forms of games being conducted in cyberspace, irrespective of the game involved being a game of mere skill, if such game is played for a wager, bet, money or other stake. Also, the main features of the Amending Act was to enlarge the inclusive definition of the word 'gaming' where the Section 3-A was introduced in the Act to prohibit wagering or betting

in cyberspace and, the replacement of the substance of Section 11 of the Act that originally exempted games of "mere skill" from the application of the statute and its substitution by including games of mere skill also within the fold of offences under the statute, if such games are played for wager, bet, money or other stake."

XX. AS TO WHETHER CHAMARBAUGWALA JURISPRUDENCE HAS LOST RELEVANCE DUE TO ADVANCEMENT OF SCIENCE & TECHNOLOGY:

(a) Learned Advocate General appearing for the State in his imitable style and vociferously contended that: the provisions of an organic Constitution like ours have to be construed keeping in view contemporary socio-economic developments and the new challenges associated with the same. There has been a paradigm shift in the whole lot of activities in the society owing to advancement of science & technology. New implications and difficulties are cropping up in the society justifying innovative ventures on the part of the State to effectively manage them. A greater leverage needs to be conceded to the State in devising appropriate measures for curbing the menace of online gaming. He passionately

submitted that what was true of things that happened in the bygone decades i.e., when CHAMARBAUGWALAS were decided, need to be examined afresh. In support of this, he cites the decision in SIVANI supra contending that the absolute embargo on videogames has been upheld by the Apex Court, despite CHAMARBAUGWALAS……

(c) However, the submission of learned Advocate General overlooks one important factor: CHARMARBAUGWALAS were decided decades ago is true, but that jurisprudence has been validated time and again by the Apex Court in K.R.LAKSHMANAN (1996) and other subsequent cases. Thus it is not that what was decided in CHARMARBAUGWALAS is being re-visited for the first time now. In the recent past, several High Courts in the country have followed the same after critical examination viz., VARUN GUMBER (P&H-2017), GURDEEP SINGH (BOMBAY-2019), RAVINDRA SINGH (RAJASTAN-2020), JUNGLEE GAMES (MADRAS-2021), HEAD DIGITAL WORKS (KERALA-2021), supra. Some of these cases went to Apex Court and came to be affirmed, the latest being AVINASH MEHROTRA, supra decided on 30.7.2021. All this is already discussed at paragraphs (IX) & (X) above. We need not refer to

SIVANI again since it is already discussed in detail infra. The PIL case does not in any way come to the rescue of the respondents since the prayer therein is related to banning of all online gambling as such. Apparently, case of the petitioners is not one of gambling; their business does not involve any act which is determined by the wheel of fortune.

XXI. AS TO DISCRIMINATION AND VIOLATION OF EQUALITY UNDER ARTICLE 14:

(a) Learned Advocates appearing for the petitioners are justified in complaining that the Amendment Act is violative of Article 14 of the Constitution inasmuch as it does not recognize the long standing jurisprudential difference between a 'game of skill' and a 'game of chance' which animates the scheme of the Principal Act, even post-amendment. Consequently, in the eye of Amendment Act, the persons who play games of chance and the persons who play the games of skill (in terms of predominance test) unjustifiably made to constitute one homogenous class. Our Constitution does not permit things which are different in fact or opinion to be treated in law as though they were the same….

(b) The amended definition of 'gaming' excludes in so many words, 'a lottery or wagering or

betting on horse-race run on any race course' in a given circumstance. The Apex Court in K.R.LAKSHMANAN supra held that, horse-racing is a 'game of mere skill' and therefore, it is 'neither gaming nor gambling'. If the legislative policy is to protect the games of skill from being treated as proscribed, the Amendment Act being unjustifiably selective in that suffers from a grave constitutional infirmity. It offends the clause of 'equal protection of the laws' enacted in Article 14, since protection is unreasonably sectarian. The equal protection clause would be diluted into a mild constitutional injunction that the State shall treat as equal in law only the horse-racers who are equal in fact with other players of games of skill. For saving such a blatant discrimination, the respondents have failed to establish the reasonable basis on which such a classification is founded and the rational nexus identifiable between the differentia of and the object sought to be achieved by such a classification vide ***STATE OF WEST BENGAL vs. ANWAR ALI SARKAR****.*

(c) Learned Advocate General pressed into service the decision in SHREYA SINGHAL, supra to justify classification between 'actual games' and 'virtual games' and that the Amendment Act that would focus the latter would not suffer any infirmity

on the touchstone of equality clause. He contends that there is an intelligible differentia between online media and offline media as recognized by the Apex Court and therefore, the legislature in its wisdom has chosen to proscribe the online games since they are injurious to public interest. True it is that, the Apex Court treated online media being different from offline. However, such a differential treatment was in the context of distinction that lies between dissemination of information via traditional media and dissemination of information via online media. Whilst there are multiple layers of prior editorial control in case of publication through traditional media, such layers may not exist in the case of publication of information through online media, as information in the case of latter "travels like lightning". It hardly needs to be stated that the cases at hand are not one of unregulated information travelling at the speed of lightening. We are at loss to know how the observations made in the decision would advance the case of respondents, when its contextual substratum is miles away from that of these petitions. The ratio in this decision being relevant albeit for different reasons is discussed below.

XXII. AS TO MANIFEST ARBITRARINESS AND VOIDING OF PLENARY LEGISLATIONS:

*(a) The expression "pure game of skill" as employed in legislations of the kind i.e., Section 176 of the Principal Act has been judicially construed to be "mere skill" and that the games mainly & preponderantly involving skill, fall into this class. The expanded meaning of 'gaming' under Section 2(7) as amended, broods through the entirety of the Amendment Act, which paints 'games of skill' and 'games of chance' with the same brush. However, Section 176 of the Principal Act even post amendment continues to maintain the distinction between these two classes of games. The original heading of this section '**Saving of games of skill**" now also continues. In English Parliamentary practice, 'headings and marginal notes are not voted or passed by Parliament, but are inserted after the Bill has become law' states **Maxwell on Interpretation of Statutes**, 12th Edn. Butterworths at page 11. Of course, since 2011, there is change in practice. In India, even headings are part of the Bill and are voted in the legislature. They provide the context for the substantive part of the section. They are there for guidance. Therefore, they cannot be ignored. Due significance has to be attached to*

the heading of a section in a statute. The substantive text of Section 176 makes the penal provisions enacted in Sections 79 & 80 inapplicable to 'any pure game of skill' i.e., a game predominantly involving skill. However, the Amendment Act deletes the term "and to wagering by person taking part in such games of skill" from the text of this section. Thus the amended definition of 'gaming' under Section 2(7) to the extent it does not admit the difference between skill games and chance games, is in direct contradiction to the amended Section 176 which intends to maintain such a difference. The very definition of 'gaming' as amended, suffers from the vice of over-inclusiveness/over-broadness of the idea of gaming as enacted in the charging provisions of the Act that are animated by CHAMARBAUGWALA Jurisprudence. The content of 'gaming' as capsuled under Section 2(7) thus bruises the legislative intent enacted in Section 176 ab inceptio and continued post-amendment, for protecting a class of citizens who plays the games of skill and therefore, fits into the text & context of this provision.

(c) The rule of law is recognized by the Apex Court as a 'basic feature' of our Constitution vide ***KESAVANANDA****..... The Amendment Act suffers from the infirmity of this kind inasmuch as*

Section 2(7) which encompasses all games regardless of skill involved, renders the charging provisions enacted in section 176 read with Sections 79 & 80 of the Principal Act so vague that the men of common intelligence will not be in a position to guess at its true meaning and differ as to scope of its application and therefore, is liable to be voided.

(d) The above view of ours gains support from the following observations of the Hon'ble Madras High Court in JUNGLEE GAMES, supra:

"120. It is true that, broadly speaking, games and sporting activities in the physical form cannot be equated with games conducted on the virtual mode or in cyberspace. However, when it comes to card games or board games such as chess or scrabble, there is no distinction between the skill involved in the physical form of the activity or in the virtual form. It is true that Arnold Palmer or Severiano Ballesteros may never have mastered how golf is played on the computer or Messi or Ronaldo may be outplayed by a team of infants in a virtual game of football, but Viswanathan Anand or Omar Sharif would not be so disadvantaged when playing their chosen games of skill on the virtual mode. Such distinction is completely lost in the Amending Act as the original scheme in the Act of 1930 of confining gaming to games of chance has been turned upside

down and all games outlawed if played for a stake or for any prize."

In the above circumstances, these writ petitions succeed:

1. The provisions of Sections 2, 3, 6, 8 & 9 of the Karnataka Police (Amendment) Act 2021 i.e., Karnataka Act No.28 of 2021 are declared to be ultra vires the Constitution of India in their entirety and accordingly are struck down.

2. The consequences of striking down of the subject provisions of the Karnataka Police (Amendment) Act 2021 i.e., Karnataka Act No.28 of 2021 shall follow. However, nothing in this judgment shall be construed to prevent an appropriate legislation being brought about concerning the subject i.e., 'Betting & gambling' in accordance with provisions of the Constitution.

3. A Writ of Mandamus is issued restraining the respondents from interfering with the online gaming business and allied activities of the petitioners.

No order as to costs.

2. A careful perusal of the ratio laid down by this Court in ***All India Gaming Federation's case supra,*** bearing in mind the well settled principles pertaining to 'ratio decidendi'

and the inversion test as held in ***Career Institutes' case supra,*** will indicate that the judgment of the Hon'ble Division Bench of this Court is neither *per incuriam* nor *sub-silentio* as contended by the respondents. Only because a specific paragraph in a precedent has not been excerpted by a Court does not mean that a precedent has not been considered in its entirety. By that logic, if the entirety of a precedent-judgment is not excerpted in a subsequent judgment, the subsequent judgment will become automatically *sub silentio* and *per-incuriam w*hich is a completely absurd proposition. Thus, it cannot be said that the decision of the Division Bench of this Court in ***All India Gaming Federation*** is either *per incuriam* (as it refers to and considers all the judgments of the Hon'ble Supreme Court) or *sub-silentio* (as it specifically holds that playing games of skill for stakes does not amount to gambling).

Principle of Nomen-Juris

In the case of ***State of Madras vs. Gannon Dunkerley & Company (Madras) Ltd - 2015 (330) ELT 11 (SC)***, the

issue before the Apex Court was whether the provisions of the Madras General Sales Tax Act are *ultra vires*, insofar as they seek to impose a tax on the supply of materials in execution of works contract treating it as a sale of goods by the contractor. In this context, the Apex Court interpreted the words “sale of goods” in Entry 48 in List II of Schedule VII to the Government of India Act, 1935 and applied the principle of *nomen-juris* to come to the conclusion by holding that the expression “sale of goods” in Entry 48 cannot be construed in its popular sense but that it must be interpreted in its legal sense. The Court held that if the words “sale of goods” have to be interpreted in their legal sense, that sense can only be what it has in the interpretation that words of legal import occurring in a statute should be construed in their legal sense is that those words have, in law, acquired a definite and precise sense, and that, accordingly, the legislature must be taken to have intended that they should be understood in that sense.

2. Based on the aforementioned jurisprudence, the words “gambling”, “game of chance”, “game of skill” have

developed meanings in judicial parlance. Therefore, applying the principle of *nomen-juris*, the words should be construed in their legal sense, instead of general parlance. While “gambling” or “game of chance” have been held to involve chance as a predominant element, on the other hand “game of skill” has an exercise of skill which can control the chance. The element of chance cannot be completely overruled in any case but what is to be seen is the predominant element. In a game of rummy, certain amount of skill is required because the fall of the cards has to be memorised and the building up of rummy requires considerable skill in holding and discarding cards. Therefore, a game of rummy is a game of skill as held in ***Satyanarayana*** supra.

Interpretation of Betting and Gambling in the context of GST

The expression “betting and gambling” also featured in the erstwhile Entry 62 of List II which dealt with tax on “betting and gambling”. By the Constitution (One Hundred and First

Amendment) Act, 2016, Entry 62 of List II was amended and the expression “betting and gambling” was omitted. The purpose of this omission was to subsume taxation on betting and gambling under the GST regime. Consequently, the same expression “betting and gambling” now features in Entry 6 of Schedule III of the CGST Act. In the case of ***State of Karnataka vs. State of Meghalaya –2022 SCC Online SC*** 350, the Apex Court held that the interpretation of the expression “betting and gambling” in the context of Entry 34 of List II shall apply to the expression “betting and gambling” under Entry 62 of List II. As the expression “betting and gambling” was omitted from Entry 62 to give way for taxation on “betting and gambling” to be subsumed under the GST regime, the expression “betting and gambling” in Entry 6 of Schedule III of the CGST Act must also be interpreted in the same manner.

2. Further, the decisions referred to above, in the context of “betting” and “gambling” have been interpreted in the context of Entry 34 of List II of the Seventh Schedule to

the Constitution and the Public Gambling Act, 1867. When words acquire a technical meaning because of their authoritative construction by superior courts, they must be understood in that sense when used in a similar context in subsequent legislations.

3. The Supreme Court in the case of ***Diwan Brothers v. Central Bank of India - AIR 1976 SC 1503*** quoted Craies on Statute law:

> *"There is a well-known principle of construction, that where the legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted, unless a contrary intention appears."*

4. So also, in the said judgment, the Apex Court referred to the case of ***Barras v. Aberdeen Steam Trawling and Fishing Company - [(1933) 45 LI.L.Rep 199],*** in which Lord Buckmaster observed as follows:

> *"It has long been a well-established principle to be applied in the consideration of Acts of Parliament that*

> *where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context must be construed so that the word or phrase is interpreted according the meaning that has previously been ascribed to it. Lord Macnaghten has stated that "In construing Acts of Parliament, it is a general rule, that words must be taken in their legal sense unless the contrary intention appears".*

5. Thus, the terms "betting" and "gambling" under in Entry 6 of Schedule III of the CGST Act must be given the same interpretation given to them by the courts, in the context of Entry 34 of List II of the Seventh Schedule to the Constitution and the Public Gambling Act, 1867. Therefore, the terms "betting" and "gambling" appearing in Entry 6 of Schedule III of the CGST Act does not and cannot include games of skill within its ambit and must be so held as per the dictum set out above.

6. Insofar as the other judgments relied upon by both sides and various other contentions urged by them, in my

considered opinion, the same are neither relevant nor germane for the purpose of adjudication of the issue in controversy involved in the present petitions and as such, I do not deem it appropriate to burden this order by referring to them in detail.

7. After having dealt with the rival contentions as stated supra, it is significant to state that a perusal of the impugned show cause notice as well as contentions and submissions of the respondents will clearly indicate that the same are an outcome of a vain and futile attempt on the part of the respondents to cherry pick stray sentences from the judgments of various Courts including the Apex Court, this Court and other High Courts and try to build up a non-existent case out of nothing which clearly amounts to splitting hairs and clutching at straws which cannot be countenanced and is impermissible in law.

X. CONCLUSIONS

- There is a distinct difference between games of skill and games of chance; games such as rummy, etc. as was discussed in several decisions above and particularized in the Division Bench decision of this Court in ***All India Gaming Federation's case supra,*** whether played online or physical, with or without stakes would be games of skill and test of predominance would apply; the said judgment is a total and complete answer not only to the various contentions urged by the respondents but also covers the issues / questions that arise for consideration in the instant petitions.

- Though Section 2(17) of the CGST Act recognises even wagering contracts as included in the term business, but that in itself would not mean that lottery, betting and gambling are the same as games of skill.

- The meaning of the terms "lottery, betting and gambling" as contemplated in Entry 6 of Schedule III of the CGST

Act should be construed nomen juris in the light of the decisions of the Hon'ble Supreme Court, this Court and other High Courts supra which do not include games of skill.

- Entry 6 in Schedule III to the CGST Act taking actionable claims out of the purview of supply of goods or services would clearly apply to games of skill and only games of chance such as lottery, betting and gambling would be taxable.

- Taxation of games of skill is outside the scope of the term "supply" in view of Section 7(2) of the CGST Act, 2017 read with Schedule III of the Act.

- A game of chance whether played with stakes is gambling;

- A game of skill whether played with stakes or without stakes is ***not*** gambling;

- A game of mixed chance and skill is gambling, if it is substantially and preponderantly a game of chance and not of skill;

- A game of mixed chance and skill is ***not*** gambling, if it is substantially and preponderantly a game of skill and not of chance;

- Rummy is substantially and preponderantly a game of skill and not of chance;

- Rummy whether played with stakes or without stakes is ***not*** gambling;

- There is no difference between offline/physical Rummy and Online/Electronic/Digital Rummy and both are substantially and preponderantly games of skill and not of chance;

- Online/Electronic/Digital Rummy whether played with stakes or without stakes is ***not*** gambling;

- Other Online/Electronic/Digital games which are also substantially and preponderantly games of skill and not of chance are also ***not*** gambling;

- The expressions, ***'Betting' and 'Gambling'*** having become nomen juris, the same are applicable for the purpose of GST also and consequently, the said words, ***'Betting' and 'Gambling'*** contained in Entry 6 of Schedule III to the CGST Act are not applicable to Online/Electronic/Digital Rummy, whether played with stakes or without stakes as well as to any other Online/Electronic/Digital games which are also substantially and preponderantly games of skill;

- The subject Online/Electronic/Digital Rummy game and other Online/Electronic/Digital games played on the Petitioners' platforms are ***not*** taxable as ***'Betting' and 'Gambling'*** as contended by the respondents under the CGST Act and Rules or under the impugned show cause notice issued by the respondents;

- Consequently, the impugned Show Cause Notice dated 23.09.2022 issued by the respondents to the petitioners is illegal, arbitrary and without jurisdiction or authority of law and deserves to be quashed.

XI. In the result, I pass the following:-

ORDER

(i) W.P.No.19570/2022, W.P.No.19561/2022, W.P.No.20119/2022 and W.P.No.20120/2022 are hereby allowed;

(ii) The impugned Show Cause Notice dated 23.09.2022 issued by the respondents is hereby quashed;

(iii) W.P.No.22010/2021 and W.P.No.18304/2022 do not survive for consideration and the same are hereby disposed off;

(iv) All interim orders that were in force during the pendency of any of the petitions stand automatically dissolved.

Sd/-
JUDGE

Srl.