

Does gambling qualify as a 'trade, commerce or intercourse'?

- Shefali Malhotra

A five-judge bench of the Hon'ble Supreme Court, in *State of Bombay vs R.M.D. Chamarbaugwala* (AIR 1957 SC 699) held that gambling or conducting the business of gambling is *extra-commercium* and hence not included within the meaning of 'trade, commerce or intercourse'. Consequently, it is 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 of the Constitution of India.

Facts

The present petition related to the validity of the Bombay Lotteries and Prize Competitions Control and Tax Act, 1948 ('Act'). The impugned Act (as the title suggests) was enacted to control and levy tax on lotteries and prize competitions in the State of Bombay¹.

Analysis

The principle question that arose in the present petition was: whether the impugned Act was a law related to betting and gambling or a law with respect to trade and commerce. The Court held that the Act comprises only prize competitions which are in the nature of a lottery or gambling, and hence it is a law on betting and gambling under Entry 34, and not on trade and commerce under Entry 26 of List II. It placed reliance on the definition of 'prize competition' under the original and amended² Section 2(1)(d) of the impugned Act.

It is pertinent to mention that prior to 1952, Section 2(1)(d) recognized three categories of 'prize competitions':

- (i) Cross-word prize competition, missing words prize competition, picture size competition, number prize competition, or any other competition, for which a solution is prepared before hand 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 generally known.
- (iii) Any other competition success in which does not depend to a substantial degree upon the exercise of skill.

However, it did not include prize competition contained in a newspaper printed and published *outside* the State of Bombay.

The aforesaid amended Section incorporated the following changes in the definition:

¹ The State of Bombay was dissolved with the formation of Maharashtra and Gujarat States on May 1, 1960.

² The impugned Act was amended, *vide*, the Bombay Lotteries and Prize Competitions Control and Tax (Amendment) Act, 1952.

- (i) In category (i), the line *"for which a solution is prepared beforehand..."* was amended to read as, *"for which the solution is or is not prepared beforehand..."*
- (ii) Deletion of the concluding sentence excluding prize competition printed and published outside Bombay.

At the outset, it is conceded that the Supreme Court rightly held prize competitions included under Categories (ii) and (iii) to be of a gambling nature, for the reason that they were dependent on chance and no substantial degree of skill was involved. The dispute arose with regard to the original and amended Category (i). While perusing the original provision, the Court held that a prize competition for which a solution was prepared beforehand was clearly a gambling competition, for the competitors were only invited to guess what the solution prepared beforehand by the promoters might be. Thereafter, it was held that although the amended provision included prize competition for which a solution *was or was not* prepared beforehand, both were still intended to be of a gambling nature.

The reasoning of the Court is flawed for three reasons. One, a literal reading of Category (i) clearly shows that it includes cross-word competition, missing word competition, etc. Solutions to the puzzles in these competitions (although prepared beforehand) are not merely based on guess work; on the other hand, it involves application of skill to deduce the correct answer based on the hints provided. Two, the Court has provided the same reasoning (i.e., the competitions where solution is prepared beforehand are of a gambling nature) for the original and the amended provision, without regard to the difference in the two. While the former only included competitions for which solutions were prepared beforehand, the latter has a larger scope as it included competitions for which solutions were or were not prepared beforehand. The Court erred in admittedly not examining the background and reasons for the legislature to amend the aforesaid provision. Three, the Court has further erred in holding that in enacting the impugned Act, the legislature was undoubtedly making a law regarding betting and gambling. In doing so, the Court overlooked the fact that several provisions of the Act have referred to prize competitions and lotteries separately. The Apex Court further went on to hold that the taxing provisions, particularly Section 12-A³, of the impugned Act was a tax on betting and gambling under Entry 62, and not a tax imposed on trade under Entry 60 of List II. It observed that the aforesaid tax is not a tax on promoter, but a convenient way of indirectly taxing the gambler, with a view to controlling betting and gambling. The promoters are free to pass on the tax on the gamblers, by increasing the amount of entry fees.

Second issue was: whether the Legislature of the State of Bombay overstepped its limits by enacting Section 12-A which purported to affect men residing and carrying on business outside the State.

In view of Articles 245 and 246, it was urged that the Legislature of the State of Bombay has the power to make laws for the whole or any part of the said State. The Court, propounding the well settled principle of territorial nexus⁴, rejected the aforesaid argument. It observed that filling up of entry forms, for the Respondents' prize competition, and payment of money taking place within the State of Bombay, constituted sufficient territorial nexus entitling the Appellant State to impose the tax.

³ Section 12-A provided for levy of tax on every prize competition or lottery contained in a newspaper or publication printed or published outside the State of Bombay.

⁴ The doctrine of territorial nexus states that if there is a territorial nexus between the person sought to be charged and the State seeking to tax him, the Statute maybe upheld. Sufficiency of territorial nexus must satisfy two tests, namely, a) the connection must be real and not illusory and b) the liability sought to be imposed must be pertinent to that connection. (Para 23)

Third issue was whether the promotion of prize competitions, in the nature of gambling, be characterized as 'trade or business' within the meaning of Article 19(1)(g), or 'trade commerce and intercourse' within the meaning of Article 301.

The Court held that gambling activities from their very nature and in essence are *extra-commercium* and hence they are not protected by Article 19(1)(g) or Article 301 of the Constitution. It observed:

"43. ...[T]o control and restrict betting and gambling is not to interfere with trade, commerce or intercourse as such but to keep the flow of trade, commerce and intercourse free and unpolluted and to save it from anti-social activities."

The aforesaid reasoning is fallacious on four grounds. One, there is no blanket prohibition on conducting the business of gambling or lottery. Gambling is permitted under two limited conditions, namely, when it is a State lottery or when it is authorized by the State Government.⁵ Consequently, when a license for conducting prize competitions (in the nature of gambling) is obtained by the Respondents, it is a legitimate business permitted by the State Government and hence there is no reason to deny the protection under Articles 19(1)(g) and 301. Two, the judgment has come to be associated with laying down the doctrine of *res extra-commercium*. The said term, in Roman Law, implies that which is incapable of private ownership or acquisition, i.e., opposed to *in commercio*. In regard to prize competitions, there is no difficulty in identifying the owner who carries on this activity.⁶ Evidently, it has nothing to do with the right to carry on trade or business or the morality of carrying on a particular activity as trade or business. Three, the equation of gambling with activities like hiring goondas for assault, murder, and housebreaking is faulty. Gambling, in so far as it is permitted by the State Government, is a legitimate business involving voluntary transactions between individuals while the latter involves usurping the life and property of another. Moreover, the State itself is involved in the business of lotteries. Four, the Court erroneously held that the fact of issuing of license and imposition of tax does not give legitimacy to prize competitions. On the contrary, issuing of license to conduct prize competitions implies that the State has permitted conducting such business subject to certain conditions, such as, paying tax.

It is unfortunate that subsequent judgments have not corrected the erroneous position set by this case despite several logical fallacies apparent on the face of it.

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⁵ Section 294-A, Indian Penal Code, 1860.

⁶ See Arvind Datar, "Privilege, Police Power and Res Extra Commercium - Glaring Conceptual Errors" 21(1) National Law School of India Review 133 (2009).