TC-05

20TH SURANA & SURANA NATIONAL CORPORATE LAW MOOT COURT COMPETITION 2022 - 2023

BEFORE THE HON'BLE HIGH COURT OF KARNATAKA

AT BENGALURU

UNDER THE ARTICLE 226 IN THE MATTER OF

WP No.1001 to 1004 of 2023

Midas Online Games India Pvt. Ltd
Rep by its Resolution Professional
Bengaluru …Petitioner

Vs.

Directorate General of GST Intelligence
Bengaluru …Respondent

DATE : 08.04.2023

PLACE: BENGALURU

COUNSEL ON BEHALF OF THE PETITIONER

MEMORANDUM ON BEHALF OF THE PETITIONER

UPON SUBMISSION TO THE HON'BLE CHIEF JUSTICE AND OTHER HON'BLE JUSTICES OF THE HIGH COURT OF KARNATAKA.

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LIST OF ABBREVIATIONS

ABBREVIATIONS	EXPANSION
&	And
AIR	All India Reporter
Anr.	Another
Art.	Article
CGST	Central Goods and Services Tax
CIRP	Corporate Insolvency Resolution Process
COC	Committee of Creditors
FY	Financial Year
GST	Goods and Services Tax
HC	High Court
Hon'ble	Honorable
IBC	Insolvency and Bankruptcy Code
IRP	Interim Resolution Professional
Ltd.	Limited
MRP	Maximum Retail Price
NBI	National Bank of India
NCLT	National Company Law Tribunal
No.	Number
NPA	Non-Performing Assets
Ors.	Others
Pvt.	Private
RP	Resolution Professional
SC	Supreme Court
SCC	Supreme Court Case
SCN	Show Cause Notice
SCR	Supreme Court Reports
SGST	State Goods and Services Tax
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TMI	Tax Management India

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THE STATEMENT OF JURISDICTION

The Writ Petition has been filed invoking the writ jurisdiction of the High Court of Karnataka under Article 226 0f the Constitution of India.

The right to move High Court by appropriate proceedings for the enforcement of the rights conferred by part III is guaranteed.

Wherein, Article 226 reads as under:

226. Power of High Courts to issue certain writs

1. Notwithstanding anything in Article 32, every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

2. The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

3. Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favor such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case be, the expiry of the said next day, stand vacation.

4. The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

THE STATEMENT OF FACTS

BACKGROUND

Midas Online Games India Pvt Ltd. is registered under companies Act, 2013 incorporated on 03.07.2017 and almost coincided with the introduction of the Goods and Services Tax Act, 2017. The company involved in the business of online betting games and one of the prominent leaders in this industry. Each participant has to make two kinds of payment such as the admission fee and pooling fee. Only the Admission fee will be the income of the company which was around 25% of the total consideration received from participants which includes the pooling fee and it will be transferred to an escrow account for the actionable claim of all the participants. The company wanted to have all India presence and aggressive promotion so therefore it reached out to National Bank of India for huge loans around INR 5000 crores.

GST SLAB ON THE ONLINE GAMING

The company believed that it is liable to pay GST at the rate of 18% only on the ‘admission fee’ component. It was of the firm view that the remaining 75% did not belong to it since it was an ‘actionable claim’ of the participants. The office of the Director General of GST issued show cause notices and statements to the company why it should not be taxed at the rate of 28% on the entire amount received by company along with applicable interest and also an equivalent penalty of 28%. The company committed a default in making a payment of INR 10 crores to its software supplier company even after repeated reminders. The software service provider filed an application before NCLT under IBC code, declare the company as an insolvent and to initiate corporate insolvency resolution process. It was aware that the company already owed around INR 5,000 crores to the NBI and the claim of principal tax alone by the GST department was almost INR 5,000 crores for the four financial year.

ARBITRARY ORDERS OF GST DEPARTMENT

The GST department passed separate orders under sections 74(9) & 73(9) respectively for the four years. The GST department demands the company to pay the entire demand of tax, interest and penalty of around INR 11,000 crores under section 78. If company fails to pay the tax department will initiate the recovery proceedings under section 79. Even before the company could recover from the shock of the orders the department direct the NBI to freeze all the bank accounts of the company under section 79(1) (c).

THE RESULTANT LITIGATION

On the other hand the NCLT admitting the application of the software company and direct the corporate insolvency resolution process by appointing the interim resolution professional to perform his duties as per the code. The GST department and NBI claim as a secured creditor in the resolution process of the company. The IRP took note of the financial position of the company and constituted the committee of creditors. Two important resolution were passed based on the financial strength of the company.

1. Appoint IRP as the Resolution Professional
2. File Writ petition before the Hon’ble High Court of Karnataka

THE STATEMENT OF ISSUES

ISSUE-1

1. Whether the writ petition filed by Resolution Professional before the Hon'ble High Court of Karnataka is maintainable?

ISSUE-2

2. Whether GST is payable on the 'entire consideration' received from participants?

ISSUE-3

3. Whether the department could be treated as 'secured creditor' to have precedence over the company's bank accounts?

ISSUE-4

4. Whether the online games are actually 'game of skills' or 'game of chances'?

SUMMARY OF ARGUMENTS

1. Whether the writ petition filed by the Resolution Professional before the Hon'ble High Court of Karnataka is maintainable?

It is most humbly and respectively submitted before the Hon'ble High Court that the writ petition seeking the interference of arbitrary orders of GST department is violation of part III of constitution of India. The right of **Audi alteram partem** is a valuable right recognized under the constitution of India wherein it is held that the principle of the maxim which mandates that none should be condemned unheard, is a part of the rule of natural justice. Such a right of hearing conferred by statute cannot be taken by any department even by courts.

2.Whether GST is payable on the 'entire consideration' received from participants?

It is most humbly and respectively submitted before the Hon'ble High Court that the company believed that it is liable to pay GST at the rate of 18% only on the 'admission fee' component. The pooling fee will be transferred to an escrow account received from all the participants which will be prize money or in other word the 'actionable claim' of all the participants. GST will not be applicable to the actionable claim because it pertains to an activity given in Schedule III which are treated neither as supply of goods nor supply of services. Hence participants don't bet on the outcome of the game/match and just do something similar to that of the selectors in picking up the real team. Hence, these games are played on the platform are nothing different from 'game of skill' and not of chance and thus outside the application of the CGST Act and rules.

3.Whether the department could be treated as 'secured creditor' to have precedence over the company's bank accounts?

It is most humbly and respectively submitted before the Hon'ble High Court that the GST department does not have any security interest over the assets of corporate debtor such security interest created by a GST department ultra vires to operation of law. The GST department cannot claim first charge over the property of corporate debtor. The claim of the respondent also does not fall within the meaning of 'Secured Creditor' as defined under section 3(30) read with section 3(31) of the IBC. The GST department was obviously not a 'secured/ financial creditor' but it can be an operational creditor. The mere fact that a creditor might be an operational creditor would not result in any loss of status of that operational creditor as a secured creditor.

4.Whether the online games are actually 'game of skills' or 'game of chances'?

It is most humbly and respectively submitted before the Hon'ble High Court that the Midas online games predominantly game of skill where participants exercise of superior knowledge, judgement and attention, so it is a game of skill, nor game of chance. The participants forecasts of such events as are specified in this game need not necessarily depend on game of chance, for it may be accurately done by the exercise of knowledge and game of skill derived from a close steady of the statistics of similar event of the past, it may be that participants may form some idea of the result of an uncertain future event in the games.

ARGUMENTS ADVANCED

1. Whether the writ petition filed by the Resolution Professional before the Hon'ble High Court of Karnataka is maintainable?

It is most humbly submitted that the Writ Jurisdiction of the High Court flows from Article 226, which confers wide powers enabling the Court to issue writs, directions, orders for the enforcement of fundamental or legal rights. The exercise of the writ jurisdiction of the High Courts under Article 226 is largely discretionary in nature, that the writ petition is maintainable under Article 226 of the Constitution,[1] since the instant case the games of skill are distinguishable from gambling and enjoy protection under Article 19(1) (g) of the constitution of India. The exercise of the writ jurisdiction of the High Courts under Article 226 is largely discretionary in nature. It is submitted that the writ petition is not maintainable on primarily four grounds: [1.1] The petitioner has *Locus Standi* to file writ petition, [1.2] Principle of natural justice to be followed, [1.3] The Executive Orders are considered as law, [1.4] GST orders violates Article 14 and Article 19(1) (g) of the Constitution of India.

[1.1] THE PETITIONER HAS *LOCUS STANDI* TO FILE WRIT PETITION

The present petition is maintainable under article 226 of the Constitution, since GST department falls within the ambit of "other authorities" as enshrined u/a 12 of the Constitution, there has been violation of Fundamental Rights. This appeal raises significant issues of public importance, engaging as it does, the interface between citizens and their businesses with the fiscal administration.

Article 226 confers a right to move to Supreme Court for enforcement of the right conferred by the Part III, which is guaranteed by sub-article (1) of Article 226 of the Constitution. Article 226 is an important and integral part of the basic structure of the Constitution. Article 226 is meant to ensure observance of rule of law. Article 226 provides for the enforcement of the fundamental rights, which is most potent weapon.

Alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is:[2]

i. A breach of fundamental rights;
ii. A violation of principles of natural justice;
iii. An excess of jurisdiction;
iv. A challenge to the vires of the statute orders.

[1.2] PRINCIPLE OF NATURAL JUSTICE TO BE FOLLOWED

[1] Constitution of India, 1950, art. 226.

[2] The Assistant Commissioner of State Tax and Ors v. Commercial Steel Ltd, 2021 SCC Online SC 884.

The Supreme Court has held that administrative action must be supported by reasons which is one of the requirements of natural justice.[3] The rule of natural justice are not embodies rules. The decision of administrative authority must be supported by reasons unless that requirement is dispensed with either expressly or impliedly. The recording of reasons by an administrative authority serves a statutory purpose, namely it excludes chances of arbitrariness and assures a degree of fairness in the process of decision making.
Manifest arbitrariness 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.[4] Therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.[5] We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.

The persons who play games of chance and the persons who play the games of skill unjustifiable 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. The doctrine of equality enshrined in Article 14 is violated not only when equals are treated unequally but also when un-equals are treated equally disregarding their difference held in the case of ***E.P.Royappa v. State of Tamil Nadu,***[6] wherein the Apex Court observed: Article 14 and 16 strike at arbitrariness in state action an ensure fairness and equality of treatment. They require that state action must be based on valent relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality.

[1.3] THE EXECUTIVE ORDERS ARE CONSIDERED AS LAW

In the case of ***Indira Sawhney v. Union of India,***[7] the Hon'ble Supreme Court held that, "Executive order is no less a law under Article 13(3)".[8]

i. Thus, even if the statute which conferred power to the executive is not discriminatory, the executive order which derived its power from the statute can be challenged under

[3] S.N. Mukherjee v. Union of India, AIR 1990 SC 1984.

[4] Shayara bano v. Union of India, (2017) 9 SCC 1.

[5] Indian Express Newspaper v. Union of India, AIR 1986 SC 515.

[6] E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555.

[7] Indira Sawhney v. Union of India, AIR 1993 SC 477.

[8] Id.

Article 14 on the grounds of being discriminatory,[9] or arbitrary,[10] as Article 14 does not allow the **State** to discriminate between persons.[11]

ii. Furthermore, **'State'** defined under Article 12 includes the Legislature and Executive of both the Centre and the States and other executive authorities within the territories of India.

iii. *"*Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. It protects us from both legislative and executive tyranny by way of discrimination".[12]

iv. The trilogy formed by Articles 12, 13 and 14 ensure non- discrimination in State action in the spheres of both legislation and execution in India.[13]

v. The attachment of bank accounts is a draconian step and such action can only be taken in case conditions specified in Section 83 of the Act, are fully satisfied. The exercise of power under Section 83 of the Act must necessarily be confined within the limits of the aforesaid provision.[14] Thus when any executive order violates fundamental rights, it will be quashed by the judiciary as to keep the excesses of the executive at bay.[15] The Hon'ble Supreme Court is the repository of fundamental rights of the citizens.[16]

[1.4] GST ORDERS VIOLATES ARTICLE 14 AND ARTICLE 19(1) (g) OF THE CONSTITUTION OF INDIA

This executive order, as will be proven in the following sections, is unconstitutional, as it violates the fundamental rights of the citizens of India.

1. As aforementioned, the executive order passed by the GST department has the same effect as would a statute as specified in Article 13(3) (a) of the Constitution. The petitioner can thus approach the Supreme Court for a remedy for the violation of Article14 as they could have done if a statute had violated their fundamental rights.
2. That the executive order of exclusion violates the right to equality as envisaged under Article 14. Article 14 is read as a positive obligation[17] on the state to confer equal measures that benefit all citizens, including the right of all citizens in a political

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[9] Ram Krishna Dalmia v. S.R. Tendolkar, AIR 1958 SC 538.

[10] Premium Granites v. State of Tamil Nadu, AIR 1994 SC 2233.

[11] Basheshar Nath v.The Commissioner of Income Tax, Delhi & Rajasthan**,** AIR 1959 SC 149, 25.

[12] Id.

[13] The State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, 8.

[14] Sakshi Bahl & Anr v. The Principal Additional Director General.

[15] Gupta Enterprises v. Delhi Pollution Control Committee and Anr. (2008) ILR 1 Delhi 940.

[16] N. JAYAPALAN, INDIAN SOCIETY AND SOCIAL INSTITUTIOND, Atlantic Publishers & Distributors, 2001, p.531.

[17] DURGA DAS BASU, COMMENTARY ON CONSTITUTION OF INDIA, Vol. 2, 2007, p.1388.

democracy to enjoy social and economic justice.[18] After 1974, the Hon'ble Supreme Court held in a number of cases that there was an over- emphasis on the doctrine of classification.[19]

3. Since ***Maneka Gandhi's*** case,[20] the Courts have adopted the Wednesbury principle[21] that if the classification was an arbitrary act of the state under Article 12 of the Constitution, Article14 would strike it down.[22] The test for arbitrariness is whether the executive acted illegally or omitted reasonable factors or its opinion was one which no reasonable man would have taken.[23] Arbitrariness is primarily an action performed by the executive capriciously without adequately determining principle and classifying based on unfounded nature of things.[24]

Article 13 of the Indian constitution forbids class legislation but it does not prohibit the reasonable classification.[25] Such classification should not be artificial, arbitrary or evasive and it must rest on substantial distinction which is real. It must bear a reasonable and just relation to the sought object which is to be achieved by the legislation. Classification of reasonable as laid by the Indian Supreme Court has two conditions as in the case of ***Saurabh Chaudhary v Union of India,***

i. The classification must be founded on intelligible differentia, distinguishing grouped together persons or goods from the left out ones of the group.
ii. The differential must be in a rational relation with the sought object that is to be achieved by the act. The object of the act and differential on the basis of classification are two separate things. It is essential that there must be the presence of nexus between the object of the act and the basis of classification. When a reasonable basis is not present for classification then such classification made by the legislature must be declared discriminatory. The orders of the GST department does not have any intelligible differentia and classified all the online games organized by the company as 'gambling' which involves substantially 'game of chance' rather than 'game of skill'.

The petitioners next contend that if the Act is good in the sense that has declared its policy and laid down some principle for the guidance of the Government in the exercise of the power

[18] Dalmia Cement (Bharat) Ltd. v. Union of India, (1996) 10 SCC 104, 15.

[19] Mohammad Shujat, Ali and ors. v. Union of India, AIR 1974 SC 1631.

[20] Maneka Gandhi v. Union of India, AIR 1978 SC 597.

[21] Associated Provincial Picture House Ltd. v. Wednesbury Corpn., (1948) 1 KB 223.

[22] KasturiLal Lakshmi Reddy. State of J &K, AIR 1980 SC 1992.

[23] Om Kumar v. Union of India, AIR 2000 SC 3689.

[24] Mittal, Right To Equality and The Indian Supreme Court, the American Journal of Comparative Law, Vol. 14, 1965, p. 426- 428.

[25] Saurabh Chaudhary v. Union of India (2004) 5 SCC 618.

conferred on it, the GST department has failed to exercise its discretion power on the basis of a reasonable classification. Article 14 protects all persons from discrimination by the legislative as well as by the executive organ of the State. "State" is defined in Art. 12 as including the Government and "law" is defined in Art. 13(3) (a) as including any notification or order.
As given in Article 19(1) (g), every citizen has the right to practice any profession, or to carry on any occupation, trade or business. Games involving substantial skill are business activities deserving protection under Article 19(1) (g).[26]

1. Midas online games recognized as skill based activities and a legitimate economic activity protected under Article 19(1) (g) of the Indian Constitution. Midas online games basically arises out of user exercise of superior knowledge, judgement and attention thus as per their skill,[27] and that their fantasy games are exempt from the application of the penal provisions, in view of sec 18 of 1867 Act, and held that they have protection guaranteed under Article 19(1)(g) of the Constitution of India.
2. The tax has been demanded by Directorate General of GST Intelligence on the ground that gaming activities being carried Midas online games is betting and amounts game of chance. But the experts could only able to decide the nature of its game and not the GST authorities issued against the Midas online games under section 79(1) (c) being violative of Article 14, and Article 19(1) (g) of the Constitution of India, and also being hit by manifest arbitrariness, against the doctrine of proportionality.
3. Orders passed by the GST department on 05.10.2022 under sec 78 and sec 79, sufficient time period should be provided before initiating the recovery proceedings under sec 79(1) (c) of the GST Act, directing the NBI to freeze all the bank accounts of the company. But the bank accounts of the company with NBI were freezed on 06.10.2022. Therefore, this amounts to violation of Article 19(1) (g) 0f the Constitution of India.
4. The petitioners cited various cases substantiating the game of skill as Constitutional. The Supreme Court ruled in two key judgements, ***State of Bombay v. R.M.D. Chamarbaugwala***[28] that Midas online games requiring significant skill were not gambling activities. Such competitions were considered economic activities, and their protection was guaranteed by Article 19(1) (g) 0f the Constitution. In the case of ***State of Andhra Pradesh v. K.Satyanarayana,***[29] the Supreme Court declared rummy to be a skill game since it required great expertise in keeping and discarding cards. The Supreme Court developed the preponderance test in this judgement, stating that rummy was 'primarily and essentially a game of skill'.

It is respectively submitted that the right to equality has been violated due to arbitrary implementation of GST orders. Arbitrariness is antithetical to the process of equality so, petition filed by the petitioner in the nature of this writ petition against the executive order is thus maintainable on grounds of violating the fundamental rights of the petitioner.

[26] State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699.

[27] Gurdeep singh Sachar v. Union of India, 2019 (12) TR 2583.

[28] Supra note 6.

[29] State of Andhra Pradesh v. K. Satyanarayana, AIR 1968 SC 825.

2.Whether GST is payable on the 'entire consideration' received from participants?

It is most humbly submitted before Hon'ble High Court of Karnataka that the Only the admission fee will be the income of the company which was around 25% of the total consideration received from the participants which includes the pooling fee. The pooling fee will be transferred to an escrow account received from all the participants which will be the prize money or in other words the 'actionable claim' of all the participants. The petitioners in these writ petitions inter alia challenge the legislative intent of making the petitioners liable to pay Goods and Services Tax on the entire consideration amount received by the company and declare Rule 31A(3) to the CGST Rules as being ultra vires the CGST Act.

The petitioner company involves in the business of lottery is not a goods and under the Central Goods and Services Tax Act, 2017, GST is levied only on goods, hence levy of GST on lottery is ultra vires to the Constitution. It is further submitted that the Constitution Article 366 sub-article (12) define goods to include all materials, commodities and articles. The definition in the Constitution exclude actionable claims since it only refers to materials, commodities and articles. The definition of goods given in Section 2(52) of Central Goods and Services Tax Act, 2017 is unconstitutional.

It is further submitted that Constitution Bench of this Court in ***Sunrise Associates v. Govt. of NCT of Delhi,***[30] has categorically held that lottery is not a good. When Constitution Bench has held that lottery is not a good, the provisions of Act, 2017 treating the lottery as goods is contrary to the judgment of Constitution Bench in Sunrise Associates.

The attempt of including the actionable claim within the meaning of goods seems to be deliberate attempt to make the lottery fall within the scope of GST which would render the definition of goods contrary to the meaning ascribed to it by the Constitution of India as held by Gannon Dunkerley. The words defined in the Constitution of India will have to be ascribed their legal meaning and not the popular meaning.

In the case of ***Bangalore Turf Club Ltd v. The State of Karnataka,***[31] The petitioners has vehemently argued and raised the following contentions:

(1) Rule 31A (3) violates Article 246A read with Article 366 (12A) and exceeds the constitutional mandate given to the Parliament and Legislature to levy tax only on the supply of goods and services on the principle that if there is no supply there is no tax.

(2) Rule 31A (3) in effect imposes tax on the petitioners on the entire bet value without the petitioners supplying any bet, thus violating constitutional mandate of Article 246A.

(3) According to the learned counsel, every tax contains four components – taxable event, taxable person, rate and measure of tax. Without assessment on all this, imposition of tax is contrary to law.

(4) The impugned Rule 31A(3) is ultra vires Section 7 of the CGST Act since the supply of bets is not in the course or furtherance of petitioners' business and is made liable to pay tax.

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[30] Sunrise Associates v. Govt. of NCT of Delhi, (2006) 5 SCC 603.

[31] Bangalore Turf Club Ltd v. State of Karnataka, 2021 (6) TR 4301.

The impugned Rule exceeds the mandate under Section 7 by levying GST on the amount that is not received by the petitioners as consideration.

To consider the aforementioned points, respondents should prove with position in law with regard to imposition of tax; activities of the petitioners; the Rule which has directed the petitioners to be liable to pay tax on the total amount received in the company.

All four components are inter-twined, with nexus being the soul of these components. A taxable event is an event which triggers tax; a taxable person is the one who is obliged to pay the tax; the rate of tax is the rate at which tax is determined/calculated; measure of tax is the value to which the rate is applied for computing a particular tax liability. These components of tax have been interpreted by the Apex Court in the case of Govind Saran, wherein it has held as follows:

The components which enter into the concept of a tax are well known:[32]

i. The character of the imposition known by its nature which prescribes the taxable event attracting the levy,
ii. A clear indication of the person on whom the levy is imposed and who is obliged to pay the tax,
iii. The rate at which the tax is imposed,
iv. The measure or value to which the rate will be applied for computing the tax liability.

If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."

In the light of the aforesaid declaration of law for a tax to be valid it must have the afore-narrated four components. The Apex Court again in the case of State of Rajasthan,[33] has held as follows:

The levy of tax cannot be said to be wanting in nexus with the taxing event. Therefore, the impugned provisions and the notifications cannot be said to be ultra vires any provision of the Constitution. It was however not disputed that but for taking MRP as a basis to provide measure of tax, no fictional price can be fixed as a measure of tax on the sale of goods.

The Apex Court in the aforesaid cases has clearly held that the measure to which the rate of tax is to be applied to a taxable person must have a nexus to the taxable event.

"31A (3) The value of supply of actionable claim in the form of chance to win in betting gambling or horse racing in a race club shall be 100% of the face value of the bet or the amount paid into the totalisator".

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[32] Govind Saran Ganga Saran v. Commissioner of Sales Tax and Ors, 1985 AIR 1041.

[33] State of Rajasthan v. Rajasthan Chemists Association, (2006) 6 SCC 773.

In terms of the aforesaid amendment to the Rule, the Government of India made value of supply of actionable claim in the form of chance to win in betting gambling or horse racing in a race club to be 100 per cent of the face value of the bet or the amount paid in to totalisator. Therefore, by this amendment, the entire amount that is paid into the totalisator is made subject to the CGST. It is this amendment which inserted 31A (3) that has triggered this lis.

Section 2(1) deals with an actionable claim. Actionable claim is not defined under the Act but is directed to hold the same meaning as assigned to it in Section 3 of the Transfer of Property Act, 1882. Section 2(17) defines what is business. Section 2(17) (h) defines activities of a race club including by way of totalisator or a license to a bookmaker or activities of a licensed book maker in such race club to be business. Section 2(31) deals with what is consideration which is any payment made whether in money or otherwise in respect of or in response to or for an inducement of goods or services or both. Section 2(52) deals with goods which would mean every kind of movable property other than money and securities including actionable claim. Section 2(93) deals with recipient. A recipient is one who receives goods or services or both. Section 2(105) defines who is a supplier. A supplier in relation to any goods or services both to mean a person who is supplying the said goods or services or both. The spirit of the afore-quoted definitions is that there must be goods and there must be supply which would only become a taxable event. If there is no supply; there is no tax.[34]

In the case of ***Dr. K.R. Lakshmanan v. State of Tamil Nadu and Anr,***[35] that the'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.

In the earlier part of this judgment, we have noticed the working of the Club which shows that apart from 5% commission from the totalizator and the bookmakers no part of the betting-money comes to the Club. The Club does not own or control any material resources of the community which are to be distributed in terms of Article 39(b) of the Constitution of India. There are two aspects of the functioning of the Club. One is the betting by the punters at the totalizator and with the bookies. The Club does not earn any income from the betting-money except 5% commission.

Midas is a mere game of skill, neither the "material resources of the community" nor "to sub serve the common good" has any relevance to the twin functioning of the company business. Similarly, the operation relation or effect on the 'operation of the economic system". The company business is completely attracting the Directive Principles contained in Article 39(b) and (c) of the Constitution. While Article 39(b) refers to "material resources of the community", the aims and objects of the Act refer to "the material resources of the Midas company business". Equally, the reference to Article 39(c) is wholly placed. While Article 39(c) relates to "the operation of the economic system – to the common detriment", the aims and objectives of the Act refer to "the economic system of the Midas business". Only the

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[34] CGST Act, 2017 (Act 12 of 2017), s.2.

[35] Dr. K.R. Lakshmanan v. State of Tamil Nadu and Anr, AIR 1996 SC 1153.

admission fee will be the income of the company which was around 25% of the total consideration received from the participants which includes the pooling fee. The pooling fee will be transferred to an escrow account received from all the participants which will be the prize money or in other words the 'actionable claim' of all the participants. Based on the winning of the participants, the prize money will be distributed which will result in gain for few and loss for many, this is typically a part of the economic system of the Midas Online Games Business, it has relevance to the objectives specified in Article 39(b) and (c). We are, therefore, of the view that the aims and objects of Article 39(b) and (c) in the constitutional provisions are totally appropriate to context of the company.

In the case of ***H. Anraj Etc v. Government of Tamil Nadu,***[36] It is held true that this entitlement to a right to participate in the draw is an entitlement to beneficial interest which is of incorporeal or intangible nature but that cannot prevent it from being regarded as goods. As we have seen, held that a lottery ticket is a slip of paper or memoranda evidencing the transfer of certain rights.

In the case of ***Union of India v. Sri Sarada Mills Ltd,***[37] An actionable claim would include a right to recover insurance money or a partner's right to sue for an account of a dissolved partnership or the right to claim the benefit of a contract not coupled with any liability.

In the case, ***State of Bihar v. Maharajadhiraja Sir Kameshwar Singh,***[38] A claim for arrears of rent has also been held to be an actionable claim. In the case of ***Official Trustee v. L. Chippendale***[39] & ***Bhupati Mohan Das v. Phanindra Chandra Chakravarty,***[40] A right to the credit in a provident fund account has also been held to be an actionable claim. In our opinion a sale of a lottery ticket also amounts to the transfer of an actionable claim.

In the case, ***Skill Loto Solutions Pvt Ltd v. Union of India,***[41] He reiterated his challenge on the ground of hostile discrimination with regard to only three categories of actionable claims, i.e., lottery, betting and gambling whereas all other actionable claims are not being taxed under Act, 2017. He submits that taxing only three items has no nexus with the object sought to be achieved. No rationale has been provided by the respondent. If actionable claim is a homogeneous clause, why only three have been picked out. Lottery is not something pernicious.

The learned counsel would also submit that lottery being a part of the Schedule Rule 31A fell for interpretation before the High Court and the High Court having held that sale of lottery being an actionable claim 100% of the face of the ticket or the price as notified whichever is higher was liable for payment of tax as the petitioners stand on the same footing.

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[36] H.Anraj Etc v. Government of Tamil Nadu, 1986 AIR 63.

[37] Union of India v. Sri Sarada Mills Ltd, (1972) 2 SCC 877.

[38] State of Bihar v. Maharajadhiraja Sri Kameshwar Singh, AIR 1952 SC 252.

[39] Official Trustee v. L. Chippendale, AIR 1944 Cal 335.

[40] Bhupati Mohan Das v. Phanindra Chandra Chakravarty, AIR 1935 Cal 756.

[41] Skill Loto Solutions Pvt Ltd v. Union of India, (2020) SCC Online SC 990.

The entire lis revolves around the fact whether Rule 31A (3) runs counter to the provisions of the Act with particular reference to sub-section (2) of Section 7. Sub-section (2) of Section 7 declares actionable claims to be neither good nor services except lottery, betting and gambling. Rule 31A (3) to depict value of supply in case of lottery, betting, gambling and horse racing. Making the entire consideration that is received by the company liable for payment of GST would take away the principle that a tax can be only on the basis of consideration even under the CGST. The consideration that the company receive only the admission fee which doesn't includes the pooling fee.

The further submits that the Parliament does not enjoy an absolute power to make an inclusive definition of something to be taxed which is not taxable otherwise. There is no absolute power with the legislature to define something. If such definition has no rationale, such artificial definition cannot be treated only for the purpose of assuming taxation power. The further submits that taxing actionable claim only is discriminatory since all actionable claims are not being taxed. It submits that according to Schedule III to the Act, 2017 under Item No. 6 actionable claims other than lottery, betting and gambling have been treated neither as supply of goods nor supply of services.

There is a clear hostile discrimination in taxing only lottery, betting and gambling whereas all other actionable claims have been left out of the taxing net. It has further submitted that the observations made in the judgment of Constitution Bench in Sunrise Associates[42] that lotteries are actionable claims are only obiter dicta and cannot be treated to be ratio of the judgment.

He reiterated his challenge on the ground of hostile discrimination with regard to only three categories of actionable claims, i.e., lottery, betting and gambling whereas all other actionable claims are not being taxed under Act, 2017. He submits that taxing only three items has no nexus with the object sought to be achieved. No rationale has been provided by the respondent. If actionable claim is a homogeneous clause, why only three have been picked out. Lottery is not something pernicious.

In the case of ***Gurdeep singh Sachar v. Union of India,***[43] The rules and regulations contained in the said Charter are to ensure that the games run by its members are 'games of skill' and are not in the form of any gambling/betting.

It is respectively submitted that the company is liable for payment of GST only for the admission fee component. The pooling fee will be transferred to an escrow account received from all the participants which will be the 'actionable claim' of all the participants.

[42] Supra note 30.

[43] Supra note 26.

3.Whether the department could be treated as 'secured creditor' to have precedence over the company's bank accounts?

It is most humbly submitted before the Hon'ble High Court of Karnataka that the GST department can't be treated as a secured creditor because it doesn't create any security interest over the company's asserts. If any secured interest is created by the GST department it would be done without any legal justification and the main object is securing the paramount exigencies of rule of law.

Security interest is regarded as "real interest" (right in rem) as opposed to "personal interest" (right in personam); as such, security interest is the interest in the property itself. Secured lenders may, on default of the personal obligation of the debtor, enforce their rights on the property, and demand the residual debt, if any, from the debtor. This right of the secured debtor is preserved in the situation of winding up/liquidation as well, with the difference there is an appropriation of a pari-passu share of workmen's dues.

IBC Sec 3(30) "Secured creditor" means a creditor in favour of whom security interest is created;[44]

Sec 3(31) "Security interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee;

On 06.10.2017, the National Company Law Tribunal, ("NCLT") passed an order commencing the Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor, and appointed as the Interim Resolution Professional. In the same order, the NCLT also declared a moratorium under Section 14of the IBC.

In the case of ***Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs,***[45] The NCLT considered Sec 238 of the IBC and held that the non-obstante clause in IBC, being part of a subsequent law, shall have overriding effect on proceedings under the Customs Act. Further looking to the waterfall mechanism under Sec 53 of the IBC, the NCLT held that distribution of proceedings from sale of liquidation of assets shall also prevail over the Customs Act provisions. The NCLT held that, as Government dues, the claims by the respondent would have to be dealt with the accordance with Sec 53 of the IBC.

The above mentioned circular clarifies that dues under the Central Excise Act would have first charge only after the dues under the provisions of the IBC are recovered. As Sec 142A of the Customs Act is pari materia with Sec 11E of the Central Excise Act, 1944, the NCLT applied the same rationale to interpret the said section and holding that the provisions of the IBC have priority.

[44] Insolvency and Bankruptcy Code, 2016 (Act 31 of 2016), S. 3.

[45] Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes and Customs, 2022 (8) TMI 1161.

The company owes INR 5000 crores to the NBI and it can't be paid to the GST Department. Mere filing of claims under 'Form C' by the respondent before the appellant cannot be taken to signify the relinquishment of the right the respondent over the warehoused goods.

In the case of ***Ghanshyam Mishra & Sons Pvt Ltd v. Edelweiss Asset Reconstruction Co. Ltd and Ors,***[46] The resolution plan submitted by the successful resolution applicant is required to contain various provisions for payment of insolvency resolution process costs, provision for payment of debts of operational creditors or the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of Section 53, whichever is higher.

In the case of ***Ebix Singapore Pvt Ltd v. Committee of Creditors of Educomp Solutions Ltd and Anr,***[47] In terms of Regulation 39(4), the RP shall endeavour to submit the resolution plan approved by the COC before the adjudicating authority for its approval under Section 31 IBC, at least fifteen days before the maximum period for completion of CIRP. Section 31(1) provides that the adjudicating authority shall approve the resolution plan if it is satisfied that it complies with the requirements set out under Section 30(2) IBC.

In the case of ***M. K. Ranganathan and Anr v. Government of Madras and Ors,***[48] "The phrase 'outside the winding up' is an intelligible phrase if used, as it often is, with reference to a secured creditor, say a mortgagee. The mortgagee of a company in liquidation is in a position to say "the mortgaged property is to the extent of the mortgage my property. It is immaterial to me whether my mortgage is in winding up or not. I remain outside the winding up' and shall enforce my rights as mortgagee". This is to be contrasted with the case in which such a creditor prefers to assert his right, not as a mortgagee, but as a creditor. He may say 'I will prove in respect of my debt'. If so, he comes into the winding up".

In the case of ***Allahabad Bank v. Canara Bank & Anr,***[49] the two-Judge Bench of the Supreme Court discussed these rights of the secured creditors in paragraphs 63 of the judgment as reported in the SCC, which are extracted below:

The first category of secured creditors mentioned above are those who go before the Company Court for dividend by relinquishing their security in accordance with the insolvency rules mentioned in Section 529. The insolvency rules are those contained in Sections 45 to 50 of the Provincial Insolvency Act. Section 47(2) of that Act states that a secured creditor who wishes to come before the official liquidator has to prove his debt and he can prove his debt only if he relinquishes his security for the benefit of the general body of creditors.

In the case of ***Jitendra Nath Singh v. Official Liquidator & Ors,***[50] that where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount

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[46] Ghanshyam Mishra & Sons Pvt Ltd v. Edelweiss Asset Reconstruction Co. Ltd and Ors, (2021) 9 SCC 657.

[47] Ebix Singapore Pvt Ltd v. Committee of Creditors of Educomp Solutions Ltd and Anr, 2021 SCC Online SC 707.

[48] M.K. Ranganathan and Anr v. Government of Madras and Ors, AIR 1955 SC 604.

[49] Allahabad Bank v. Canara Bank & Anr, (2004) 4 SCC 406.

[50] Jitendra Nath Singh v. Official Liquidator & Ors, (2013) 1 SCC 462.

realized; or where a secured creditor relinquishes his security for the general benefit of the creditors, he may prove for whole of his debt.

In the case of ***Canfin Homes Ltd. v. Lloyds Steel Industries Ltd,***[51] the Bombay High Court observed the stage for relinquishing security arises when a secured creditor seeks to prove the whole of his debt in the course of winding up. If, he elects to prove in the course for winding up the whole of the debt due and owing to him, he has to necessarily surrender his security for the benefit of the general body creditors."

In the case, ***Bhavesh Kiritbhai Kalani v. Union of India,***[52] According to the petitioner, company is involved in the online betting games and he follows the law while conducting his business. Without availing any opportunity, the company straightway received the attachment order and realized that from the Office of the Principal Commissioner of Central GST, Mumbai, such order of freezing had happened and since then, Company has not been allowed to operate the account. The Court extensively has examined the scope of section 83 of the CGST Act, where it has not permitted the freezing of the bank account of the third party petitioner, holding it arbitrary under section 83 of the Act. The Court lays down great stress on the procedural safeguards. The procedure must satisfy the requirement of natural justice, it must be just fair and reasonable.

To streamline the process of attachment/detachment of the Bank Account all Ward in-charges/Proper Officers are directed to follow the standard operating procedure:[53]

a) Approval of the Commissioner, Trade & Taxes is mandatory before attachment/detachment of bank account of erring dealers.
b) While issuing the letter to the Bank Manager for attaching/ detachment the Bank account of the dealers, the said letter shall be digitally signed by the concerned Ward Officer/Proper Officer. A copy of the letter should also be forwarded to the Nodal Officer.
c) The letter must be in the prescribed format indicating the name, E-mail and mobile no. of the Ward In-charge/Proper Officer who is sending the said letter.
d) The Ward In-charge/Proper Officer shall also send an email from his official email-ID to the Bank Manager of the respective Bank.
e) The Ward Officer should specifically mention in the letter of detachment that in case any clarification/confirmation is needed by the bank before detaching the bank account.

On perusal of the relevant provisions and the precedents thereto, The complete attachment done by the GST department was arbitrary and against to the rule of law. It is clear that a GST department can't be a secured creditor to have relinquished its security, and to participate in winding up proceedings, if the claim is filed for the whole amount before the Resolution Professional is completely arbitral orders of GST authorities.

[51] Canfin Homes Ltd. v. Lloyds Steel Industries Ltd, 2001 (4) Bom CR 84.

[52] Bhavesh Kiritbhai Kalani v. Union of India, (2021) 92 GSTR 373 (Guj) 3.

[53] Notification. 3(417)/GST/Policy/2021-22/253-60, point 4.

4.Whether the online games are actually 'game of skills' or 'game of chances'?

It is most humbly submitted before the Hon'ble High Court of Karnataka whether a game of chance or skill is a question of fact to be decided on the basis of facts and circumstances of each case. While deciding the question of "skill versus chance", Indian courts have adopted the test followed by the U.S. courts known as the "dominant factor test", or "predominance test".
Supreme Court in ***K.R. Lakshmanan v. State of Tamil Nadu,***[54] which was relied upon by the Punjab and Haryana High Court to hold that since success in Dream 11's fantasy sports basically arises out of user's exercise of superior knowledge, judgment and attention, it is a game of skill and not a game of chance. The 3 judges' bench of the Hon'ble Apex Court held that the "horse racing" is not gambling, and is a game of skill, nor of mere chance. The Petitioner erroneously claims that these judgment are per in curium.
The petitioner has relied upon the definition of "Betting or Gambling" in Finance Act, 1994 as contained in definition in Section 65-B (15) thereof, as follows:[55]
"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."
Whether a game of chance or skill is a question of fact to be decided on the basis of facts and circumstances of each case. While deciding the question of "skill versus chance", Indian courts have adopted the test followed by the U.S. courts known as the "dominant factor test", or "predominance test".
In the case, ***Gurdeep singh Sachar v. Union of India and Ors,***[56] Their Online Fantasy Sports Gaming are "games of skill" and not any "games of chance" and therefore outside the purview of Rule 31A (3).
Relying again on the 'skill test', the Supreme Court in held that, rummy is preponderantly a game of skill and not of chance. The Court further observed that, "it 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". The expression 'mere skill' means presence of skill of a substantial degree.
Relying again on the 'skill test', the Supreme Court in ***State of Andhra Pradesh v. K.Satyanarayana & Ors,***[57] held that, rummy is preponderantly a game of skill and not of chance. The Court further observed that, "it 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". The expression 'mere skill' means presence of skill of a substantial degree

[54] Supra note 38.

[55] Finance Act, 1994 (Act 32 of 1994), Sec 65.

[56] Supra note 26.

[57] Supra note. 29.

Distinguishing between the terms 'games of skill' and 'games of chance', the Supreme Court in ***K.R. Lakshmanan v. State of Tamil Nadu & Anr,***[58] stated 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.

In this case, the court was considering whether horse-racing was a game of skill or chance. It observed that the outcome in a horse race depends on several factors like form, fitness and inherent capacity of the animal, the ability of the jockey, the weight carried and the distance of the race, which are all objective facts capable of being assessed by persons placing the bets. Thus, unlike lottery, the prediction of the result of the race is an outcome of knowledge, study and observation.

In the case of ***Pleasantime Products v. Commissioner of Central Excise, Mumbai,***[59] the Supreme Court held, while considering whether 'scrabble' is a puzzle or a game, held that scrabble is a game. It was also observed that, unlike puzzle where the outcome is fixed, scrabble is a game of skill as the skill of player influences the outcome.

The Andhra Pradesh High Court in the case of ***D. KrishnaKumar v. State of Andhra Pradesh,***[60] held that games of skill like rummy, even when being played for stakes, are outside the ambit of the Andhra Pradesh Gaming Act, 1974. However, the Division Bench of the Madras High Court in the case of ***Director, Inspector General of Police v. Mahalakshmi Cultural Association,***[61] had taken a contrary view holding that a game of skill for stakes falls within the definition of gaming under section 3 of the Madras City Police Act, 1888.

It is found that, in the Canadian case of ***Rex v. Fortier,***[62] the distinction between game of chance and game of skill was set out by the Court stating that, "game of chance and a game of skill are distinguished on the characteristics of the dominating element that ultimately determines the result of the game.

In the case of ***State v. Gupton,***[63] the Supreme Court of North Carolina held that any athletic game or sport is not a game of chance. In the United States, the 'dominant factor test' is applied by many States to determine whether or not a particular game is a 'game of skill' or 'game of chance'. For instance, poker is considered to be a game of skill because more skilful players will always win over the less skilled or novice players.

In the case of ***Varun Gumber v. Union Territory of Chandigarh,***[64] the High Court of Punjab and Haryana has held that games such as horse, boat and foot racing, football, baseball, chess,

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[58] Supra note. 38.

[59] Pleasantime Products v. Commissioner of Central Excise, Mumbai, (2010) 1 SCC 265.

[60] D. KrishnaKumar v. State of Andhra Pradesh, 2003 Cr LJ 143.

[61] Director, Inspector General of Police v. Mahalakshmi Cultural Association, (2012) 3 Mad LJ 561.

[62] Rex v. Fortier, 13 Q.B.308.

[63] State v. Gupton N.C. 271.

[64] Varun Gumber v. Union Territory of Chandigarh and Ors, 2017 SCC Online P&H 5372.2017 (4) RCR (Criminal) 1047.

golf are games of skill and significant judgement and not a game of chance. However, in a fantasy game, a participant user who builds a virtual team would require considerate skill, knowledge, judgement and discretion, as the participant has to estimate the relative value of each athlete/sportsperson as against all athlete/sportsperson available for selection. He is required to study the strengths and weaknesses of the athlete which would determine the result of the game and winning a contest.

In a study carried out by the Computer Scientist ***Roman Yampolskiy***, it is concluded that Poker is a game that requires a specific set of skills and some of those skills include:[65]

1. The ability to precisely calculate probability of a needed card coming on a turn;
2. The skill to read opponents' behaviour and body language; and
3. The competence to apply strategic concepts such as "semi-bluffing and playing for implied odds."

In accordance with the aforementioned cases, law and arguments, the counsel submits that the games conducted by Midas where preponderance of skill dominates cannot be considered gambling and are protected under the Constitution.

[65] 30 N.C 271.

PRAYER

Wherefore in the light of the issues raised, arguments advanced and authorities cited, it is humbly requested that this Honourable Court may be pleased to adjudge and declare:

1. That the writ petition filed by the Resolution professional before the Hon'ble High Court of Karnataka in the nature against the Executive order is maintainable on the grounds of violating the Fundamental Rights.
2. The hostile discrimination of actionable claim has no nexus with the object achieved. So petitioner is liable to pay the GST only on the admission fee component.
3. The GST department does not have any security interest over the assets of corporate debtor such security interest created by a GST department ultra vires to operation of law.
4. The participants exercises superior knowledge, judgement and attention, so it is a game of skill, nor game of chance

And/Or,

To grant any other order in favour of the petitioner which the Hon'ble Court may deem fit in the eyes of Justice, Equity and Good Conscience.

All of which is respectfully submitted and for such act of kindness petitioner shall be duty bound as ever pray.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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COUNSEL FOR THE APPELLANTS